

THE
GEORGE WASHINGTON
UNDERGRADUATE
LAW REVIEW

It is with great respect that we dedicate this edition of the George Washington University Undergraduate Law Review to former Solicitor General of the United States, Donald B. Verrilli Jr. Mr. Verrilli spoke to the GW Pre-Law Student Association in April 2018 and left us inspired, eager, and motivated to tackle the legal issues faced by the United States and the world. Thank you for speaking to us and for all that you do, Mr. Verrilli.

THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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Zach Sanders
Nikhil Venkatasubramanian

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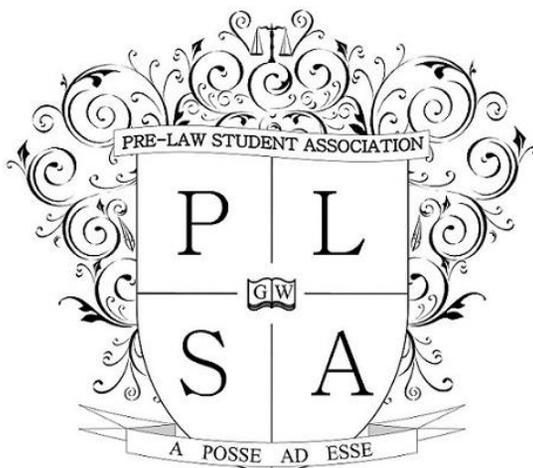
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Foreword

Dear Reader,

On behalf of the entire Undergraduate Law Review team, I am thrilled to introduce this unique and impressive publication.

I have been intimately involved with the Undergraduate Law Review for much of my time at GW. As a Writer and an Editor-in-Chief, I experienced firsthand the level of dedication, organization, and attention to detail required of the writers, editors, and leadership of this publication. This is one of a very small number of Undergraduate Law Reviews in the country, and the only one, to our knowledge, that self-produces its articles and utilizes Bluebook citation standards. Those involved in this publication are hands-on from the beginning, starting with the selection of writers and continuing with topic generation, research, outlining, drafting, polishing, and cite-checking. The care and effort invested in this publication, year after year, is commendable.

This April, we welcomed former Solicitor General of the United States Donald B. Verrilli, Jr. to GW for our Spring 2018 Keynote Speaker Event. Mr. Verrilli recounted an occasion when he sought out his constitutional law professor for a recommendation. When Mr. Verrilli told the professor that he wanted to apply to clerk for the legendary Judge J. Skelley Wright of the DC Circuit, the professor responded, “You’d have to be the Editor-in-Chief of the Law Review to even have a shot!” Mr. Verrilli, of course, had just been elected Editor-in-Chief of the Columbia Law Review. Such is the importance of the law review and legal writing processes in the legal academy.

Writing for a publication such as this at the undergraduate level is an incredible advantage: students finish the process with exposure to legal research, intensive editing, writing, and a citation system not normally taught until the 1L year. We are proud of the work that our writers do and the advantages that this work confers upon them. And I, personally, am proud of the work of our leadership team in ensuring the continued success of this publication and the continued access to these advantages.

It is with great pleasure that I present to you the 2018 Edition of the GW Undergraduate Law Review.

Sincerely,



Zach Sanders
President, GW Pre-Law Student Association



Introduction

Dear Reader,

For the last four years, I have had the honor of being a part of the *George Washington University Undergraduate Law Review (ULR)* team. I've had the opportunity to work with dozens of talented writers, editors, and true friends. In my final year at GW, I was given the chance to direct the publication that you are currently reading. I'm eager to share the spectacular pieces that our team has spent the last academic year refining.

After one of our most competitive application processes yet, the 11 pieces in this publication represent the work of some of the best and brightest GW undergraduate students. These students chose, researched, and argued a legal issue of their own interest during the last year. They were assisted by our team of nine associate editors, also students and our team of nine professional editors (legal professionals in the DC community and beyond) who graciously volunteered to offer their insight on the legal issues involved. Copies of the GW ULR will be placed in prestigious institutions including the Library of Congress, American Bar Association Library, and the George Washington University's Gelman Library.

There are many words of gratitude I have for those involved in the publication process. First and foremost, I must thank my amazing ULR leadership team. The publication you are reading would not have been possible without the work of our three co-Editors-in-Chief Talia Balakirsky, Emily Horak, and Hope Mirski. As an Editor-in-Chief last year, I had the opportunity to learn from our director Zoe Goldstein. This publication would not exist if it wasn't for the dedication and mentorship that Zoe demonstrated when she directed the team.

Finally, I would like to thank our writers. The Articles that you are about to read are the result of a year of hard work, dedication, and genuine passion. The *GW Undergraduate Law Review* is only possible because of the undying interest and curiosity of the GW undergraduate community in exploring and analyzing legal issues. In times of political turbulence in the United States and abroad, a thorough analysis of society's underlying legal institutions and intuitions can provide a valuable insight into achieving stability. I know that the individuals involved in this volume of the GW ULR will go on to achieve great things. I am incredibly happy to have had the opportunity to have worked with them.

Sincerely,



Nikhil Venkatasubramanian
Director, *George Washington University Undergraduate Law Review*

ARTICLES

The Expanded Application of Religious Freedoms Protections

Audrey J. Hertzberg

I. Introduction

The United States Supreme Court sits in a precarious position regarding the protection of civil liberties. The body that has been credited with some of the most progressive decisions in U.S. history such as the 1954 *Brown et al vs. The Board of Education of Topeka, Kansas et al* decision¹ and *Roe v. Wade* in 1973² has also exhibited periods of close constructivism (i.e. the Court's strict interpretation of the Constitution within the scope of civil liberties as understood by the founder's intention). Such was the case when addressing questions of constitutionality like in the case of *Texas vs. Johnson*.³ *Brown* and *Roe* are well-known for explicitly providing otherwise marginalized groups with expanded rights: African-American children in *Brown* and women seeking abortion access in *Roe*. Both of those decisions were met with heavy criticism and, in some cases, opponents still make arguments of religious freedoms infringement by the government.⁴ These advocates claim that by trying to legislate in the religious sphere, the Court overstepped the boundaries of its powers.⁵

¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ *Texas v. Johnson*, 491 U.S. 397 (1984).

⁴ Center for Reproductive Rights, *Center for Reproductive Rights Sues Texas to Stop Latest Unconstitutional Abortion Restrictions*, CENTER FOR REPRODUCTIVE RIGHTS, <https://www.reproductiverights.org/press-room/center-for-reproductive-rights-sues-texas-to-stop-latest-unconstitutional-abortion-restrictions> (last visited Jan. 18, 2018).

⁵ *Legislatively Overturning Roe v. Wade With a Life at Conception Act (S. 231/H.R. 681 and S. 1456/H.R. 586)*, THE PROLIFE ALLIANCE, http://www.prolifealliance.com/end_roevwade.html (last visited January 18, 2018).

Since the 1950s, subsequent polarization of social movements among political parties has contributed to increased ideological division among voters.⁶ Today, civil liberties and religious freedoms decisions have been politicized into partisan matters. The Democratic and Republican parties are in acute opposition with one another with respect to the expansion of freedoms by the Supreme Court, and special interest groups and state legislatures have grown to represent both sides in the conflict.⁷ An example of this includes the First Amendment case in which a Texas court argued against flag burning as free speech while the defendant felt that protecting his speech was a more constructivist approach, as it did not allow the government to censor activism.⁸

To fully understand this issue, one must first look at the source of the religious freedoms protection outlined in the First Amendment.⁹ The freedom of a person to express religious affiliation openly was considered a foundational American civil right; it began as a protection against the prosecution that the colonists faced stemming from King George III's intolerance of non-Protestant religious groups. The First Amendment itself reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.¹⁰

The first part of this sentence is where much debate over interpretation of the clause arises. Any new laws that establish a change in social norms contrary to what the religious majority practices are particularly scrutinized by those who view these developments as invective to religious practice.

Christianity is the most popular religion among religious people in the United States, and this demographic is particularly concentrated throughout the southern states.¹¹ This

⁶ Hahrie Han and David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization after the Second World War*, 37 BRITISH JOURNAL OF POLITICAL SCIENCE, 505, 506 (2007) (discussing party polarization in the 1950s post-war United States).

⁷ 2018 PAC Summary Data, OPEN SECRETS CENTER FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00545202> (last visited Jan. 18, 2018).

⁸ *Texas v. Johnson*, 491 U.S. 397 (1984).

⁹ U.S. CONST. amend. I, §1.

¹⁰ *Id.*

¹¹ Religious Landscape Study, PEW FORUM, <http://www.pewforum.org/religious-landscape-study/> (last visited Jan. 18, 2018).

geographic concentration becomes relevant when observing the higher rate of cases challenging civil rights protections that emerge from more religious states.¹² An individual's religiousness is often associated with social values and political affiliation, although this can be an ostensible correlation.¹³

Understanding the way that religion can be used as a tool for limiting civil rights is essential to identifying an issue that will continue to affect the American people. Fundamental contradictions lie between the expansions of civil liberties for traditionally discriminated-against groups and what the religious doctrine of Christianity reveals. One such issue is women's access to reproductive health services. Changing attitudes in the media and in socio-political interactions have explored the ways in which these religious issues are viewed in place of what was once a privacy case. Women's access to contraception has been continually challenged since *Roe*. This is because organizations and small businesses are able to countersue, arguing that it is against their religious beliefs to provide reproductive services to employees through employer-provided healthcare.¹⁴

One important feature in considering how the Supreme Court addresses balancing religious liberties with civil rights is in examining its makeup. In so openly expanding the function of religious freedoms now applied to a variety of cases previously characterized under privacy, free speech, or other legal protections, the Supreme Court risks jeopardizing civil rights for minority groups. This places the federal judicial system in a precarious position in the current cycle, begging the question of which rights the Court will choose to protect: religious freedom or civil rights.

Definitional distinctions must be made clear when looking at issues of civil rights protections versus religious liberties freedoms. A civil liberty and a civil right are certainly separate from one another. While a civil right is a protection given to individuals who might otherwise be discriminated against based on their gender, race, sexual orientation or other distinguishing factor,¹⁵ a civil liberty is a type of behavior that the government cannot

¹² *Id.*

¹³ Allan B. I. Bernando, Jose Antonio R. Clemente, and Ma. Jenina N. Nalipay, *What Personal Value Types are Associated with Beliefs on the Social Value of Religion?*, 61 *PSYCHOLOGICAL STUDIES*, 170, 178 (2016).

¹⁴ David Zubik et al. v. Sylvia Burwell, 578 U.S. (2016).

¹⁵ *Civil Right*, MIRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/legal/civil%20right> (last visited Jan. 18, 2018).

abridge.¹⁶ As mentioned earlier, the First Amendment establishes religious freedoms,¹⁷ which in turn determines that no one person can be prosecuted for their affiliation to a religious group.¹⁸ Civil rights are endangered by the undue expansion of religious protections via the Supreme Court, rather than examining the government's attitude towards the behaviors they are expected to carry out as protectors of the citizenry. Establishing archetypal sanctuary standards against any threat, including religious liberties cases, is fundamental to securing permanent protections.

Part II: Historical Precedent

A. The Rehnquist Court, The Roberts Court, and the Shift in Religious Rights Cases

William Rehnquist is a classic example of a conservative Justice who had a long, illustrious career on the Court before he was appointed to the seat of Chief. Justice Rehnquist offered a public response to the decision in *Roe* by saying that he thought the case had been improperly decided.¹⁹ As Chief Justice, Rehnquist had a number of notably liberal Justices on his court, including Thurgood Marshall, who believed that the Chief was an excellent leader but ardently disagreed with many of his decisions.²⁰ Marshall continued on to criticize one of Rehnquist's most prominent civil liberties cases, *Jefferson v. Hackney*, which dealt with federal welfare programs²¹ Marshall claimed that Rehnquist "misrepresented the legislative history" of the federal welfare program, which contributed to its negative connotation among many people.²² This is when the Supreme Court began to see a fracture in the positioning of civil rights cases against religious liberties cases. William Rehnquist was both an advocate of religious rights and an outspoken critic of increased civil rights protections, which went on to shape their reception in the judiciary for years after his retirement.

Additionally, scholars can look at today's court and see an even more acute switch under Chief Justice John Roberts. Roberts lies in a relatively centrist location on the political

¹⁶ *Id.*

¹⁷ U.S. CONST. amend. I, *supra* note 9.

¹⁸ *Freedom of Religion*, MIRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/freedom%20of%20religion> (last visited Jan. 18, 2018).

¹⁹ BOB WOODWARD AND SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 235 (1979).

²⁰ Thomas R. Hensley, Kathleen Hale & Carl Snook, *The Rehnquist Court: Justices, Rulings and Legacy* 38 (2006).

²¹ *Jefferson et al v. Hackney, Commissioner of Public Welfare*, 409 U.S. 898, 1, 4 (1972).

²² Woodward and Armstrong, *supra* note 19 at 408.

spectrum, which is important to note as he freely decides civil liberties cases that favor both the Democratic and Republican parties. In this sense, the current court has been responsible for far more civil liberties expansions than Rehnquist's court was, and the reasoning for this is clearly the makeup of the Justices themselves.

The movement toward protecting religious liberties began more recently, most notably around the time of the 2008 presidential election. Concerned about what a liberal president might do to the First and Second Amendments, large political action groups began forming. And those that already existed further mobilized—mostly in the southern states—with the aim of continuing to protect religious freedoms. This movement gained energy when Barack Obama became president and began to rollout his plan for what would become the Affordable Care Act.²³ The Affordable Care Act afforded funding and protection for several programs that traditionally religious conservative groups had not supported, such as access to abortion and birth control.

B. Religious Liberties Cases

Employment Division v. Smith (1990) is a case in which the Supreme Court decided that two Native Americans who had used peyote during a religious ceremony were ineligible to receive unemployment benefits distributed by the federal government.²⁴ The 1990 Congress was highly critical of this decision and went on to pass the controversial 1993 Religious Freedom Restoration Act (RFRA), in which the use of substances in religious ceremonies was protected.²⁵ Some left-wing advocates felt that this legislation was overreaching in the direction of laissez-faire government, but they permitted its passage in defense of the targeted minority who had been discriminated against in *Employment Division v. Smith*. The Supreme Court ultimately ruled this way, as it acknowledged the RFRA restrictions. However, in this case, the government had not followed the RFRA properly. Therefore, the Court did not rule in favor of the Native American defendants.

The Supreme Court approved the individual mandate in June 2012 in *National Federation of Independent Business v. Sebelius*.²⁶ This controversial case involved the provision of

²³ Daniel Lanford and Jill Quadagno, *Implementing Obamacare: The Politics of Medicaid Expansion under the Affordable Care Act*, 59 THE PACIFIC SOCIOLOGICAL ASSOCIATION 619, 636-639 (2015) (discussing the development of The Affordable Care Act and its implementation).

²⁴ *Employment Div. v. Smith et al*, 494 U.S. 872, 1, 4 (1990).

²⁵ 42 U.S.C. § 2000bb (1993).

²⁶ *National Federation of Independent Business v. Kathleen Sebelius*, 567 U.S. 519, 1, 4 (2012).

birth control for female employees, which resulted in umbrage from right-wing interest groups.²⁷ The mandate was seen as execrable to religious institutions, who believe that family planning goes against their personal political standards. There was an immediate legal outcry against this stipulation, beginning with smaller, local cases, and eventually culminating in the *Sebelius* case.²⁸ This trenchant mobilization from politically motivated individuals provides one foundation for further cases regarding efforts on the part of private companies to determine how compliance with health insurance regulations is or is not most appropriate for their business.

Burwell v. Hobby Lobby is the primary case that denies providing contraception to women, a civil liberties issue for women in need of family planning resources.²⁹ In *Burwell*, a large crafts retailer, Hobby Lobby, argued that it should not be required to provide contraceptives to full-time female employees in their healthcare plan because it would violate the company's religious beliefs. The Court sided with Hobby Lobby and made any requirement of birth control provision defunct, establishing a linchpin religious liberties precedent.³⁰ The implications of this case introduce a paradigm into discussion of women's health insurance coverage as separate from men's.

In another twentieth century argument for special provisions due to religious beliefs, Colorado shooter Robert Lewis Dear, Jr., a self-proclaimed anti-abortion advocate and "warrior for the babies" believed that he should not have to live within a certain vicinity to a contraceptive provider such as Planned Parenthood. He explained that his decision to target this location in a violent shooting was premeditated, motivated by his religious beliefs that abortion was morally wrong.³¹ He chose Planned Parenthood as he felt it was in direct contrast to his beliefs.³²

A similar issue arose when same-sex marriages were first legalized in the United States. While at first a state-by-state movement, marriage legalization was initially concentrated in western and northeastern states. Subsequently, the Court heard *Obergefell v. Hodges*, legalizing same-sex marriage for couples in all fifty states.³³ The reaction to this case

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Burwell, Sec. of Health and Human Serv. v. Hobby Lobby Stores*, 573 U.S. 1, 1 (2014).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Obergefell et al. v. Hodges, Dir. Ohio Dept. of Health*, 576 U.S. 1, 1 (2014).

was immediate. There was backlash from small county clerks across the southern “Bible Belt,” indicating a refusal to issue marriage licenses despite their legalization on the national level.³⁴ There was a subsequent influx of cases, such as the case brought to the Alabama State Supreme Court in June 2015 in which a number of judges and clerks refused to honor the same-sex marriage mandate. The Alabama Supreme Court heeded the ruling by the Supreme Court and enforced the law, therefore ending the *de jure* anti-gay marriage discrimination.³⁵

One major issue with the religious argument against same-sex marriage is that it does not allow for/explicitly offer a legal substitution for marriage, such as “joined union.”³⁶ Spousal equal rights proved the most compelling non-moral part of the same-sex marriage argument, and the court saw it this way too.³⁷ In the case of marriage equality, the courts could not uphold any kind of religious exemption because it would leave certain individuals without the legal protections due to their sexuality, which is illegal due to how civil rights are defined.³⁸

The Supreme Court heard another civil liberties case in the 2017-2018 cycle that involves the use of one party’s religious liberties to violate a same-sex couple’s civil rights. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* involved a bakery owner, Jack Phillips, who elected not to make a wedding cake for a same-sex couple.³⁹ He maintained that while religious conviction served as the source of his inability to bake the wedding cake, he was actually suing for privacy rights after government intervention in his small business.⁴⁰ After the Colorado Civil Rights Commission found out about the discriminatory situation, they investigated and charged Phillips with unfair treatment of the couple.⁴¹

³⁴ Robin Fretwell Wilson, *Getting the Government Out of Marriage post Obergefell: The Ill-Considered Consequences Transforming the State’s Relationship to Marriage*, 4 UNIVERSITY OF ILLINOIS L. REV. 1445, 1446 (2016).

³⁵ The Associated Press, *Alabama Supreme Court Refuses Challenge to Gay Marriage*, NBC NEWS, <https://www.nbcnews.com/news/us-news/alabama-supreme-court-refuses-challenge-gay-marriage-n532171> (last visited Jan. 18, 2018).

³⁶ Melanie Health, *State of our Unions: Marriage promotion and the Contested Power of Heterosexuality*, 23, SOCIOLOGISTS FOR WOMEN IN STUDY, 27, 46 (2009) (discussing the definitional merits of marriage versus joined unions).

³⁷ *Obergefell v. Hodges*, *supra* note 33.

³⁸ *Civil Right*, *supra* note 13.

³⁹ *MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION*, NO. 16-111 (Filed Nov. 21, 2017).

⁴⁰ *Id.*

⁴¹ *Id.*

Phillips initiated the suit because he felt that the Colorado government had no right to tell him how to run his small business.⁴² Phillips argued that he would have been happy to *sell* the couple a cake but did not feel comfortable having to *create* a cake for the couple to celebrate their same-sex marriage.⁴³ This is a distinction construed to shift the case from a freedom of speech issue to that of privacy rights: government compulsion to create a product infringed on his rights as a business owner. So, part of the debate in Phillips's case centers around whether forcing Phillips to create a cake constitutes compelled action and perhaps even unintentional advocacy of same-sex marriage. This case is one of the most prudent examples of how expansions of the civil liberties can clash with the civil rights afforded to minority communities.

There are examples of situations in which the Court does not side with religious groups. Under Chief Justice Roberts, the court was responsible for a unanimous religious liberties decision in *Gonzales v. O Centro Espirita beneficente Uniau do Vegetal* that ruled in favor of a party that used an otherwise illegal drug as part of a religious ceremony.⁴⁴ The case dealt with the religious use of hoasea tea, a hallucinogenic beverage that contains dimethyltryptamine.⁴⁵ Dimethyltryptamine is both a highly psychedelic drug and a Schedule I substance. Provided this, any users are subject to federal prosecution. However, the Supreme Court ruled that its religious use was protected and users could not be targeted for using it.⁴⁶ This case represents an exception when it comes to religious liberties in conflict with civil rights.. By allowing the religious individuals to use the hallucinogenic tea, no other marginalized group was put at risk. Therefore, this case does not provide an example of how religious liberties cases can challenge civil rights.

C. The Role of Justices and Special Interest Groups

Supreme Court Justices are often given briefs from political groups who either want to persuade the judges to take on a specific case or want to influence the outcome in the

⁴² *Id.*

⁴³ Transcript of Oral Argument at 19, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (Filed Nov. 21, 2017).

⁴⁴ *Alberto R. Gonzales et al v. O Centro Espirita beneficente Uniau do Vegetal*, 546 U.S. 418, 1, 3, 2006.

⁴⁵ *Dimethyltryptamine*, MIRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/dimethyltryptamine> (last visited Jan. 18, 2018).

⁴⁶ *Id.*

case.⁴⁷ Certainly, accepting such briefs can be an important part of the judicial process, as it helps inform the most prudent positions on any given issue.⁴⁸ Because these briefs are openly one-sided, this process is somewhat one of implemented bias. In situations where briefs successfully influence the way that the Justices interpret a particular case, they further contribute to the politicization of the Supreme Court. While many of the Justices already have suspected leanings, it is their professional imperative to interpret the Constitution as fairly as possible.⁴⁹ Ideological perspectives provide one source affecting the sway of the Supreme Court. This is most plain in an examination of historical precedent, especially in comparing the courts under different Chief Justices.

The balance of religious liberties and civil liberties illustrate some of the most complicated legal grey area for the Supreme Court. Now more than ever, the Court is taking on cases that are sure to shape the future of civil rights access for protected groups, and it more frequently hears these cases in a way that contextualizes discrimination as a religious liberties issue rather than blatant bias against those groups. Understanding how the legal precedent has been shaped over many courts is the cornerstone of seeing this issue as it is presented today. Understanding how the shift has occurred and what its implications are provide two of the most significant pieces to analyzing the Court's shifting understanding of these cases.

Part III: Issues Pertinent to Religious Shift and Subsequent Effect

A. Shifting Attitudes on the Court

There are several issues pertinent to the move toward religious cases that the Supreme Court hears. The first is the decidedly Conservative shift on the Court, even with the addition of Sonya Sotomayor, the most recently appointed liberal Justice. As previously stated, Chief Justice John Roberts stands on the line between liberal and conservative leanings, with a tendency to resolve Constitutional accountability.⁵⁰ Justice Kennedy

⁴⁷ Paul M. Collins, *Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POLITICAL RESEARCH QUARTERLY, 55, 63-70, (2007) (discussing importance of Amicus Curiae Briefs), <http://www.jstor.org/stable/4623807>.

⁴⁸ *Id.*

⁴⁹ Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, THE N.Y. TIMES, <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html> (last visited Jan. 31, 2018).

⁵⁰ Richard F. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. 33, 45 (2015).

frequently finds himself operating as the deciding vote on civil rights cases, although he also tends to lean conservatively in such decisions. This shift should not be understated, as it is the purpose of the Court to determine what kinds of cases to take, and only four judges need to agree to hear one in order for it to be added to the docket.⁵¹

With the addition of Justice Neil Gorsuch, the judicial branch has solidified a more consistently Conservative angle. Antonin Scalia's passing created an opportunity for a new political shift, in that a more liberal Justice may have been appointed—President Barack Obama nominated Merrick Garland to the Court, but he was not confirmed by a Republican-majority Senate. Consequently, the spot remained open until President Donald Trump was elected, nominating Neil Gorsuch to the bench.⁵² Justice Gorsuch has a history of upholding religious liberty protections throughout his career.⁵³

Different Justices on the current court make arguments both for and against expanding and protecting religious freedoms. Justice Samuel Alito criticized the Court's vote against hearing a case brought by a small pharmacy in Washington State.⁵⁴ This was particularly interesting, as it meant that the majority of the Court decided not to hear the case, not just the "left-leaning" Justices who currently make up fewer than half of the Court's members. The pharmacy argued it should not have to stock emergency contraceptives as per state law, citing personal Christian beliefs.⁵⁵ Justice Alito's criticism of the court's decision not to take the case centered mostly on his fear that by failing to take religious liberties cases, the Court was not doing its job to protect religious minorities in the United States. This was not exactly true, as Christianity is not a religious minority in the United States.

Chief Justice John Roberts dissented from the liberal half of the Supreme Court in the ruling on *Zubik v. Burwell*,⁵⁶ a case that dealt explicitly with companies trying to avoid providing contraception to female employees. Both Chief Justice Roberts and Justice Alito have gone on record several times in the last two years to warn against the dangers of not

⁵¹ Shay Lavié, *Discretionary review and undesired cases*, 44 EUROPEAN JOURNAL OF LAW AND ECONOMICS, 265, 282 (2017).

⁵² Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV., 96, 126 (2017).

⁵³ Clint Bolick, *Gorsuch, the Judicious Judge*, 17 EDUCATION NEXT 1, 6-7 (2018).

⁵⁴ Rachel La Corte, *High court won't hear challenge to rules that Washington pharmacies dispense emergency contraceptives*, THE SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/high-court-wont-hear-challenge-to-rule-that-washington-pharmacies-dispense-emergency-contraceptives/>, (last visited Jan. 18, 2018).

⁵⁵ *Id.*

⁵⁶ David Zubik et al. v. Sylvia Burwell, 578 U.S. 1, 5, 2016.

taking religious liberties cases and what that means for constitutional interpretation.⁵⁷ Despite such concern, the Supreme Court has not indicated any intent to stop hearing religious liberties cases, further supporting their legal mores as those responsible for setting judicial precedent.

There are also examples illustrating how the Court has sided in favor of or against religious institutions in cases that do not explicitly pit religious liberties against civil rights. *Hosana-Taybor v. EEOC* explored a case where a woman who was both a teacher and a minister tried to sue her former employer but was denied claims of wrongful dismissal because she was operating within a private religious institution.⁵⁸ The Evangelical Church claimed that by filing a suit, she had gone against their Christian morals of solving conflict internally.⁵⁹ Here, the Court sided unanimously with the religious institution and allowed for the teacher to be terminated.⁶⁰ The circumstances of this case addressed the preservation of religious institutional right to terminate ministers as they see fit, which does not directly conflict with the civil rights of the terminated party.

In *Employment Division v. Smith*, the Court held that recreational peyote used as part of Native American religious ceremonies was not protected because there was a state statute against drug use.⁶¹ Consequently, employers are allowed to refuse to hire people if they failed a drug test, even if it the drug use was for religious purposes. In *Boerne v. Flores*, a religious body tried to argue that it was exempt from a rule that buildings in a historical neighborhood could not be renovated because they wanted to enlarge their church, but the Court disagreed.⁶² The Court held that the local ordinance superseded the interest of the church in expanding.⁶³ In this situation, the religious issue came second to enforcing more general neighborhood construction laws. That being said, this is not a case that strictly involves civil liberties and therefore does not serve as an antithesis to the notion that religious liberties cases do often develop from an anticipated civil rights threat.

⁵⁷ *Id.*

⁵⁸ *Hosanna-Tabor Evangelical Church v. Equal Employment Opportunity Commission*, 565 U.S. 1, 2 (2011).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Employment Div. v. Smith et al*, 494 U.S. 872, 1, 4, 1990.

⁶² *City of Boerne v. Flores*, Archbishop of San Antonio, 521 U.S. 507 (1997).

⁶³ *Id.*

One area of particular inconsistency comes at the intersection of separating church and state. Religion in schools is often argued as a privacy issue, and any government intervention can be construed as an aggressive regulatory effort. Debate circulating prayer in public schools is one of the most prudent examples of such a discussion. *Lemon v. Kurtzman* remains the leading case on the Establishment Clause, which still helps the Court interpret what role religion may play in schools.⁶⁴ For example, religion must also have a secular purpose in order to be permissible.⁶⁵ In these cases, religious liberty is not usually found at the core of the argument being advanced by religious institutions, probably because they know that they are unlikely to win using that argument.

Two years ago, the Court ruled that a New York State community could start its town council meetings with a Christian prayer, something that would have been a violation of the separation of Church and State under past Courts.⁶⁶ This is particularly important because the prayer was distinctly Christian, rather than non-denominational. Since this is the case, the decision indicated shifting attitudes away from emphasis on formal legal separation of church and state, at least in local governmental settings.

B. Implications of Court Decisions

In comparison to the global community, the United States finds itself in a particularly interesting place. Other developed nations do not experience the same difficulties in their inability to reconcile their religious beliefs with constitutional protection. Scandinavian countries offer women birth control but do not have a problem with an overly Christian culture in their society, even if it is not technically entrenched in their government.⁶⁷ Some European countries—Spain, Italy, France—do not have the same birth control measures and freedoms of the United States *and* their religious bodies are highly involved in the way their governments function, even if they have some clauses about keeping religion out of the state.⁶⁸

⁶⁴ *Lemon et al v. Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al*, 411 U.S. 192, 5 (1973).

⁶⁵ *Id.*

⁶⁶ U.S. CONST. amend. I, *supra* note 9.

⁶⁷ Elena Mihailovna Miroshnikova, *Religious Freedom in the Context of Separation: The Case of Modern Europe*, 10 EUROPEAN JOURNAL FOR CHURCH AND STATE RESEARCH, 227, 232 (2003).

⁶⁸ *Id.*

The United States provides a different context for religious liberties than other nations. Many of the most powerful religious groups in the United States draw on their international diaspora for support, funding, and further lobbying of U.S. political figures. How the United States leads often sets precedent for many other nations, and it is important to place an emphasis on civil liberties protections in an effort to encourage other nations to do so as well.

Apart from the precedent set for other nations, there is a more direct responsibility for the Supreme Court to set an example for lower courts in the United States. What the Justices determine as most valuable to their constitutional interpretations is what lower courts will model themselves after. *Stare decisis* provides the backdrop for how precedent shapes the judicial system at a given point in history. Precedent is reinforced by acceptance, which indicates that civil rights must be more thoroughly protected and acknowledged by the general electorate if challenges to these rights are expected to cease.

Part IV: Conclusion

The correlation between increased civil rights protections and religious liberties cases being brought to the Supreme Court is fascinating. As Supreme Court scholars track the increased use of religious arguments and understand how they will go on to influence and inform civil rights prosecutions, they will begin to uncover why this is so problematic. The more the Court relies on religious freedom to curtail civil rights, the easier it will be for the majority to ignore the separation between church and state, further blurring the legal line already serving as a roadblock for oppressed groups.

The last ten years have brought about more expanded rights for protected minorities than the previous thirty did, including rights for not only same-sex couples and women as mentioned in this article, but also for individuals identifying as transsexual⁶⁹ or for immigrants in the United States.⁷⁰ The increased protection is precisely what brings the more recent change in religious liberty defenses. Individuals feel that their religious beliefs are threatened because other marginalized groups have access to more protections. Even so, it

⁶⁹ *Understanding Transgender Access Laws*, N.Y. TIMES (FEB. 24, 2017), <https://www.nytimes.com/2017/02/24/us/transgender-bathroom-law.html>.

⁷⁰ *DACA – Issues*, NATIONAL IMMIGRATION LAW CENTER, <https://www.nilc.org/issues/daca/>, (last visited Jan. 18, 2018).

is not always clear in which cases religious liberties are truly threatened and in which cases it is a matter of changing societal attitudes toward a particular issue that give rise to litigation.

Contemporary cases like *Masterpiece Cakeshop v. Colorado Civil Rights Commission* will shape the future of how civil rights and civil liberties are treated and valued in the United States.⁷¹ The understanding that these religious liberties cases are often argued specifically in instances where a religious belief comes into conflict with a civil right presents a grave danger in our court system. In light of the effort put toward keeping church and state separate, it is important to understand how these defenses put civil liberties at risk while working to ensure that the First Amendment right to freely practice a religion is also protected.

⁷¹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, *supra* note 39.

Coercive Federalism and its Implications on Environmental Legislation in the United States of America

Margaret Meiman

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”

-James Madison, 1788¹

I. Introduction

As climate change accelerates, the proper use of energy resources grows more complex. Thus, the question of jurisdiction over environmental issues has become increasingly relevant. While the states originally held a great degree of autonomy with regard to environmental regulations, the federal government began to exert more authority in the 1970's with the passage of the Clean Air Act² and Clean Water Act,³ which delegated Congressional Authority to the Environmental Protection Agency. This trend continues steadfast, with the federal government observably taking more protective stances than the majority of states. While authority has always been divided between the federal government and the states, with an emphasis on state led implementation, the status quo has not proved effective in addressing environmental problems in this nation.⁴ Despite existing legislation, global temperature has increased 0.8° Celsius (1.4° Fahrenheit) since 1880.⁵ Two-thirds of

¹ The Federalist No. 45 (James Madison).

² The Clean Air Act, 42 U.S.C. § 7401(110)(a)(2)(D)(i)(I).

³ The Clean Water Act, 33 U.S.C. § 1251 (1972).

⁴ Fred Pearce, *What Would a Global Warming Increase of 1.5 Degrees Be Like?*, YALE SCHOOL OF FORESTRY & ENVIRONMENTAL STUDIES (June 16, 2016), https://e360.yale.edu/features/what_would_a_global_warming_increase_15_degree_be_like.

⁵ Adam Voiland, 2009: *Second Warmest Year on Record; End of Warmest Decade*, NASA (Jan. 21, 2010), <https://www.nasa.gov/topics/earth/features/temp-analysis-2009.html>.

this warming has occurred since 1975 at a rate of roughly 0.15-0.20°C per decade.⁶ This lack of efficacy indicates a need for revision.

This article examines the history of environmental legislation in the United States and explores the different possibilities for revising jurisdiction. First, the article provides background on the issue of environmental degradation and related legislation. Second, it examines the opposing bases for both federal jurisdiction and state jurisdiction over environmental regulations and enforcement. Finally, the article concludes with a recommendation for a new definition to outline the relationship between state and federal authority, which proposes coercive federalism, a system in which the federal government pressures states with mandates and regulations while still limiting overreaching powers of the federal government. As global warming and climate change accelerate, the United States government finds itself at a critical juncture. This leads to a necessary reevaluation of how to divide legislative authority on environmental legislation.

II. Background

In 1948, a thick layer of acrid smog descended on the mill town of Donora, near Pittsburgh.⁷ While pollution was considered normal in this industrial town that was home to a U.S. Steel zinc works, a temperature inversion caused conditions to worsen significantly, making breathing nearly impossible. By the time that conditions cleared three days later, there were 18 fatalities and nearly 6,000 ill.⁸ Yet, the U.S. Public Health Service did not name any party responsible.⁹ Meanwhile, the zinc works continued to operate during the crisis, prolonging it.¹⁰ U.S. Steel ultimately paid \$235,000 to settle \$4,643,000 worth of lawsuits, a low measure of accountability on any scale.¹¹ In 1969, the Cuyahoga River in Cleveland, Ohio, caught on fire when a few sparks from a passing train ignited the oil-based pollution that clogged the river.¹² This was not the first fire on the Cuyahoga River, albeit the most

⁶ *Id.*

⁷ Edwin Kiester, Jr., *A Darkness in Donora*, SMITHSONIAN MAGAZINE, (1999) <https://www.smithsonianmag.com/history/a-darkness-in-donora-174128118/>.

⁸ Helmuth Herman Schrenk et al., *Air pollution in Donora, Pa: Epidemiology of the Unusual Smog Episode of October 1948: Preliminary Report* 31 (1949).

⁹ *Id.*

¹⁰ *Id.* at 74.

¹¹ The New York Times, *Steel Company Pays \$235,000 to Settle \$4,643,000 in Donora Smog Death Suits* (1951), <http://www.nytimes.com/1951/04/18/archives/steel-company-pays-235000-to-settle-4643000-in-donora-smog-death.html>.

¹² Jennifer Latson, *The Burning River That Sparked a Revolution*, TIME MAGAZINE, (2015) <http://time.com/3921976/cuyahoga-fire/>.

destructive, indicating the cumulative effects of the pollution.¹³ Residents of Ohio at the time were not unduly bothered by this pollution, but rather saw it as a necessary evil of economic progress.

Disasters like these were common in the early 20th century during the nascent stage of US environmental legislation. In 1948, the Federal Water Pollution Act was enacted, the first federal statute that attempted to regulate water quality.¹⁴ The purpose of this act was, “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters” intending to remove all pollutants from waters by 1985.¹⁵ This act gave significant authority to the states, including all decisions regarding implementation. It further limited the role of the federal government to “support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.”¹⁶ Early air pollution legislation was similarly vague and state centric. Prior to codified statutes, the state of Georgia utilized nuisance to hold Ducktown manufacturing plants accountable for smoke production by extending an injunctive remedy against interstate pollution.¹⁷ In 1955, the Air Pollution Control Act was enacted.¹⁸ This statute identified urbanization and industrialization as contributing factors to the air pollution problem plaguing the nation at the time. For example, it designates “air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source” as the primary responsibility of States and local governments, placing sole fiscal responsibility on the states rather than on the federal government.¹⁹ These two early pieces of legislation, while a valiant first step, were not sufficient. Much like the Articles of Confederation, which lacked the ability to govern because it lacked the authority to collect taxes or raise a military force,²⁰ the Water Pollution Control Act and the Air

¹³ Michael Rotman, *Cuyaboga River Fire*, CLEVELAND HISTORICAL, (2017) <https://clevelandhistorical.org/items/show/63>.

¹⁴ Federal Water Pollution Control Act, 33 U.S.C. § 1251-1376 (1948) (current version at 33 U.S.C. § 1251 (1972)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

¹⁸ Air Pollution Control Act, 42 U.S.C. § 7401-7671 (1955) (currently version at 42 U.S.C. § 7401 (1977)).

¹⁹ *Id.*

²⁰ ARTICLES OF CONFEDERATION OF 1781.

Pollution Control Act similarly lacked the enforcement mechanisms necessary to be truly effective at curbing environmental damage.

Due to the failure of prior legislation, there was a reactionary explosion of environmental legislation in the 1970s that drastically increased federal jurisdiction. The Environmental Protection Agency was founded under President Richard Nixon in 1970, and the Water and Air Pollution acts were then amended into their better-known forms, the Clean Air Act and the Clean Water Act in 1970 and 1972, respectively.²¹ The Clean Water Act made it unlawful to discharge any pollutant from a point source into navigable waters unless a permit was obtained. The EPA's National Pollutant Discharge Elimination System (NPDES) permit program controls were established to regulate the amount of discharge allowed. The Clean Air Act empowered the EPA to eliminate or minimize emissions from coal-fired power, acid, glass and cement plants and petroleum refineries, with a distinction made between stationary and mobile pollution sources.²² Section 110 of the CAA details the good neighbor provision, which essentially established air as a commons, a “shared resource in which each stakeholder has an equal interest”²³, allowing the federal government and the EPA to increase their power, rather than delegating it to the states.²⁴ Clearly, these amendments expanded the federal government’s role beyond that of a source of funding for state led conservation projects.

There was another push under the Obama administration to increase the scope of federal jurisdiction with regard to environmental legislation. The administration was responsible for attempts to increase federal control of mining in order to prevent some of the negative environmental effects of coal mining.²⁵ For example, the administration’s Clean Power Plan directed that states use a combination of “building blocks” to achieve emissions reductions.²⁶ Although the EPA does not explicitly direct the states in which path to take, it is clearly nudging them to choose expanded renewables and energy efficiency through economic incentives. If a state chooses to produce more renewable power or implement

²¹ Environmental Protection Agency, *EPA History* (2017), <https://www.epa.gov/history>.

²² Environmental Protection Agency, *National Pollutant Discharge Elimination System (NPDES)* (2017), <https://www.epa.gov/npdes/npdes-permit-basics>.

²³ Research on the Commons, Common-Pool Resources, and Common Property, DIGITAL LIBRARY OF THE COMMONS(2009), <http://dlc.dlib.indiana.edu/dlc/contentguidelines> (last visited May 1, 2018).

²⁴ The Clean Air Act, 42 USC § 7401(110)(a)(2)(D)(i)(I).

²⁵ Memorandum from Nancy K. Stoner, Acting Assistant Administrator for Water to the Regional Administrators of EPA Regions 3,4,5 (July 11, 2011), https://www.epa.gov/sites/production/files/2016-09/documents/final_mtm_guidance_-_signed.pdf.

²⁶ 40 C.F.R. §60.1 2015.

more stringent energy-efficient mandates for homes and businesses, it will receive extra credits toward meeting its emissions targets through the Clean Energy Incentive Program, which increases that states' access to matched federal funding.²⁷ The goal of the clean power plan is to protect human health and the environment by reducing CO₂ emissions from fossil fuel-fired power plants in the U.S.²⁸

At the same time, there was significant pushback from some states in reaction to the federal increase in power under the Obama administration. The states generally fall into two different camps: those that desire more lenient regulations than the federal government prescribes in order to attain economic benefit and those that want stricter regulations than the federal government is willing to impose to preserve the environment. States that want to be more restrictive and protect the environment tend to advocate for floor preemptions, which set minimum standards that states must meet, but can exceed if they so desire.²⁹ States interested in economic benefit advocated for less strict regulation in the form of ceiling preemptions, which created laws that cap the amount of regulation states can enact on a particular issue. A ceiling preemption might also prohibit states from setting new or more stringent emissions standards for a particular industry because the cap has already been reached. A large number of preemption claims are brought by single firms or industry associations, such as trade associations, which frequently seek to avoid state taxation laws and prefer to design products under a single federal standard, rather than 50 separate state standards.³⁰ Accordingly, one example of state law being preempted is accepted is Section 209(a) of the CAA, which prohibits states from adopting or enforcing standards relating to the control of emissions from new motor vehicles or new motor vehicle engines, a clear preemption of state law.³¹ Thus, states with large businesses and significant industry influence on local government tend to see higher levels of advocacy for ceiling preemptions. Taking the clear split between these two different groups of states into account, there is indication of a need for legislative preferences to account for and address these differences.

²⁷ *Id.* at 60, 62.

²⁸ *Id.* at 60, 62.

²⁹ Preemption refers to the invalidation of a state law in favor of a federal one, traditionally applied when state law contradicts federal law. Federal Preemptions are based upon Article IV, Sections 2 of the United States Constitution, also known as the Supremacy Clause.

³⁰ Norman A. Dupont, *Federal Preemption of State and Local Environmental Laws* 176 (2011), <http://ringbenderlaw.com/wp-content/uploads/2016/06/04-Dupont-09-11.pdf>.

³¹ 40 C.F.R. §209 2017.

III. Evaluating Claims to Jurisdiction

A. *The Case for Federal Jurisdiction*

The Commerce Clause of the United States Constitution stipulates that among the powers granted to Congress by Article I is the authority to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."³² That authority serves as the basis of most federal statutes enacted by Congress beginning in the 1970's to protect public health and the environment. These statutes include the Clean Air Act, the Clean Water Act, and the Endangered Species Act, which remain in effect today even though the power to enact environmental regulations is not explicitly given to the federal government by the Constitution. The long-held debate over the extent of the commerce power centers on the definitions of the terms "to regulate," "Commerce," and "among the several States." The Dormant Commerce Clause, considered to be an implicit interpretation of the Commerce Clause, prevents states from passing laws that interfere with or burden interstate commerce.³³ This positive interpretation of the clause serves as the legal foundation of much of the U.S. government's regulatory power.³⁴ In 1804, the inland and intracostal waterways of the United States that were mentioned in the Commerce Clause were specified in the US Code, thus narrowing the definition of the clause to specific geographic areas. However, these specified interstate rivers and bodies of water fall under federal jurisdiction.³⁵ In 1865, *Gilman v. Philadelphia* held that navigable waters are considered a part of commerce, which established precedent for later rulings and laws on environmental legislation.³⁶

Early Supreme Court cases up through the New Deal years expanded the use of the Commerce Clause in order to increase the power of the federal government. However, recently, more restrictive interpretations have been preferred. In 1824, the court decided unanimously in *Gibbons v. Odgen* that New York's licensing requirement for out-of-state operators was inconsistent with a congressional act regulating the coasting trade because it created a monopoly of the waters.³⁷ The New York law was thus deemed invalid by virtue

³² U.S. CONST. art. I, § 8.

³³ U.S. CONST. art. 1, § 8, cl. 2.

³⁴The Editors of Encyclopædia Britannica, *Commerce Clause* (April 29, 2016), <https://www.britannica.com/topic/commerce-clause>.

³⁵ 33 U.S.C. § 1804.

³⁶ *Gilman v. Philadelphia*, 70 U.S. 713 (1865).

³⁷ *Gibbons v. Odgen*, 22 U.S. 1, 219-220 (1824).

of the Supremacy Clause, giving precedent to federal control even in New York waters.³⁸ In his opinion, Chief Justice John Marshall developed a clear definition of the word commerce, which included navigation on interstate waterways. Chief Justice Marshall wrote in his opinion that

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter...this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.³⁹

This landmark case was one of the earliest expansions of federal power, which gave the federal government the jurisdiction to regulate commerce and interstate waterways. This case was never overturned, and the precedent established is referenced today. This trend continued into the early part of the twentieth century with cases such as *Swift and Company v. United States*, which found that even business done at the local level could be considered part of the all-encompassing definition of commerce.⁴⁰ This was part of a broader effort by the federal government to increase regulatory authority in order to affect wages and other economic issues that may have caused the depression. Following a brief period of judicial pushback to this federal overreach, the Supreme Court did not overturn a single law on the basis of the commerce clause from 1937 to 1995.⁴¹ The distinct extent of the Commerce Clause was determined in a series of Supreme Court cases throughout the 20th Century, with

³⁸ U.S. CONST. art. VI, cl. 2.

³⁹ *Gibbons*, 22 U.S. at 68.

⁴⁰ *Swift and Company v. United States*, 196 U.S. 375, 398 (1905).

⁴¹ CHEMERINSKY E. CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 2nd ed. New York: Aspen Publishers, Inc. (2002).

Justice Rehnquist noting in 1995 that its “power is subject to outer limits.”⁴² In his opinion in *United States v. Lopez*, Rehnquist outlined the three broad categories which Congress or its delegates may regulate under the Commerce Clause on the basis of past Supreme Court Decisions⁴³: “the use of the channels of interstate commerce,”⁴⁴ “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,”⁴⁵ and “those activities having a substantial relation to interstate commerce.”⁴⁶

More recently, environmental regulatory disputes have moved beyond Commerce Clause interpretations, manifesting in cases directly concerning the Environmental Protection Agency. In 2007, in *Massachusetts v. EPA*, the EPA argued that the Clean Air Act did not give them the authority to combat climate change.⁴⁷ However, the court determined that given the EPA's failure to dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming and its refusal to regulate such emissions, the federal agency was liable for Massachusetts' injuries.⁴⁸ The Court rejected the EPA's argument that the Clean Air Act was not meant to refer to carbon emissions, giving the EPA authority to regulate air pollution agents. Justice Stevens noted that the Act's definition of air pollutant was written with “capacious” language so that it would not become obsolete and would be adaptable to future crises such as climate change.⁴⁹ In this case, the EPA attempted to avoid responsibility for environmental degradation due to climate change. In losing the case, the agency was legally compelled to expand its jurisdiction, and the responsibilities contained therein, to include the mitigation of climate change and greenhouse gasses.⁵⁰ The Supreme Court ruled against the EPA only because the organization was evidently trying to shirk responsibility for greenhouse gas emissions that the Clean Air Act indicates that they ought to bear.

⁴² *United States v. Lopez*, 514 U.S. 549, 557 (1995).

⁴³ *United States v. Lopez*, 514 U.S. 549, 557 (1995).

⁴⁴ Rehnquist cites the decision in *Caminetti v. United States*, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917).

⁴⁵ Rehnquist cites the decision in *Southern R. Co. v. United States*, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911).

⁴⁶ Rehnquist cites the decision in *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937).

⁴⁷ *Massachusetts v. EPA*, 549 U.S. 497, 503 (2007).

⁴⁸ *Id.*

⁴⁹ *Id.* at 532.

⁵⁰ *Id.* at 503.

The Cross-State Air Pollution Rule addresses air pollution from upwind states that crosses state lines and affects air quality in downwind states. The EPA finds that emissions of SO₂ and NO_x in 27 Eastern, Midwestern, and Southern states contribute significant quantities of ozone precursors to downwind states.⁵¹ The CSAPR sets an emission limit for each state that it covers, known as allowances, to prevent downwind pollution, and also requires that cost be considered when making emission allowance determinations.⁵² In 2012, the D.C. District Court overturned the Transport Rule, finding that the rule exceeded the EPA's Statutory Authority because it may require states to reduce their emissions by more than their own significant contributions.⁵³ The Court found that each state could only be held accountable for its proportionate amount of downwind air pollution, despite the positive environmental repercussions of smaller emission allowances.⁵⁴ In another case in 2014, *Environmental Protection Agency et al. v. EME Homer City Generation* the Supreme Court overturned the D.C. District Court's decision.⁵⁵ Justice Ginsberg wrote the decision in *EME Homer* that

In short, nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations. By altering the schedule Congress provided for SIPs and FIPs, the D.C. Circuit stretched out the process. It allowed a delay Congress did not order and placed an information submission obligation on EPA Congress did not impose. The D.C. Circuit, we hold, had no warrant thus to revise the CAA's action-ordering prescriptions.⁵⁶

The Supreme Court's decision supported the consideration of cost in decisions regarding emission allowances and concludes that the Transport Rule actually increases equitability among states with regard to responsibility for pollution.⁵⁷ Justice Ginsburg specifically notes that air pollution is "transient" and "heedless of state boundaries."⁵⁸ This decision affirms that the EPA, a part of the federal government, has authority over issues regarding cross state pollution. As illustrated

⁵¹ 40 C.F.R. § 97.42 2017

⁵² *Id.*

⁵³ *EPA v. EME Homer City Generation L.P.*, 696 F.3d 7, 11 (2014).

⁵⁴ *Id.*

⁵⁵ *EPA V. EME Homer City Generation L.P.*, 134 S. Ct. 1584, 1593 (2014).

⁵⁶ *Id.* at 1601.

⁵⁷ *Id.* at 1607.

⁵⁸ *Id.* at 1594.

by cases and legislation from the 18th century to the present day, the federal government has long held jurisdiction over this issue.

B. The Case for State Jurisdiction

The Tenth Amendment to the United States Constitution states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁵⁹ The framers intended this amendment to serve as a reminder and a protection against the encroachment of the federal government on individual liberty. Justice Story illuminated the purpose of this amendment in stating that “this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.”⁶⁰ This amendment is used but infrequently to overturn federal law, but in 1992, the decision in *New York v. United States* did precisely that.⁶¹ Writing for the majority, Justice Sandra Day O'Connor found that the “Take Title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 exceeded Congress's power under the Commerce Clause, deeming it coercive. The Take Title provision states that

If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession.⁶²

Thus, the Federal Government essentially pushed the burden of dealing with low-level radioactive waste onto the states. Justice O'Connor wrote that “Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, ‘Congress has impermissibly directed the States to regulate in this field,’ constituting a violation of the tenth amendment.”⁶³ Through this decision, the Court

⁵⁹ U.S. CONST. Amend. X, §.

⁶⁰ *New York v. United States*, 505 U.S. 144, 156 (1992).

⁶¹ *Id.*

⁶² 42 U.S.C. § 2021e.

⁶³ *New York*, *supra* note 59, at 160.

determined Congress's interference in low-level radioactive waste removal by the states to be unconstitutional, that New York State could not be forced to "take title" of these hazardous waste materials and be responsible for their safe disposal. Thus, federal authority to dictate state action was limited in this decision.

The state of California has long desired more restrictive environmental laws than the federal government has provided, making them a prime example of state action to supersede federal authority. In 1976, *EPA v. California* established California's long term waiver which allowed the state to institute stricter emissions controls than are required by the federal government.⁶⁴ The central issue of this case was whether federal constructions which discharge water pollutants in a state with a federally approved permit program are to secure their permits from the state or from the Environmental Protection Agency.⁶⁵ Justice White delivered the opinion of the Court, stating that "the Clean Air Act is without clear indication that Congress intended federal installations emitting air pollutants to be subject to the permit program of a State's implementation."⁶⁶ The Court ultimately concluded that

the Federal Water Pollution Control Act Amendments of 1972 do not subject federal facilities to state NPDES permit requirements with the requisite degree of clarity. Should it be the intent of Congress to have the EPA approve a state NPDES program regulating federal as well as nonfederal point sources and suspend issuance of NPDES permits as to all point sources discharging into the navigable waters subject to the State's program, it may legislate to make that intention manifest.⁶⁷

This decision led to the current state of affairs between California and the Federal Government, which concerns motor vehicle emissions particularly. The Clean Air Act allows California to seek a waiver of the preemption which prohibits states from enacting emission standards for new motor vehicles.⁶⁸ The EPA must grant a waiver, however, before California's rules may be enforced and only unless the request is "arbitrary" or "capacious."⁶⁹ Notably, this privilege of applying for a waiver is limited to California.⁷⁰

⁶⁴ *EPA v. California*, 426 U.S. 200, 227-228 (1976)

⁶⁵ *Id.* at 201.

⁶⁶ *Id.* at 214.

⁶⁷ *Id.* at 227.

⁶⁸ 42 U.S.C. § 7525 (2017).

⁶⁹ 42 U.S.C. § 7543 (2017).

⁷⁰ *Id.*

In order for other states to implement legislation for motor vehicle emissions stricter than what the federal government requires under the Clean Air Act, they must be identical to what California has already implemented.⁷¹ The Clean Air Act allows other states to adopt California's motor vehicle emission standards under section 177.⁷² Section 177 requires, among other things, that such standards be identical to the California standards for which a waiver has been granted, but these additional states need not seek EPA approval.⁷³ When California changes its laws, the other states with identical laws are required to change their own laws to reflect this change.⁷⁴ The provisions of section 177 of the CAA require Maine to amend the Maine LEV program at such time as the State of California amends its California LEV program.⁷⁵ Thirteen states have adopted California emission standards thus far, but have been unable to tailor these requirements to suit their own state. These states are: Arizona, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington. In fact, these states combined represent approximately one quarter of the U.S. vehicle fleet and vehicle miles traveled.⁷⁶

This approach of simply replicating California's waiver in other states is not sufficient to deal with the issue of emissions, nor is it practical for states that have different economic and geographic situations than California. It ultimately creates an inequality of opportunity for states in determining environmental legislation. As indicated by the decision in *New York v. United States*, the federal government may not force a plan of action upon a state without violating the Tenth Amendment, but yet this in equal and unfair system persists in the United States today.⁷⁷

IV. Solutions

A two-pronged solution is necessary in order to appropriately redistribute jurisdiction and burdens between the state and federal governments with regard to environmental legislation. First, a shift from a system of cooperative federalism to one of coercive federalism will allow an increase in the Federal Government's ability to enforce

⁷¹ 42 U.S.C. § 7507 (2013).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 42 U.S.C. § 7507 (2013).

⁷⁶Lori Sinsley, *13 States Adopting California Clean Car Standards Would Reap Significant Economic and Environmental Benefits*, ENVIRONMENTAL DEFENSE FUND, (June 30, 2009), <https://www.edf.org/news/13-states-adopting-california-clean-car-standards-would-reap-significant-economic-and-environme>.

⁷⁷ U.S. CONST. Amend. X, *supra* note 58.

minimum environmental standards. Secondly, states will enjoy increased autonomy in implementation decisions and be allowed to implement stricter regulations to better protect the environment through the prohibition of federal ceiling preemptions. Most notably, both federal and state jurisdiction should move beyond the status quo of emissions focused legislation and toward broader environmental topics.

The shift from cooperative to coercive federalism would result in a collaborative and balanced form of federalism, in which the state and federal governments work together on a host of issues.⁷⁸ This change is necessary because current laws are not effective enough in reducing emissions that cause climate change,⁷⁹ as evidenced by the 1.4 degree increase in global temperature has occurred since 1880.⁸⁰ As established in *Gibbons v. Odgen* and through interpretations of the Commerce Clause, the federal government should continue to exercise its power to control common waterways of the U.S., as well as to mitigate air pollution, as per the Good Neighbor Clause that establishes the air as a commons.⁸¹ For this situation, I advocate for a coercive partnership between the federal government and the states, rather than the cooperative partnership that currently exists. Under this new coercive system, the states will retain a large portion of their autonomy as implementers of policy, but federal ability to force states to comply with minimum environmental standards will increase.

However, the federal government ought to face restrictions on their coercive decisions, as to not exceed their constitutionally granted authority. The federal government thus shall only enforce performance-based standards, not technology and design standards.⁸² This will allow states to determine their own method of reducing pollution, with the federal government only determining the minimum standard the states need to meet in order to prevent excessive environmental degradation.

A two-part strategy would ensure that the standards are met: both positive and punitive. This will involve the use of positive incentives for firms to comply, and punitive incentives for states that do not comply. The federal government will offer firms who comply

⁷⁸ W.W. NORTON AND COMPANY INC., FEDERALISM, (2013) AMERICAN POLITICS TODAY THIRD TEXAS EDITION, <http://www.wwnorton.com/college/polisci/american-politics-today3/texas/ch/03/outline.aspx>.

⁷⁹ NASA, *Climate Change: How do we know?* (Accessed December 29, 2017), <https://climate.nasa.gov/evidence/>

⁸⁰ Voiland, *supra* note 5.

⁸¹ *Gibbons v. Odgen*, 22 U.S. 1 (1824).

⁸² Environmental Protection Agency, *Economic Incentives* (2017), <https://www.epa.gov/environmental-economics/economic-incentives>

with or exceed the minimum standards with monetary or near monetary rewards such as tax breaks or subsidies. Market-based approaches create an incentive for the private sector to incorporate pollution abatement into production or consumption decisions and to innovate in such a way as to continually search for the least costly method of abatement. According to Robert Stavins, “Market based incentives allow any desired level of pollution cleanup to be realized at the lowest overall cost to society, by providing incentives for the greatest reductions in pollution by those firms that can achieve these reductions most cheaply.”⁸³ Pollution control in this case can be generalized to environmental policy in general, and thus Stavins’s evidence makes it clear that offering such incentives can increase efficiency and lower costs.

By contrast, states that do not comply with the minimum standards set by the federal government will lose 10 percent of their funding for emergency management programs. This is guided by the rationale that failure to mitigate emissions will result in increased environmental disasters because of climate change. States will also lose 10 percent of their federal funding for the power grid. This is mirrored by the precedent for this is found in the National Minimum Drinking Age Act of 1984, which forced states to increase the drinking age to 21 or lose 10 percent of their federal highway appointment.⁸⁴ The reductions in federal funding for non-compliant states will provide the funding for the incentive programs for private firms.

Secondly, the government should not be allowed to restrict states if they so choose to implement more stringent environmental regulations than are federally mandated. While the federal government is frequently the most appropriate actor to set and enforce environmental policy, the law must provide for checks and balances to prevent the federal government from acting solely in its own interest. This can be principally accomplished by removing the waiver provision of the Clean Air Act. This action wills all states to set stricter regulations, which will have a long-term net benefit for the United States. Notably, it is not expected that every state will decide to set stricter regulations, but they ought to be allowed. This will allow each state to determine what regulations and methods of implementation are most appropriate for their state, rather than being forced to adopt California’s standards. Accordingly, the sovereignty of state government as guaranteed by the Tenth Amendment

⁸³ ROBERT B. STAVINS, EXPERIENCE WITH MARKET-BASED ENVIRONMENTAL POLICY INSTRUMENTS 359, (2003) [https://doi.org/10.1016/S1574-0099\(03\)01014-3](https://doi.org/10.1016/S1574-0099(03)01014-3).

⁸⁴ 23 U.S.C. § 158 (1995).

is recognized, as well the significant differences between different states in terms of industry, geography, and resource availability. The basis for this suggestion was established in 1976 when California first received their waiver of preemption,⁸⁵ but was reversed in 2008 when California was denied a waiver that would allow them to institute motor vehicle greenhouse gas standards because of pressure from automobile lobby and interest groups.⁸⁶ Notably, this removal of the waiver provision is meant to apply to all varieties of environmental legislation, not just legislation concerning motor vehicle emissions. This action essentially clears bureaucratic red tape and allows new legislation to be implemented more quickly than waiting on a waiver to be granted by the EPA, which can take years. As established earlier, waivers must be granted to California as long as they are not erroneous in nature, which simply expedited the process of tightening regulations.⁸⁷

Next, the federal government ought to allow for floor preemptions, but prohibit ceiling preemptions. This will allow states to set floor preemptions about environmental issues as they so desire, so long as they are above the federal minimum standard, essentially allowing states to create their own alternative minimum standards. However, under this plan states shall not be allowed to set ceiling preemptions with regard to environmental or near environmental issues, ultimately preventing them from capping the quantity of environmental policy introduced in a state. These steps are necessary, because the federal government has pushed back against stricter emissions restrictions in certain states before because of economic and political motivations. If one state adopts stricter regulations, all businesses hoping to sell goods in that state (as well as the rest of the country) must comply with those stricter regulations. For example: all cars must comply with California emissions standards if they are to be sold in California. This eventually leads to all cars generally conforming to these standards, because otherwise the manufacturer would have to separately produce cars for one state.

Perhaps most importantly, these changes should not be restricted to just vehicle emissions, despite the fact that this has long been the precedent. Rather, this legal framework ought to be extended to other issues, including carbon emission allowances that may become

⁸⁵California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, 41 Fed. Reg 196 (October 7,1976).

⁸⁶ California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg 45 (March 6, 2008).

⁸⁷ 42 U.S.C. § 7543 (2017).

necessary in the future for factories, businesses, and even perhaps towns. Despite this increase in power for the states under this new coercive relationship, the Federal government ought to maintain jurisdiction over inter-state conflicts that concern common areas, like navigable waterways or air pollution, as established by the Commerce Clause of the Constitution as well as the specification of specific Inland and intracoastal waterways of the United States in the U.S. Code in 1804.⁸⁸

Finally, EPA funding ought to be redistributed to reflect this new allocation of responsibilities. Currently, the EPA divides their funding between their five major initiatives. These initiatives include improving air quality (13%), protecting America's waters (47.2%), sustainable development (22.7%), ensuring the safety of chemicals and preventing pollution (7.8%), and protecting human health by ensuring legal compliance (9.4%).⁸⁹ I propose the prioritization of funding based upon function and dividing it into research and development funding, compliance funding, and funding for the maintenance of water, air, and other similar endeavors. The federal government must bear the responsibility of greater research and ensuring compliance among states because these actions can be justified under the Commerce Clause since they concern interstate activities. However, the parts of the EPA budget that focus strictly on maintenance should be allocated to states' respective environmental agencies and used for the same purpose but by a different actor. This funding ought to be divided based on the population and the size of each state for purpose of fair redistributions. In conclusion, these solutions will function together to more appropriately distribute jurisdiction over environmental legislation in the United States, redefining the relationship between the State and Federal Governments.

Part 5: Implications and Conclusion

While the removal of the waiver requirement may be burdensome to some short-term business interests and the legislators that they support, disappointed lobbyists are not the chief concern of the courts. Manufacturers will now be forced to produce products that match the emissions requirements of the states with the strictest requirements, as explained in background provided at the beginning of this review. The adjustment period will likely be

⁸⁸ 33 U.S.C. § 1804.

⁸⁹ Office of the Chief Financial Officer, FY 16 EPA Budget in Brief, United States Environmental Protection Agency (Feb. 2015), https://www.epa.gov/sites/production/files/2015-02/documents/fy_2016_bib_combined_v5.pdf.

costly due to the need to increase efficiency of cars, factories, and other emitters of pollutants. However, this could potentially lead to economic benefits in the future. By 2020, California's emissions and cap-and-trade regulations will result in "cumulative benefits from avoided health costs, improved energy security, and reduced social costs of carbon valued at \$10.4 billion," according to a report by the Environmental Defense Fund.⁹⁰ By 2025, it will likely exceed \$23.1 billion.⁹¹ These adjustments will also drastically reduce emissions and pollution. To take a case in point, California passed AB 32, a groundbreaking law signed by governor Arnold Schwarzenegger in September 2006 that directs industries to reduce all greenhouse gas emissions by 25 percent over the next 13 years.⁹² Another law, AB 1493, which was enacted in 2002, directs automakers to reduce greenhouse gases emitted by passenger vehicles sold in California after 2009, with a 30 percent reduction in statewide vehicular emissions by 2016.⁹³

Changes such as these, especially if replicated across the nation, will hopefully stave off or decrease the severity of climate change and global warming. Climate scientists have determined that halting warming at 1.5 degrees Celsius is advisable and at 2 degrees Celsius is absolutely necessary.⁹⁴ Allowing any greater increases will make life in many places of the world unsustainable and lead to climatic weather events and refugee crises. While the current administration does not favor stricter environmental laws, the United States is the only nation in the world that has not committed to the Paris Climate Accords. One administration's desires should not supersede what is right and necessary for the rest of the population.⁹⁵ The Courts ought to enforce this course of action in order to provide the maximum benefit for the citizens from which the government derives its authority.

⁹⁰ Sinsley, *supra* note 76.

⁹¹ Safia Samee Ali & Christina Wilkes, *Experts Say California's Environmental Policies are Bellwether for Economic Growth*, NBC NEWS, (Aug. 17, 2016, 3:40 PM) <https://www.nbcnews.com/news/us-news/experts-say-california-s-environmental-policies-are-bellwether-economic-growth-n631841>.

⁹² Charles W. Schmidt, *ENVIRONMENT: California Out in Front*, ENVIRONMENTAL HEALTH PERSPECTIVES (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1849903/>

⁹³ *Id.*

⁹⁴ Pearce, *supra* note 4.

⁹⁵ Robinson Meyer, *Syria Is Joining the Paris Agreement. Now What?*, THE ATLANTIC, (Nov. 8, 2017) <https://www.theatlantic.com/science/archive/2017/11/syria-is-joining-the-paris-agreement-now-what/545261/>.

Coercing the State

Kevin Wong

Introduction

In the prophesied year of 1984, Congress passed the National Minimum Drinking Age Act of 1984, allowing the Secretary of Transportation to withhold up to 10 percent of the federal highway funds provided to a state if it did not pass laws mandating a minimum drinking age of at least 21 years of age.¹ This led to *South Dakota v. Dole*, where the state sued, arguing that this use of Congress's constitutional spending power interfered with state sovereignty by forcing it to take some action. South Dakota lost, the Court ruling that these incentives were not unconstitutionally coercive.

Federal power has expanded throughout the history of the United States. This is no surprise. The republic is no longer a collection of these states but rather the single entity we view it as today. From an economic perspective, the federal government has increasingly become the dominant actor in economic affairs. This is, and should be, reflected in changes in jurisprudence.

Perhaps the first increase in central power can be attributed to the formation of our second republic itself. Our first republic, formed by the Articles of Confederation, created a government based on unanimous consent and the whims of its members. It was decentralized to a fault. Our Constitution was created to solve the coordination problems emerging from decentralized control. Similarly, the crisis that was the American Civil War led to massive centralization to fight one of the only conflicts in our history that has an

¹ National Federation of Independent Business v. Sebelius, 567 U.S. 519, 632 (2012).

existential threat to the federal union. The United States, in resolving that conflict, passed legislation imposing an income tax, which massively expanded federal revenues vis-à-vis the state and, correspondingly, its economic reach and power. It took direct military control of the state in Reconstruction. After some legal wrangling, this new central role in our polity was codified in the early 20th century by the 16th amendment and 17th amendments, giving the federal government power to levy income taxes and eliminating the direct voices of the states.

The Great Depression and the World Wars too contributed to this trend of increased centralization and federal authority. Then-radical programs established by the New Deal led to challenges to their constitutionality and, later, rulings which would permit the federal government to provide for financial incentives towards goals outside the scope of the enumerated powers, even after expansion of the enumerated powers under the Necessary and Proper Clause. By the 20th century, the federal government's power to spend for vague purposes was clearly defined in *United States v. Butler*. This led to legislation like the act at the center of *Dole*, which conditioned federal subsidies or expenditures on compliance with certain federal requirements. This too was ruled constitutional but with the Court stating that there could be possible situations where Congressional legislation could be "unconstitutionally coercive" upon the states.² That day came in this decade, when certain sections of the Affordable Care Act were ruled unconstitutional for violating the doctrine set forth in *Butler*. Among other things, this paper will argue that this decision was in error. And, more importantly, that there are fundamental differences in standards of coerciveness must be considered in relation to autonomous semi-sovereign governmental entities. Coercing a state is a high bar indeed to meet. But, first, an exploration of the path to the present.

Part I. History

In the early republic, in a time of little federal authority, there have long been different conceptions of the scope of federal powers. As far back as one of the earliest treatises on the federal Constitution, the Federalist Papers, Alexander Hamilton argues that the federal government may spend money on matters outside its explicit jurisdiction under the spending clause.

² South Dakota v. Dole, 484 U.S. 203, 211 (1987).

Justice Story confirms this in his famous *Commentaries on the Constitution of the United States*, which advocates this Hamiltonian position, striking back against strict constructionism and arguing,

But it is said, that [expenditure] must be applied to the general welfare; and that can only be by an application of it to some particular measure, conducive to the general welfare. This is admitted. But then, it is added, that [some] particular measure must be within the enumerated authorities vested in congress, (that is, within some of the powers not embraced in the first clause,) ...

[But why] not, since it is for the general welfare? No reason is assigned, except, that not being within the scope of those enumerated powers, it is not given by the constitution. Now, the premises may be true; but the conclusion does not follow, unless the words common defence and general welfare are limited to the specifications included in those powers... [W]e are led back to the same reasoning, which construes the words, as having no meaning per se, but as dependent upon ... the enumerated powers. Now, this conclusion is not justified by the natural [meaning] ... of the words; ... it strips them of all reasonable force and efficacy.³

In 1819, Marshall writes in *McCulloch v. Maryland* that “should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not [e]ntrusted to the Government, it would become the painful duty of this tribunal ... to say that such an act was not the law of the land.”⁴ This has been read differently, construing the language to create or justify restrictions on federal spending powers: in the modern day, we conceive of the spending powers to emerge from the spending clause and, therefore, the only relevant object is the promotion of the general welfare noted therein. However, there is the contrary position taken, as Story criticized above, that could also imply that it is not the means but rather the objects, that matter.⁵ The act of creating incentives or expenditures to achieve goals outside the enumerated powers would therefore be unconstitutional. Beyond the reasons given by Story, this is simply ill conceived.

Any ends-based conception of constitutional policy would be almost necessarily be practically non-justiciable: the court lacks the capacity to effect in-depth analysis of not only tertiary, but even the direct effects of legislative outcomes before that significant empirical

³ Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 5th ed., Vol. I, § 922.

⁴ *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819).

⁵ David Dudley Field, *Centralization in the Federal Government*, 132 THE NORTH AMERICAN REVIEW 407, 408 (1881).

research. Richard A. Posner similarly argues that, “the capability of the courts to conduct scientific or social scientific research is extremely limited, and perhaps nil.”⁶ This means that any analysis of such ends would require evidence that is not yet available due to the constraints of time itself, unacceptable levels of judicial discretion, bordering on fanciful speculation, that would easily fall into the constraints set by the political question doctrine first presented by Marshall and elaborated upon in the 1962 case *Baker v. Carr*.⁷

By the 1930s, after the early 20th century’s centralizing impulses, this question emerged yet again, but rather, in the more modern context of conditionality. The federal government in *United States v. Butler* (1936) created a program that established a tax on agricultural processing that would be redistributed to farmers who agreed to cultivate fewer acres. The Court held that while the tax was impermissible, as “it is a step in a plan to regulate agricultural production,”⁸ it was permissible that monies be spent, saying that, “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”⁹ Rather, it is limited by Congress’ conception of the general welfare, a standard that, in truth, may as well be tautological, as any Congress which passes any bill into law will claim its virtues. In *Butler*, the Court too seems to throw its hands up and writes, “How great is the extent of that range when the subject is the promotion of the general welfare of the United States[?] [W]e hardly need remark.”¹⁰

Thus, objectives not within the enumerated powers can be achieved through the use of conditional expenditure.¹¹ This doctrine forms the basis for a great deal of legislation, including the 1965 changes to Medicaid, where Congress incentivized the states to enroll people outside the scope of the original Act by having the federal government pay half the costs of those new enrollees.¹²

Further elaboration came with two cases: *Pennhurst State School and Hospital v. Halderman* (1980) and *South Dakota v. Dole* (1987). *Pennhurst* spoke about the need for clear terms and conditions for the use of federal funds: “if Congress intends to impose a condition

⁶ Richard A. Posner, “Against Constitutional Theory,” 73 N.Y.U. L. REV. 1, 12 (1998).

⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁸ *United States v. Butler*, 297 U.S. 1, 80 (1936).

⁹ *Id.* at 66.

¹⁰ *Id.* at 67.

¹¹ *Dole*, *supra* note 2, at 207.

¹² *Sebelius*, *supra* note 1, at 641 (Ginsburg, R., dissenting).

on the grant of federal moneys, it must do so unambiguously.”¹³ In practice—and on judicial review—this has not created meaningful burdens on Congressional powers, for well-drafted law is generally unambiguous. In *Dole*, the main question was the constitutionality of the 1984 National Minimum Drinking Age Act, which authorized the Secretary of Transportation to withhold up to 10 percent of federal highway funds to states failing to establish a minimum drinking age of 21. And in *Dole*, we find some clarification on the limits of fiscal coercion: “the relatively small financial inducement offered by Congress here ... is not so coercive as to pass the point at which pressure turns into compulsion.”¹⁴ But the Court did not draw a bright line regarding how much coercion was excessive.

This would not soon be resolved. The 1992 case *New York v. United States* also spoke on this topic, but rather than dealing with incentives per se, it dealt with the direct “commandeering” of state governments to comply with legislation passed by Congress, i.e. that “[the f]ederal Government may not compel the States to enact or administer a federal regulatory program.”¹⁵ This was held as unconstitutionality coercive and contrary to state sovereignty. The dissenters, White, Blackmun, and Stevens,¹⁶ foreshadowed a similar dissent in *Printz v. United States*, warning of disconnecting the incentives for the federal government to involve the states at all and associated harms to cooperative federalism.¹⁷ Yet, this decision also ruled two other provisions constitutional: redistribution of surcharges levied by states and levying fees against non-compliance with federal regulations.

The most recent return to this question took place in the extremely politicized context of the Affordable Care Act (known more popularly as Obamacare) in *National Federation of Independent Business v. Sebelius* (2012). The last part of the four-part ruling delivered by Justice Breyer stated that the provisions in the Act authorizing the relevant Secretary to withhold all of the federal Medicaid subsidies as a penalty for noncompliance were unconstitutional, being unduly coercive upon the states. Justice Breyer explained that “when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism”.¹⁸

Chief Justice Roberts also argues that it violates the test in *Pennhurst* that the conditional receipt of federal funds be clearly defined, saying that “[t]he Medicaid expansion,

¹³ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1980).

¹⁴ *Dole*, *supra* note 2, at 204.

¹⁵ *New York v. United States*, 505 U.S. 144, 188 (1992).

¹⁶ *Id.* at 210 (White, B., dissenting).

¹⁷ *Printz v. United States*, 521 U.S. 898, 970 (1997) (Stevens, J., dissenting).

¹⁸ *Sebelius*, *supra* note 1, at 577-578.

however, accomplishes a shift in kind, not merely degree,”¹⁹ meaning that the provisions in the law stating that Congress can change the provisions of the Act do not apply. His justification for this is because “Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level [... and therefore ...] no longer a program to care for the neediest among us.”²⁰

To the question of creating standards for coercion, the majority opinion simply says that no standard is necessary and that judges can assess coerciveness on the fly, stating without justification, “the Court in *Steward Machine* did not attempt to ‘fix the outermost line’ where persuasion gives way to coercion. The Court found it [e]nough for present purposes that wherever the line may be, this statute is within it.’ We have no need to fix a line either.”²¹ This is more an admission of such a line being unknown than anything else. The majority similarly, on the question of the Medicaid expansion incentives and severability, does not see itself able to set a cap, for, if a conception of coerciveness were found, the Court would be able to set such a line.

Part II. Problems in coercion

There are fundamental problems with the core of “coercive federalism” exercised through fiscal incentives alone. This claim that a state can be coerced into action by finances alone is unsupportable. Similarly is the claim of its unconstitutionality. First, this paper will address a number of normative arguments about property rights before moving onto practicality concerns and broader constitutional objections.

First, there is a claim that states, once promised monies by federal programs, can be coerced by their withdrawal. This requires that states have a claim to the subsidies that the federal government provides. Federal monies, however, are the property of Congress. Although this may be an unpopular point, Congress may use its monies how it wishes, constrained solely by the general welfare. This is not to mean that Congressional spending power is totally unlimited. There are clear political limitations on Congress’s legislative authority, as democratic disagreement in super-majoritarian institutions like those of our Senate will stall all but the most popular or necessary initiatives. But as a matter of law, as

¹⁹ *Id.* at 583.

²⁰ *Id.* Although it is clear that expansions of this sort, moving away from the provision of care to the most disadvantaged amongst us, have been enacted for decades. See note 12.

²¹ *Id.* at 585.

that welfare is itself defined by Congress, it follows that there are few, if any, constraints on what the Congress may spend its money.²² This is stated quite clearly in the Constitution, and this exact interpretation appears above, where this paper quotes Story's *Commentaries on the Constitution of the United States*. This ought not be a controversial position, its being affirmed (also noted above in the last part) by the ruling also given in *Butler*.

The fact those monies belong to Congress means that even where the government creates new grants, states are not entitled to those monies. This does not change simply because grants have existed for some time. States are not and have not been entitled to monies from the federal government. Yet, removing those monies via repeal is not impermissible. Congress, could, if it desired, repeal Social Security tomorrow through its ordinary processes of passing laws. Instead, our current coercive federalism doctrine is strangely blind in its application, as it does not apply if programs are created or destroyed. Nor does it necessarily apply if programs are created with conditions in mind. Instead, it only applies if Congress conditionally withholds payments, which, in economic terms, is equivalent to the destruction of a program followed by the creation of a new positive program, permissible under current law. Ginsburg notes this in her dissent in *Sebelius*,²³

Consider also that Congress could have repealed Medicaid. Thereafter, Congress could have enacted Medicaid II, a new program combining the pre- 2010 coverage with the expanded coverage required by the ACA. By what right does a court stop Congress from building up without first tearing down?

Similarly, the power of the government to directly administer health care is not limited, it being a form of expenditure authorized by the general welfare clause. Such a direct tax, on the ground, would have the even greater coercive effects to each citizen than it would have where state input into the program is both required and provided. Comparatively, if we care about state input into the operations of the federal government at large, it is better to keep open options for states to act within federal structures and not to so reduce the options available to Congress that it must choose between inaction and a total circumvention of the states, leaving policy-makers without an important tool that capitalizes on local knowledge and needs.

²² *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

²³ *Sebelius*, *supra* note 1, at 636-637 (Ginsburg, R., dissenting).

While Thomas argues in his dissent to *Sebelius* that even if a state declined to engage in some new federal program, it would still be required to pay federal taxes.²⁴ However, federal taxes are taxed not from the coffers of the states, but rather, from the citizens therein residing. The states have no claim on those tax revenues.²⁵ Although one could conceive of a Laffer curve-esque trade-off between federal and state taxes, this is extremely slight, and, by no means at present and likely taxation rates, would become onerous.

Furthermore, the coercive federalism doctrine functionally serves as a restriction on the ability for Congress to modify its own legislation. In *Sebelius*, the majority states “the federal-state relationship is in the nature of a contractual relationship.”²⁶ It rests this requirement on an *obiter dictum* in *Pennhurst*.²⁷ This does reflect the fact these programs, when initially set up, are voluntary programs into which the states enroll, pressing the metaphorical “Accept” button on Congress’ terms and conditions. However, the Court in *Sebelius* ruled in effect that Congress did not have the authority to change those programs if its changes are coercive, even if Congress’ metaphorical terms and conditions give that ability to Congress. And while *Pennhurst* requires that changes be clear, the Medicaid ‘contract’ is so clear, giving Congress authority to change and repeal it at will.²⁸

This authority to change programs established from a contractual basis has long been exercised. Similar state-administered programs like Social Security and various changes to Medicaid in the past have exercised the powers to change the contract at Congress’ will. For example, Social Security was expanded to cover survivor and disability benefits after congressional amendment. And Medicaid has been expanded considerably in the past, expanding from its original requirements to cover children, pregnant women, and millions of others.²⁹ Moreover, in the context of contract law, it is nothing new for a contract to have terms for self-modification without approval of all parties. For example, End user license agreements may state that those terms and conditions may be modified by one of the parties without notice.

The question, then, is whether changes are coercive or not. This is the fundamental problem behind this conception of an economically coercive federalism. Beyond the

²⁴ *Sebelius*, *supra* note 1, at 680 (Thomas, C., dissenting).

²⁵ *Sebelius*, *supra* note 1, at 643 (Ginsburg, R., dissenting).

²⁶ *Sebelius*, *supra* note 1, at 676 (Thomas, C., dissenting).

²⁷ *Pennhurst*, *supra* note 13, at 17.

²⁸ 42 U.S.C. §1304.

²⁹ *Sebelius*, *supra* note 1, at 641 (Ginsburg, J., dissenting).

absurdity of its logical consequences, preventing Congress from exercising its sovereign power to change its own creations, its premises are fundamentally flawed. Normally, we conceive of coercion as something having to do with the use of force to compel some decision. Perhaps military force is not an acceptable method of enforcing federal programs upon the states. But it is not unacceptable as a matter of contract law, as two parties may specify an extremely high price to inaction or noncompliance. In fact, many contracts possess non-compliance, modification, or withdrawal provisions. These provisions are not anything new, and the inclusion of those provisions in an agreement modification by one party alone does not create a special form of coerciveness.

However, the Court seems to rest its decision on an argument of economic duress. This requires (1) threats of an unlawful act by one party which (2) compels performance by the other party of an act which it had a legal right to abstain from performing.³⁰ As the logic of the first criterion is self-referential, the Act of Congress being unlawful or not, analysis falls upon the second criterion.

While economic coercion exists as a matter of contract law, economic incentives are not in of themselves sufficient. It is practically impossible for a state or taxing authority to coerce by pressure to its fiscal budget. It is possible for a person or for a firm to be economically coerced because those actors cannot simply demand more funds from their populations. States, however, have the ability to compel the payment of higher taxes. They can provide Medicaid funding by themselves from their own tax bases without the support of federal funds. However, from a principled point of view, the majority in *Sebelius* argues against this, saying that it would undermine the accountability of government.³¹ This misses the point that it is not only lawyers and legislators that can read but that a democratic populace, too, can understand the written word and arguments delivered by their representatives. It is not impossible for a democratic polity to assign blame to correct causes. However, that the majority rejects a state-only Medicaid program as impossible perhaps is little more than ignoring history—as Ginsburg notes in her dissent, “Arizona declined for 16 years to participate in Medicaid, even though its residents’ tax dollars financed Medicaid programs in every other State” and Medicaid-like services were provided to its population.³²

³⁰ Chase Manhattan Bank v. State of New York, 13 A.D.3d 873, 874 (2004).

³¹ Sebelius, *supra* note 1, at 578.

³² Sebelius, *supra* note 1, at 644.

But even ignoring the question of an ability to coerce the state, the determination of the line at which incentive gives way to coercion is impossible. Its predictability is minimal; its consequences a political question; its standards non-existent; and its legislative guidance equivalent to the theatre of the absurd.

Law requires predictability. And in procedural law such as this, arbitrary restrictions make it more difficult to provide for the efficient resolution of pressing societal problems. Predictability is necessary for government to be able create reasonably tailored laws that solve those problems. If it is unclear what means may be employed to make those laws, there is another barrier to problem solving and a delay to resolving these societal ills.

This problem of standards extends, not only in that it becomes unclear what activities may be permissible, but also that it is fundamentally a political question. In *Baker v. Carr*, the Court established a number of criteria for determining such a question:

- (1) A “textually demonstrable constitutional commitment of the issue to a coordinate political department,”
- (2) “a lack of judicially discoverable and manageable standards for resolving it,”
- (3) “the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion,”
- (4) “the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government,”
- (5) “an unusual need for unquestioning adherence to a political decision already made,”
or
- (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”³³

The matter of coerciveness falls into the second criterion. The majority in *Sebelius* argues that it need not have a standard for coerciveness, saying, “We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.”³⁴ Lacking such a standard falls directly into the criteria noted in *Baker*. Of course, that such standards are not present does not mean that they cannot exist. And, given that the Court was once willing to rule that a lack of standards makes apportionment cases a political question,³⁵ this

³³ *Baker*, *supra* note 7, at 217.

³⁴ *Sebelius*, *supra* note 1, at 585.

³⁵ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

is more a matter of finding proper standards. This too is noted in Ginsburg's dissent, asking of the majority:

When future Spending Clause challenges arrive ... how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's—or States'—budget is determinative: the lead plaintiff, all challenging States (in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?³⁶

What we see from the *Sebelius* decision is the profound lack of such standards. It is not that the Court was unable to find or state those standards; it is that they simply lack such standards. For, if they did, the severability portion of *Sebelius*, where the Court simply removed the consequences to non-compliance with Medicaid expansion, would have become a limit on what the federal government could have refused to provide. The Court could have stated that the Secretary of Health and Human Services would be able to withhold a maximum of 50 or 10 percent of funds. The Court, however, ruled that the Secretary may not withhold funds for failure to enact Medicaid expansion. Yet, the ruling invalidates implicit portions of the Act that may not be coercive, as the Act allows the Secretary significant discretion in how much shall be withheld. For example, if the Secretary were to withhold one per cent of Medicaid funds for non-compliance, it would be unlikely for the Court to find it coercive. But here, it in effect has, by striking down the Medicaid expansion in its entirety. This violates the Court's own principle "to conserve, not destroy, the legislation"³⁷ and bears open the heart of the predictability problem: what exactly, if anything, is coercive, and what shall the Court prohibit?

However, beyond the fact that we currently *lack* those standards, it is likely impossible to create such standards due to subjectivity. Some fixed percentage withheld, for some states, would be too much. For others, however, it would be minimal. For states like West Virginia, New Mexico, and Mississippi, which receive more than four dollars for every

³⁶ *Sebelius*, *supra* note 1, at 643 (Ginsburg, R., dissenting).

³⁷ *Sebelius*, *supra* note 1, at 524.

dollar sent to Washington,³⁸ it is plausible that any disincentive could be coercive. But for a state like Delaware, which receives very little from Washington, getting 50 cents for every federal dollar,³⁹ it may be no problem at all. A single line designating ‘coercion’ for all states may be impossible to establish.

Yet, considering the Court’s own precedent, if we can determine that something like the National Minimum Drinking Age Act of 1984 is not coercive, removing only 5 percent of highway funding, it must be the case that a coercive disincentive lies somewhere between those two values. This raises the important (but admittedly somewhat childish) question, is 10 percent coercive? Is 15? How about 25? 50? 75? With this economic coercion doctrine, these are questions that the court will have to answer to a reasonable degree of granularity, for as long as the Republic stands, Congress will continue to pass laws that provide conditional funding. And Congresses shall push the lines of their own power.

The Court also ruled based on a perception of Congressional intent. Perhaps it is another means of determining coercion. However, this runs into the various criticisms of intent that have been applied over the years: How can a body of hundreds be distilled to one amorphous intent? Is Congress simply a reflection of the will of the people? If so, then what is the people’s will? How can we determine exactly what was intended by the authors and revisers of each section? As the Justice Cardozo said, “to hold that motive ... is equivalent to coercion is to plunge the law in[to] endless difficulties.”⁴⁰ Moreover, basing such a decision on intent creates other difficult problems. Perhaps the Congress writes legislation that is not coercive? But what if it is intended to be? Is that unconstitutional? Perhaps the Congress somehow writes truly coercive legislation⁴¹ without intending to be coercive? Is that too verboten?

What we have in *Sebelius* is a conception of coercion in the alternatives availed to the states. But this too fails to achieve its purpose. The majority writes “If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme so that the most vulnerable groups in

³⁸ McMaken, Ryan, *Which States Rely Most on Federal Spending?*, Mises Wire, (Apr. 3, 2016) <https://mises.org/blog/which-states-rely-most-federal-spending>.

³⁹ *Id.*

⁴⁰ *Steward Mach. Co. v. Collector* 301 U.S. 548, 550 (1937).

⁴¹ Something along the lines of physical coercion, threatening the deployment of the military, could certainly be found coercive, since that would be in fact an important threat on the general health of the states.

our society ... would not be left out in the cold.”⁴² If this is the standard for coercion, then all Congress would need to do is directly administer whatever program the states do not implement. Like how the insurance exchanges in the Affordable Care Act are administered by the states, but as a backup, there are federally administered exchanges. The federal government argued that the lack of a backup scheme was because Congress did not expect that anyone would refuse the gift of expanded Medicaid funding.⁴³ The Court rejects this, saying that given so many states have joined in legal action, it clearly is not generous enough.⁴⁴ This is, however, fundamentally circular. It is also absurd – if any state’s refusal (which may not always be due to economic reasons, but rather, for political ones) is grounds for rejection of congressional incentives, the Court has created an incentive for no Congress to ever allow state input into its programs, from fear of those programs being gutted by those courts. All of this creates strong reasons for Congress to never establish cooperative programs with the states, and instead, simply administer them independently through federal agencies. The impact on the health of our nation’s federalism cannot be anything but negative. And even ignoring that, if this is the standard, it does not service its purpose. Congress may simply be coercive with a provided backup, but with no intention that it be used.

More broadly, however, the 10th Amendment and federalism in general, from first principles, do not provide for the protections that the Court claims. When it states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,”⁴⁵ it does not insulate the states from incentives to use those powers in a certain fashion. For example, in trials, citizens possess the right to plead guilty or not guilty. That plea deals can be offered does not violate the right to trial by jury guaranteed by the Sixth Amendment, for the exercise of that right is not insulated from the context of incentives surrounding its exercise. Similarly, defendants may waive their rights, just as states may contract out of theirs. Incentives can be strong, just as they can be between the state and the citizen and between firms. But the Tenth Amendment does not prohibit them, for states do not give up their legal powers or rights when making a choice that involves the weighing of incentives. What is not permissible is

⁴² Sebelius, *supra* note 1, at 687.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ U.S. CONST. amend. X.

the use of government power to pose an existential threat to a free actor. That, however, is not what is under review in *Sebelius*, nor is it the topic of this paper.

III. Concluding remarks and the new way forward

Part II concedes that it is possible for states to be coerced by military force in the manner of warfare. It also concedes the theoretical possibility that a state may be called upon to raise more revenue than is at all possible. Both are reasonable places from which a new coercion doctrine may develop.

We can create a hard rule that the federal government ought not force the states into a fiscal impossibility. Similarly, we can create a hard rule that it should not be able to pummel them into submission to federal programs through the military or use of force.⁴⁶ And these are eminently justiciable standards. From economics, we know in general and in reasonably specific terms how much a state can be meaningfully expected to extract from its population. We know, from any modicum of sense, the destruction of military action in the homeland. These are what Posner would term the “actual and likely effects of particular decisions and doctrines.”⁴⁷ These standards are ones are easily found and managed. And to borrow the Court’s circular analysis of an ‘ungenerous’ gift, this paper just demonstrated their discoverability. Moreover, they are respective of what coercion, in the context of an actor able to demand new resources, actually is. These standards too escape the problems noted in Part II, for they are also not determined by motive, but by *actual coercion*, by something which no state, be it Delaware or West Virginia, could possibly deny. Furthermore, this solution also deals with the edge-cases which current doctrine’s basis on intent must either prohibit (making it absurdly broad) or permit (rendering it ineffective at its stated goal).

These standards would further re-empower the states themselves to have influence on federal programs. The passage of the 16th and 17th amendments created a fundamental mismatch between the federal government and the states. The Sixteenth Amendment grants the federal government overpowering financial resources far in excess of that which the states have at their disposal. And the Seventeenth Amendment, eliminating the state legislatures’ selection of US Senators, eliminates the states’ direct input into the business of

⁴⁶ Rebellions à la the Civil War being excepted, but at that point, it ceases to be much of a federal program, more readily entering the realm of the existential.

⁴⁷ Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 11 (1998).

the Congress. These amendments, along with the pressing demands of the Great Depression and the World Wars, were central to the expansion of federal power in the 20th Century.⁴⁸ This decoupling, where the federal power gains economic dominance over the states, which then is unconstrained by the lack of state oversight, is central to the death of the “dual federalism” of the early republic.⁴⁹

It is time to recognize this structural change fundamentally shifts the role of the states. It is still plausible that states can go their own way with social programs like Medicaid. That it can be done does not make it easy. It would require a state to tax its populace the value of its subsidies. Regardless, it would be far better for both parties that the local knowledge of the states is combined with the goals and resources of the metropole. It is these kinds of tertiary effects that the courts must consider in rendering judgment and that Posner warns of in *Against Constitutional Theory*. If the Court truly cares about federalism, the only way to achieve this would be to eliminate the incentives that the Court has established for the federal government to simply bypass state engagement for direct control over its objectives.

Of course, it would require the rejection of the current controlling precedent, but the Supreme Court has demonstrated a willingness to overturn unworkable doctrines. And such a requirement would be based on the fifth criterion noted in *Baker*, that we ought not need to adhere to recognized political questions.⁵⁰ For this doctrine is exactly what that is.

⁴⁸ Scott G. Crowley, *The Effects of the Sixteenth and Seventeenth Amendments in Changing the Role of the States in the Federal System*, 1989 BYU L. REV. 145, 146 (1989).

⁴⁹ *Id.* at 147.

⁵⁰ Baker, *supra* note 7, at 217.

The Consumer Financial Protection Bureau: Questions of Constitutionality and Reform

Bri Mirabile

Introduction: The Financial Crisis and Subsequent Government Action

In the political realm, crises almost invariably lead to calls for action. Such was the situation during the financial crisis of 2007-2009, colloquially referred to as The Great Recession. During this time, the national unemployment rate reached 10 percent,¹ consumer spending fell considerably,² and GDP experienced a maximum contraction of about 8 percent.³ Rooted in the poor lending standards of financial institutions and lack of oversight thereof, the crisis created an atmosphere ripe for reform.⁴ As Federal Reserve Chairman Ben Bernanke states in his memoir, even the markets themselves reacted positively to the news of potential Congressional action.⁵

The first major piece of legislation Congress passed in response to the financial crisis was the Troubled Asset Relief Program (TARP) in 2008.⁶ It provided the federal government with the funding ability and power necessary to help homeowners and financial institutions on the brink of disaster.⁷ However, the legislation failed to address any of the underlying systemic causes of the financial crisis. In order to prevent a similar crisis from occurring in

¹ U.S. Bureau of Labor Statistics, THE RECESSION OF 2007-2009 2 (2012).

² *Id.* at 15.

³ Jason Furman, ADVANCE ESTIMATE OF GDP FOR THE FOURTH QUARTER OF 2015 (2016).

⁴ Ben Bernanke, THE COURAGE TO ACT 314 (2015).

⁵ *Id.* at 308.

⁶ H.R. 1424, 110th Cong. (2008).

⁷ Bernanke, *supra* note 4, at 315.

the future, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.⁸

In his signing ceremony, President Obama claimed “reform will put a stop to a lot of the bad loans that fueled a debt-based bubble.”⁹ Congress then enacted the Dodd-Frank Act in an attempt to remedy the mismanaged financial regulation that contributed to the crisis.¹⁰ One component of the legislation’s solution was the creation of the Consumer Financial Protection Bureau (CFPB), which consolidated and streamlined the functions of multiple oversight agencies.¹¹ The Bureau was first proposed by Oren Bar-Grill and Elizabeth Warren in their University of Pennsylvania Law Review article titled *Making Credit Safer*.¹² The new structure of regulatory agency oversight was intended to be more effective and efficient in monitoring the nation’s financial institutions and protecting consumers from predatory lending practices. More specifically, the CFPB was meant to “act as a market umpire to protect consumers from improper financial products and promote proper market disclosures.”¹³ In order to properly accomplish such an enormous task, legislators awarded the CFPB ample power to do so. Congress conferred most of this power upon a single Director who can only be removed by the President for cause. The unusual amount of power awarded to the CFPB and its Director by Congress has led some to question whether that concentration of power violates the Constitution.

In October 2016, a three-judge panel for the D.C. Circuit Court found the structure of the CFPB to be unconstitutional because it violates the Take Care Clause of Article II of the Constitution.¹⁴ In January of 2018, the D.C. Circuit reversed the decision of the panel by a vote of six to three en banc.¹⁵ However, this reversal is not likely to be the last ruling on

⁸ H.R. 4173, 111th Cong. (2010).

⁹ Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act, The Obama White House Archives (July 21, 2010, 11:34 AM), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

¹⁰ H.R. 4173, 111th Cong. (2010).

¹¹ Bernanke, *supra* note 4, at 463.

¹² Oren Bar-Gill and Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

¹³ Lawrence G. Baxter, *Understanding Regulatory Capture: An Academic Perspective from the United States*, in *THE MAKING OF GOOD FINANCIAL REGULATION: TOWARDS A POLICY RESPONSE TO REGULATORY CAPTURE* 33 (Stefano Pagliari, ed., 2012).

¹⁴ PHH Corp. v. Consumer Financial Protection Bureau, No. 15-1177 1, 10 (D.C. Cir. Dec. 11, 2016).

¹⁵ PHH Corp. v. Consumer Financial Protection Bureau, No. 15-1177 1, 67-68 (D.C. Cir. Jan. 18, 2018).

this case, as its constitutional implications could affect all independent agencies and are too broad to relegate to a Circuit Court.

More recent political developments also reveal the need for the Supreme Court's clarity on the matter. President Obama's first appointment to the position of Director, Richard Cordray, engaged in aggressive regulation of credit providers during his time at the Bureau.¹⁶ Cordray, a liberal Democrat, resigned his position to run for Governor of Ohio early in President Trump's first term.¹⁷ President Trump then appointed Mick Mulvaney, a conservative Republican, to head the Bureau. After substantial controversy, Mulvaney began the process of reversing the aggressive enforcement policies that Cordray previously adopted.¹⁸ It is now readily apparent that the ideology of the Director, political or otherwise, can have an enormous impact on the enforcement practices of the CFPB. Mulvaney's rollbacks demonstrate how much power Cordray used to strengthen regulation, and both men's actions have raised questions about their largely unilateral authority within such a powerful agency.

The government of the United States has a long and rich history based on the doctrine of the separation of powers, or the idea that the legislative, executive, and judicial branches are independent of and can exert checks and balances on one another. Although the constitutionality of the Consumer Financial Protection Bureau has not been ruled on in its entirety, the unique structure and function of the agency creates legitimate questions about whether it violates the separation of powers. The Bureau's authority extends to areas usually separated into legislative, executive, and judicial categories. The resulting unification of power creates a system of regulatory authority so powerful that the agency can engage in enforcement practices with relative impunity. Therefore, the structure of the CFPB ought to be modified to create an agency that better reflects the longstanding American tradition of separate and equal branches of government.

The President of the United States is a key part of that tradition, as he must be able to control agencies within the executive branch. The rise of the administrative state, however, has placed an additional burden on the President's shoulders, underscoring the importance

¹⁶ Avie Schneider, Richard Cordroy Stepping Down as Head of U.S. Consumer Protection Agency, NPR (Nov. 15, 2017 12:35 PM), <https://www.npr.org/sections/thetwo-way/2017/11/15/564349200/richard-cordray-stepping-down-as-head-of-u-s-consumer-protection-agency>.

¹⁷ *Id.*

¹⁸ Alan Rappeport, *Mick Mulvaney Calls for 'Humility' from Consumer Financial Protection Bureau*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/us/politics/mick-mulvaney-consumer-financial-protection-bureau.html>.

that he “take Care that the Laws are faithfully executed.”¹⁹ In order to do so, he must be able to exercise that power over the administrative agencies under his control. When those agencies become too independent and the President is no longer able to exert meaningful control, those agencies become unconstitutional.

This article will examine the legal philosophy underpinning the separation of powers and how that theory applies to different types of regulatory agencies. It will also examine the Take Care Clause of the Constitution in light of the independence the CFPB’s structure affords the agency. It will argue that the CFPB is a unique agency, whose Director possesses more power than is constitutionally permissible for a single person to exercise without being accountable to the President, and that the solution to this problem involves creating a clearer definition of government agencies and establishing clearer rules of oversight. Given that the CFPB oversees an important sector of the economy that, when mismanaged, can plunge the country into a financial recession, it is critical that the CFPB be reformed.

I: The Background of and Legal Precedent for Separation of Powers

A. Philosophical Underpinnings of the Separation of Powers

The theory of the separation of powers is rooted in the legal philosophy of Montesquieu’s treatise *The Spirit of the Laws*. He reasons that a “cruel tyranny” will arise in a state in which the executive, legislative, and judicial power is vested in one body of men.²⁰ Therefore, to preserve liberty the “government [must] be so constituted as one man need not be afraid of another.”²¹ Montesquieu contends that such a government would have to be structured in a manner that separated and balanced the powers of the individual branches.²² By creating a system of harmony at the highest level of government, individuals maximize their liberty while still enjoying the protection and administrative benefits of the state.²³

It is exactly this harmony that the Founding Fathers worked to emulate in the Constitution. James Madison provides a lengthy justification for the importance of separation of powers in *Federalist Paper No. 10*.²⁴ Expanding upon the logic of Montesquieu,

¹⁹ US CONST. art II, § 3, cl. 1.

²⁰ BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 224 (1748).

²¹ *Id.* at 198.

²² *Id.* at 234.

²³ *Id.* at 237.

²⁴ *THE FEDERALIST NO. 10* (JAMES MADISON).

he argues that men have to be divided into factions in government, so that the ambitions of one can be checked by the ambitions of another.²⁵ Thus, “the Constitution as a whole embodies the bedrock principle that dividing power among multiple entities and persons helps protect individual liberty.”²⁶ Separation of powers is the ideal method by which individual liberty is protected and men are prevented from gaining too much control over the government.²⁷

The creation of the Constitution was a delicate exercise in balance. Just as Madison wanted to ensure the branches of government remained separate and in competition with each other, Alexander Hamilton wanted to make sure they were still able to effectively take action.²⁸ *Federalist No. 70* reflected the Founders’ belief that the new American government needed to be headed by a strong, unitary executive.²⁹ This belief is consistent with the doctrine of separation of powers in which competent and active legislative and judicial branches can still oversee a strong executive. As President Woodrow Wilson once stated, “Quite as important as [Congressional] legislation is vigilant oversight of administration.”³⁰ Thus, the philosophy of Hamilton had to be balanced with those of Montesquieu and Madison.

The Constitution harmonized both to achieve a balance of an empowered central government checked from within. While Hamilton’s enumerated powers given to the president were explicitly stated in Article II, one must look at the implications throughout the Constitution to discover the separation of powers. The Constitution grants executive power to the President of the United States, whose duty is to “take Care that the Laws be faithfully executed.”³¹ The Executive is explicitly empowered to fulfill this obligation using his appointment and commissioning powers.³² As James Madison stated during the First Congress, “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”³³ Consistent with Hamilton’s

²⁵ *Id.*

²⁶ PHH Corp. v. Consumer Financial Protection Bureau, No. 15-1177 1, 49 (D.C. Cir. Dec. 11, 2016).

²⁷ *Id.* at 49.

²⁸ THE FEDERALIST NO. 70 (ALEXANDER HAMILTON).

²⁹ *Id.*

³⁰ WOODROW WILSON, THE ESSENTIAL POLITICAL WRITINGS 159 (Ronald Pestritto ed. 2005).

³¹ US CONST. art II. § 3, cl. 1.

³² US CONST. art II. § 2, cl. 2.

³³ 1 Annals of Cong. 463 (1789).

vision, the President was granted substantial power so that he could effectively lead the new government.

The limits on presidential power are less explicit. Implied in Article II Section 3's statement that the President shall give a State of the Union address lies the idea that the Executive must keep the legislative branch well informed of its actions.³⁴ In fact, the legislative branch is explicitly granted the power to oversee many of the institutions under the Executive's control.³⁵ Each branch of the federal government has its own article enumerating its powers and outlining how it can check the other two branches.³⁶ Legislative oversight of the executive branch is particularly pertinent to this article, as Congress has the responsibility to oversee the CFPB. Though the broad, philosophically-based duty of the legislative branch to monitor the executive branch is not written anywhere in the Constitution, the Supreme Court has ruled that certain legal theories need not be explicitly stated to be an integral part of the Constitution.³⁷

Legal theorists agree that a close reading of the Constitution reveals a clear foundation for the separation of powers. M.C.J. Vile points out the very simple yet important fact that the federal government is separated into three parts.³⁸ If the Founding Fathers did not intend for the branches to be separate, they would not have structured the Constitution the way they did.³⁹ Likewise, Jack Beermann asserts "The strongest evidence that a power is assigned to a particular branch is an explicit textual commitment of that action to the branch...When a power has been assigned to a particular branch, no other branch is allowed to exercise that function unless the Constitution explicitly permits it to."⁴⁰ However, different branches can be granted power in the same area of influence.⁴¹ This seemingly contradictory method of design creates a Madisonian environment in which the different yet powerful factions of government are forced to compete for control.⁴² It is with this tradition in mind that the CFPB's constitutionality will be examined.

³⁴ US CONST. art II, § 3, cl. 1.

³⁵ US CONST. art I, § 8, cl. 12, 13.

³⁶ US CONST.

³⁷ Manning, John, *Separation of Powers as Ordinary Interpretation*, 24 Har. L. Rev. 1939, 1971 (2011).

³⁸ M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 405 (2nd ed. 1967).

³⁹ US CONST.

⁴⁰ Beermann, Jack, *An Inductive Understanding of the Separation of Powers*, 63 Admin. L. Rev. 467, 472 (2011).

⁴¹ US CONST.

⁴² Beermann, *supra* note 40, at 484.

B. Legal Doctrine Concerning the Separation of Powers

Since the legal justification for the separation of powers is not specifically stated in the Constitution, the Supreme Court has sought to provide clarity on the matter. The focus of this article's legal analysis will concern the Court's interpretation of the separation of powers doctrine and Article II's Take Care Clause as they relate to oversight of executive agencies.

In many of its cases, the Supreme Court pays explicit attention to the idea of separation of powers, despite the fact that the philosophy is not explicitly stated in the Constitution. In fact, in *Buckley v. Valeo* the Court specifically refers to Montesquieu's writings on the subject.⁴³ While the Court qualifies its argument in this case by stating that the Constitution does not provide for total separation of the branches, it nonetheless affirms the idea that the branches must be reasonably independent of one another. In order to maintain that independence, the Courts hold that Congress cannot write a statute that would be "unconstitutionally vague" and thus leave too much discretion to whoever is interpreting it.⁴⁴ The Court takes special care in this decision⁴⁴ to make sure that it creates clear limits for the interpretation of the laws so that the integrity of the separation of powers doctrine may be maintained.

However, as much as the Court would like to create "bright line" rules concerning the separation of powers, a thorough examination of the case law reveals it has largely failed to do so. In *Myers v. United States*, the Court held that the presidential power to appoint someone to a position necessitated the presidential power to remove an appointee at will.⁴⁵ The Court interpreted the Take Care Clause of the Constitution broadly and resolved that the President's power to remove officials was "plenary," so Congress was forbidden from implementing changes to or limiting the president's power in that regard.⁴⁶

The decision rendered in *Humphrey's Executor v. United States* created an exception to this rule. The Court declared that Congress has the power to create "independent agencies"⁴⁷ which can exercise executive power while existing outside the realm of control of the executive branch.⁴⁸ These agencies can be "quasi-legislative" or "quasi-judicial," and in either case the President does not have the power to remove directors at will because such power

⁴³ *Buckley v. Valeo*, 425 U.S. 946, 120 (1976).

⁴⁴ *Id.* at 42.

⁴⁵ *Myers v. United States*, 272 U.S. 52, 177 (1925).

⁴⁶ Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1142 (2000).

⁴⁷ *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1, 4 (D.C. Cir. 2016).

⁴⁸ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

would undermine the independence of those agencies.⁴⁹ Thus, the broader rule established in *Humphrey's Executor* ultimately decrees that “Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office.”⁵⁰ Since according to scholarly consensus there really is no binary distinction between independent and executive agencies, no “bright-line” rule concerning the directorship of executive agencies has been established.

The Court has ruled in many cases that the President should have some measure of control over agencies that perform executive functions. A substantial amount of ambiguity arises when Congress decides that an agency should be independent of the president, as the duties an agency is bound to perform and how those duties should be overseen is not entirely clear. Left without a definitive answer by the Supreme Court, the CFPB sits atop a mass of controversy over its proper functions. The legal community must determine whether the CFPB violates the doctrine of separation of powers that the Founding Fathers and subsequent Supreme Courts have held so dear.

C. Legal Doctrine Concerning the Take Care Clause of Article II

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court begins its ruling by asking a simple question about the development of the administrative state. “No one doubts Congress's power to create a vast and varied federal bureaucracy...[but] where, in all this, is the role for oversight by an elected President?”⁵¹ The answer lies in that fact that the Constitution “requires that a President chosen by the entire Nation oversee the execution of the laws.”⁵² Logically, the President must have some control over the execution of all laws regardless of what entity is actually administering them.

Contrary to Justice Scalia’s dissent in *Morrison v. Olson*, which implies that all executive powers must be subject to total and exclusive control by the President,⁵³ the ruling in *Free Enterprise Fund* indicates the belief of the Court that not all law enforcement powers have to be directly within the President’s purview. However, if statutes create restrictions

⁴⁹ *Id.* at 629.

⁵⁰ *Id.* at 631.

⁵¹ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 499 (2010).

⁵² *Id.* at 499.

⁵³ *Morrison v. Olson*, 487 U.S. 654, 705 (1988).

“of such a nature that they impede the President’s ability to perform his constitutional duty [to see that the laws are faithfully executed],” then there is a constitutional basis for increasing the accountability of a regulatory agency.⁵⁴

The Take Care Clause of Article II Section 3 of the Constitution is essential to understanding the relationship between the President and the executive agencies he controls. Due to the rapid increase in the number of executive agencies (and their power) since the Great Depression, the judiciary has had less time to establish constitutional precedent concerning the agencies’ relationships with other branches of government. Thus, the legal literature on issues related to executive agencies is hardly adequate. The literature pertaining to the CFPB itself is scarcer, necessitating more reliance on the intent of the Framers. The Take Care Clause is of particular importance to any examination of the CFPB because it is the basis for constitutionally limiting agency independence.

Myers v. United States reaffirmed the Constitution’s limitation of agency independence. According to the Court, “the power to remove officers appointed by the President and the Senate [is] vested in the President alone.”⁵⁵ In effect, only allowing the Senate to oversee appointment ensures the President has the sole authority to determine whether or not an agency head is properly executing the laws. While the President does not have to consult the Senate in order to remove an officer, it is important to note that this power can still be limited in by legislative decree.⁵⁶ However, Chief Justice Taft stated that

As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.⁵⁷

Even though Congress created a small exception, the intent of the Constitution is clearly to protect the President’s ability to take care that the laws are faithfully executed. It is from this part of his constitutional duty that his ability to remove officers is implied. Since

⁵⁴ *Id.* at 691.

⁵⁵ *Id.* at 591.

⁵⁶ 12 U.S.C. 5491 §1011 (c) (3) (2010).

⁵⁷ *Myers v. United States*, 272 U.S. 52, 117 (1925).

“Article II makes a single President responsible for the actions of the Executive Branch,”⁵⁸ the President cannot “take Care that the Laws be faithfully executed” if he cannot oversee the faithfulness of the officers who execute them.”⁵⁹ This implication is limited, however, if there is an “express limitation respecting removals.”⁶⁰ The CFPB’s Directorship possesses such a limitation, but the aforementioned Constitutional principles still apply.⁶¹ If limitations create restrictions “of such a nature that they impede the President’s ability to perform his constitutional duty [to see that the laws are faithfully executed],” there is a constitutional basis for increased accountability of a regulatory agency to the President himself.⁶²

II: Typical Regulatory Agencies and an Examination of the CFPB

A. Regulatory Theory

Scholars of regulatory theory have long considered executive and independent agencies to be separate legal entities. According to federal statute, an executive agency is “an Executive department, a government corporation, [or] an independent establishment.”⁶³ (Independent establishments simply mean “an establishment in the executive branch which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.”⁶⁴) However, since there is no mention in the United States Code of “independent agencies,” there seemingly exists no statutory basis for the entity. Instead, the courts conceived the idea of independent agencies.⁶⁵

According to legal scholars Kirti Dalta and Richard Revesz, independent agencies are “almost always defined as agencies with a for-cause removal provision limiting the President’s power to remove the agencies’ heads to causes of ‘inefficiency, neglect of duty, or malfeasance in office.’”⁶⁶ While the removal status of the head of the agency typically plays the most significant role in scholars’ determination of independence, Dalta and Revesz examine a total of seven measures of independence in their article.⁶⁷ Their list includes

⁵⁸ *Clinton v. Jones*, 520 U.S. 681, 712 (1997).

⁵⁹ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 447, 484 (2010).

⁶⁰ *Id.* at 484.

⁶¹ 12 U.S.C. 5491 §1011 (c) (3) (2010).

⁶² *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

⁶³ 5 U.S.C. 379 §105.

⁶⁴ 5 U.S.C. 379 §104.

⁶⁵ *Humphrey’s Executor v. United States*, 295 U.S. 602, 625 (1935).

⁶⁶ Kirti Dalta and Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98

CORNELL L. REV. 770, 772 (2013).

⁶⁷ *Id.* at 784.

multiple indicia in which the CFPB is atypical, such as its removal protection, multimember structure, and budget and communication authority.⁶⁸ Due to the diversity of indicia that determine independence, they reject the claim that an agency's independence depends solely upon the existence of for-cause removal protection for its Director.

Dalta and Revesz also reject the logic used in *Humphrey's Executor v. United States* that states there is a constitutional basis for the distinction between executive and independent agencies.⁶⁹ By comparing traditional "executive agencies" with what are considered "independent agencies" on their seven measures of independence, they conclude that there is no clear distinction between the two. Evaluating these facts in light of the *Humphrey's Executor* decision, Dalta and Revesz find "no reason to infer a constitutionally based measure of independence from a statutory measure of independence."⁷⁰ This is now conventional legal scholarship. All agencies are executive agencies that lie on a spectrum of independence.⁷¹ The spectrum of independence ranges from most to least presidential control.

This article argues that there is a point at which an agency's independence is so isolated from presidential control that it becomes unconstitutional. According to Article II of the Constitution, the President has the power to take care that the laws of the United States be faithfully executed.⁷² At some point, an agency becomes so independent that the President can no longer meaningfully oversee its functions. If he is prohibited from making sure that one of his agencies is enforcing the laws properly, then that agency must be unconstitutional. While the Supreme Court indicated in *Free Enterprise Fund v. Public Company Accounting Oversight Board* its belief that not all law enforcement powers fall directly under presidential control, it did find that an agency was unconstitutional if its design prohibited the President from exercising his Article II powers.⁷³ If the President is not able to meaningfully oversee his agencies, the delicate system of checks and balances ingrained in the Constitution is violated.

Despite the clarity of the idea that there is a point at which executive agencies become unconstitutionally independent, there is no way to establish a "bright line" rule regarding where on the spectrum an agency becomes unconstitutional. There are simply too many

⁶⁸ *Id.*

⁶⁹ Dalta and Revesz, *supra* note 66, at 824.

⁷⁰ *Id.* at 843.

⁷¹ *Id.* at 824.

⁷² US. CONST. art. II, § 3, cl. 1.

⁷³ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 447, 484 (2010).

factors of independence to be analyzed, and those factors interact differently depending on the unique situation of each agency. Theoretically, two agencies could possess the same indicia of independence and still vary in their isolation from presidential control. Therefore, agency independence from presidential control has to be evaluated on a case-by-case basis by the courts. If an agency possesses too many indicia of independence that interact in such a manner that inhibits the Take Care Clause, then that agency is unconstitutional.

B. Common Measures of Independence

There are several characteristics that heavily influence the overall independence of an agency. Both the leadership structure of an agency as well as its budget authority are particularly important considerations. For example, agencies can possess a multimember board with or without partisan balance requirements and term limits or possess a single director with or without for-cause removal protection. Different requirements for the budget proposal and review process also influence an agency's independence. While each measure influences an agency's overall independence to a different degree, the combination of a multimember board or a single director (with for-cause removal protection) in addition to a lack of significant funding oversight would imply an agency possesses a high degree of independence.

Agencies headed by multimember boards are better insulated from presidential control because the President typically lacks the ability to completely replace the board at the onset of his term. The appointees of past presidents play a role in mitigating the influence of the newer president's appointees until such a time (if ever) when the board is completely filled with appointees of the new administration. To further increase independence, some multimember agencies are designed to require a partisan balance on the board, although this is not always the case.⁷⁴ Regardless, empirical research shows that executive agencies with multimember boards are still relatively productive.⁷⁵ It is only when the government is divided that multimember boards tend to exercise their ability to resist presidential control (and become less productive).⁷⁶ Unfortunately, divided government occurs commonly, which creates a need for presidents to exert another form of control over such agencies.

⁷⁴ Dalta and Revesz, *supra* note 68, at 797.

⁷⁵ Adam Candeub and Eric Hunnicutt, *Political Control of Independent Agencies: Evidence from the FCC*, 3 (2010) (unpublished manuscript).

⁷⁶ *Id.* at 13.

The logical countermeasure to the problems posed by a multimember board is an executive agency headed by a single director. Theoretically, this structure makes the agency more accountable to presidential control because the President can directly exert pressure on the director. The most pertinent form of pressure is the threat of job termination, which is employed at many executive agencies.⁷⁷ However, Congress can choose to blunt this tool by creating a statutory removal protection for the director of an agency. Statutory removal protection typically limits the President's ability to fire the director of an agency to cases of "inefficiency, neglect of duty, or malfeasance in office" and severely restricts the President's control over that agency.⁷⁸ If the director of an agency has a large degree of control over that institution, the degree of isolation will be even more severe. Since each executive agency is structured differently, a director protected from at-will presidential removal at one agency might be highly independent, while the director at another agency might have a lower degree of independence. This is one of the reasons why each agency's constitutional independence must be examined on a case-by-case basis.

Although the leadership structure of an agency is an important factor in determining independence, it is essential that it be considered in accordance with its funding system. Certain agencies enjoy the privilege of bypassing budget review authorities.⁷⁹ These agencies are able to avoid centralized review of their budget submissions, which makes them less accountable to centralized oversight.⁸⁰ In some cases, such as that of the Federal Reserve, a uniquely independent funding structure was specifically designed by Congress in order to prevent the Executive from wielding undue power over the economy.⁸¹ There are cases when such independence is necessary but independent funding is a powerful tool and must be handled carefully. If funding independence were to be combined with other measures, the danger of an agency crossing the line of unconstitutional independence substantially increases.

C. The CFPB

Due to the nature of its leadership and funding structure, the CFPB possesses too much independence from executive oversight to be considered a constitutional agency. Its single

⁷⁷ Dalta and Revesz, *supra* note 66, at 786.

⁷⁸ *Id.* at 786.

⁷⁹ *Id.* at 804.

⁸⁰ *Id.*

⁸¹ 12 U.S.C. §§ 221 to 522 (1913).

Director empowered with statutory removal protection violates the separation of powers and prevents the President from exercising his Article II powers.⁸² This design flaw alone is unconstitutional and was written about at length by Judge Brett Kavanaugh of the D.C. Circuit Court of Appeals in its decision *PHH Corporation v. Consumer Financial Protection Bureau*.⁸³ For the purpose of reinforcing his decision and introducing logic consistent with the conclusion this article reaches concerning the CFPB's funding structure, his argument will be briefly examined.

According to Judge Kavanaugh's argument, the decision to appoint a single Director to lead the CFPB is unique, given the nature of the agency.⁸⁴ Often, multimember boards head regulatory agencies that are isolated from presidential control because those agencies are designed to have a significant impact on the economy.⁸⁵ The CFPB's task to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws" affects businesses across the country, ranging from small banks to some of the largest financial institutions in the world.⁸⁶ Due to the way Congress structured the agency, much of this expansive power is transferred to the single Director.

The Director of the CFPB is empowered with the ability to control most of the operations of the agency.⁸⁷ Such operations primarily concern rulemaking and enforcement.⁸⁸ The CFPB also possesses the power to interpret the law (which is still considered an executive function, but begins to inch toward judicial power).⁸⁹ The Director himself has the power to "appoint and direct" the employees of the Bureau,⁹⁰ establish the functioning units of the Bureau,⁹¹ and is the only employee of the Bureau specifically required to appear before Congress.⁹² Most of the force driving the Bureau's expansive

⁸² *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177 1, 6 (D.C. Cir. Dec. 11, 2016).

⁸³ *Id.*

⁸⁴ Recent Legislation, 124 Harv. L. Rev. 2123, 2128 (2011).

⁸⁵ 12 U.S.C. §§ 221 to 522 (1913).

⁸⁶ 12 U.S.C. 5491 §1011 (a) (2010).

⁸⁷ 12 U.S.C. 5491 §1011 (2010).

⁸⁸ Hunton and Williams LLP, *Is the Current Structure of the CFPB Unconstitutional?* 2 (August 2017), <https://www.hunton.com/images/content/3/2/v2/32409/is-current-structure-of-cfpb-unconstitutional.pdf>.

⁸⁹ 12 U.S.C. 5491 §1011 (e) (4) (E) (2010).

⁹⁰ 12 U.S.C. 5491 §1013 (a) (1) (A) (2010).

⁹¹ 12 U.S.C. 5491 §1013 (b) (1) (2010).

⁹² 12 U.S.C. 5491 §1016 (a) (2010).

agenda thus lies with the Director. Some believe that this combination of powers, delegated solely to the Director, creates such a unique agency that it violates the separation of powers.⁹³

According to the plaintiffs in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the CFPB's structure violates the President's constitutional authority to oversee this agency because too many of the traditional checks and balances of government power have been removed.⁹⁴ Their brief states in part,

While the Supreme Court has approved the constitutionality of certain removals of checks or balances in isolation—e.g., a limit on the President's power to remove certain officers—the Court has never held that it is constitutional to remove all of the checks and balances that Title X removes, and to combine that lack of checks and balances with the open-ended statutory mandate that Title X provides the CFPB—thereby effectively granting unlimited discretion to the agency.⁹⁵

The logic applied here is consistent with the idea of a spectrum of agency independence. The CFPB's powers are consolidated in a way that causes its directorship to violate the separation of powers. The ability of the Director to perform so many functions that are unbound by typical checks and balances makes the agency headed by that Director too independent to be constitutional. If a single individual heads an agency or branch of government, that individual must somehow be held directly accountable to the people.⁹⁶ Since the Director of the CFPB is not, his position violates the delicate balance of power created by the Framers of the Constitution.

The Director's unique position also violates Article II because his power can be exercised absent any meaningful presidential oversight.⁹⁷ In effect, the Director's statutory removal protection blocks the president from being able to oversee the CFPB because the Director is responsible for so much of the agency's operation. Indeed, "the Director enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President."⁹⁸ Thus, the President is prohibited from performing

⁹³ Susan Dudley, *Is the Consumer Financial Protection Bureau Unconstitutional?*, FORBES, (April 15, 2016, 11:00 AM), <https://www.forbes.com/sites/susandudley/2016/04/15/is-the-consumer-financial-protection-bureau-unconstitutional/#434c062864e7>.

⁹⁴ Complaint at 26, *PHH Corp. v. Consumer Financial Protection Bureau*, D.C. Cir. Dec. 11, 2016 No. 15-1177.

⁹⁵ Complaint, *supra* note 94, at 26.

⁹⁶ *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177 1, 51 (D.C. Cir. Dec. 11, 2016).

⁹⁷ US CONST. art II, §3, cl 1.

⁹⁸ *PHH Corp. v. Consumer Financial Protection Bureau*, *supra* note 96, at 6.

his constitutional duty of making sure that the laws are faithfully executed by his inability to rein in the authority of the Director.

Some might argue that the appointment power allows for enough presidential control of the Director, but that power is deemed an “ex ante” form of control.⁹⁹ If the President can only exert his control over the Directorship after a previous Director has completed his term, he cannot exercise any power over the Director he inherits. Depending upon the timeline of his term and the appointment of the Director by the previous administration, it could be years before the current President is able to exercise any sort of oversight of the position through his appointment power. Thus, the independence of the Director renders the agency unaccountable to the President and violates Article II of the Constitution.

D. The Funding Structure

Although Judge Kavanaugh finds sole justification for the unconstitutionality of the CFPB in its leadership structure, this article argues that the funding structure of the agency also pushes it past the point of constitutional independence. If, as the Judge asserts, there is an “ordinary constitutional practice of dividing power among multiple entities and persons,” then statutory barriers to the CFPB’s funding oversight are also unconstitutional.¹⁰⁰

Traditionally, government agencies are accountable to Congress and the Office of Management and Budget (OMB). These mechanisms serve the purpose of making sure that no agency is too isolated from control by Congress or the President. Tracing the logic of Judge Kavanaugh, the funding process is a way to keep agencies accountable to the American people; their elected representatives have a constitutional duty to preserve the separation of powers by diluting the authority of the agency.¹⁰¹

Some would argue that the CFPB should maintain its current level of funding independence because the structure is not only constitutional, but also necessary due to the potential for regulatory capture.¹⁰² In fact, such concerns were noted in a Treasury paper justifying the Obama Administration’s impetus for creating the CFPB.¹⁰³ The paper explicitly

⁹⁹ *Independence, Congressional Weakness, and the Important of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HAR. L. REV. 1822, 1834 (2012).

¹⁰⁰ PHH Corp. v. Consumer Financial Protection Bureau, *supra* note 96, at 51.

¹⁰¹ *Id.* at 51.

¹⁰² *Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation*, U.S. DEP’T OF THE TREASURY 29 (2009).

¹⁰³ *Id.* at 29.

mentions that “funding structure can seriously impact regulatory competition and potentially lead to regulatory capture,”¹⁰⁴ and proposed that the agency’s appropriations process be similar to that of the Federal Reserve.¹⁰⁵ (The CFPB does obtain a portion of its funding directly from the Federal Reserve’s asset pool,¹⁰⁶ but this paper does not argue that this CFPB mechanism alone or the way the Federal Reserve gets its funding is unconstitutional.) Though the potential for the financial industry to dominate the CFPB through congressional lobbying should be taken seriously and interaction between the banking industry and its regulators is necessary, “Some degree of coordination between government and banks for the implementation of monetary policy and the maintenance of financial stability” has to take place.¹⁰⁷

Certainly, however, the greatest degree of coordination between the CFPB and another entity should not be between it and the industry it regulates. Substantial oversight from the branch of the federal government that the CFPB lies within should be built into its funding structure. If the President has no way to use the appropriations process to control the actions of the CFPB, he has substantially less power to ensure that the laws are faithfully executed. Much like how the independence of the Director insulates the CFPB from presidential control, its funding structure adds another layer of insulation. The two even combine at points — the Consumer Financial Protection Act of 2010 granted the Director the sole authority to determine whether the agency needed to spend an additional \$1 billion over 5 years to carry out its relevant authorities.¹⁰⁸

The main problem with the CFPB’s funding structure lies in its independence from the Office of Management and Budget (OMB). The OMB is a powerful tool through which the President can exert control over executive agencies because it is housed in the Executive Office of the President. When an agency does not have to go through the OMB for budgetary requests, it reduces presidential influence over that agency.¹⁰⁹ This barrier prevents the President from reviewing the request and asking for changes before Congress can see

¹⁰⁴ *Id.* at 29.

¹⁰⁵ Brief on Rehearing En Banc of Amici Curiae Financial Regulation Scholars in Support of Respondent at 16, *PHH Corp. v. Consumer Financial Protection Bureau*, D.C. Cir. Dec. 11, 2016 No. 15-1177.

¹⁰⁶ 12 U.S.C. 5491 §1017 (a) (2010).

¹⁰⁷ Lawrence G. Baxter, *Understanding Regulatory Capture: An Academic Perspective from the United States*, in *THE MAKING OF GOOD FINANCIAL REGULATION: TOWARDS A POLICY RESPONSE TO REGULATORY CAPTURE* 34 (Stefano Pagliari, ed., 2012).

¹⁰⁸ 12 U.S.C. 5491 §1017 (e) (2) (2010).

¹⁰⁹ Christopher Berry, Barry Burden, and William Howell, *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. Rev. 783, 785-86 (2010).

the budget request or some sort of determination is made.¹¹⁰ Although the Director of the CFPB does have to submit copies of the financial operating plans and forecasts of the agency, this process is simply a formality.¹¹¹ The OMB can take no action other than review the reports provided to it, which deprives it of its typical power.

The statute establishing the CFPB defines its budgetary independence in no uncertain terms. “This subsection [regarding the OMB] may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.”¹¹² This language is explicit, forceful, and undermines any authority the OMB might have had were the language not included. This particular sentence shows the intent behind the law governing the CFPB — the agency must be as independent as possible from the OMB.

The OMB check on an executive agency is such a powerful tool because federal agencies are, in effect, not allowed to operate beyond what their financing allows.¹¹³ With the ability to determine one’s own financing comes the ability to take a more active role in determining the functions of the agency. Since the President cannot exert a powerful check on the funding of the CFPB, the agency is able to independently expand its operations if it chooses to do so. Again, this independence is reinforced in the law by the Director’s ability to discretionarily spend \$1 billion over 5 years without any provision stating the accompanying report of such spending must be approved by another authority.¹¹⁴ The Director merely has to submit a report for the purpose of justification; presumably, the money can be appropriated regardless of whether the President finds the presented justification warranted. Due to this structural feature, the CFPB is granted undue funding independence.

The CFPB also derives 12 percent of its funding from the Federal Reserve.¹¹⁵ The President has no power to control this part of the agency’s appropriations, and while this on its own is not unconstitutional, it adds to the independence of the agency. The President has no control over the appropriations of the Federal Reserve, as it gets its funding from its

¹¹⁰ *Id.* at 786.

¹¹¹ 12 U.S.C. 5497 §1017 a 4 A (2010).

¹¹² 12 U.S.C. 5497 §1017 a 4 E (2010).

¹¹³ Kate Stith, *Congress’ Power of the Purse*, 97 *Yale L. J.* 1343, 1356 (1988).

¹¹⁴ *Id.* at 1356.

¹¹⁵ 12 U.S.C. 5491 §1017 (a) (2010).

market operations and the Treasury Department.¹¹⁶ Therefore, this funding mechanism is another way in which the President's oversight of the CFPB is restricted. In addition, this ability to self-fund "deprives Congress of a powerful tool for punishing or rewarding agencies"¹¹⁷ and contributes to a lack of separation of powers.

Overall, the funding structure of the CFPB is such that the agency is as independent as possible. It does not perform the same duties as the Federal Reserve, and so cannot completely derive its funding independently of Congress. However, the fact that it does get some of its annual appropriation from the Federal Reserve shows the effort made by legislators to keep it independent. While some funding independence is necessary, especially for an agency that handles financial regulation that can impact a large portion of the United States' economy, the funding structure of the CFPB still contributes to its unconstitutionality.

III: Proper Policy Response to Constitutional and Practical Problems Caused by the CFPB

The proper policy response to the constitutional problems caused by the CFPB is to restructure the agency. It must no longer be allowed to operate with such excess independence; changing the way the directorship and funding structure work would allow for the needed increases in presidential oversight so that the President can take care that the laws are faithfully executed. It would also make the agency more accountable to other government powers. By allowing other parts of the government to oversee and "check" its actions, the CFPB would no longer be its own entity in violation of the longstanding history of separation of powers.

A. The Directorship

The aspect of the directorship that pushes the CFPB past the point of constitutionality on the spectrum of agency independence is its statutory removal protection. Thus, the policy solution to this problem is simple. Congress should amend the Consumer Financial Protection Act of 2010 to omit §1011 (c) (3), which states, "The President may

¹¹⁶ 12 U.S.C. §221 to 522 (1913).

¹¹⁷ *Supra*, note 3, at 1833.

remove the Director for inefficiency, neglect of duty, or malfeasance in office.”¹¹⁸ It should insert a provision that allows for at-will removal of the Director by the President.

This is the solution proposed by Judge Kavanaugh in *PHH Corp. v. CFPB*. “To remedy the constitutional flaw, we follow the Supreme Court’s precedents, including *Free Enterprise Fund*, and simply sever the statute’s unconstitutional for-cause provision from the remainder of the statute. Here, that targeted remedy will not affect the ongoing operations of the CFPB. With the for-cause provision severed, the President now will have the power to remove the Director at will, and to supervise and direct the Director.”¹¹⁹

Such an amendment would allow the President to remove the Director if he determines that the Director is not executing the laws properly, or in accordance with his will as the Constitution implies.¹²⁰ Since the President has the power to oversee the entire Executive Branch and all of the executive agencies within it, it is proper that he has the power to make sure that it is operating effectively. His Article II authority to ensure that the laws are faithfully executed would be restored since he could fire a Director whom he deems is not performing his duty properly.

B. *The Funding Structure*

The problem of the CFPB’s funding is a bit more complicated, since it is important to balance the necessary independence of the agency with the ability of different parts of the government to oversee its funding. Allowing the agency to continue to draw 12 percent of its funding from the Federal Reserve would not necessarily force it past the point of constitutional independence if other reforms were enacted.

The most important funding reform that needs to take place is the removal of provisions that only allow for ex post facto review of budgets. When the OMB can only review budgets after they take effect, it cripples the ability of the Executive to have any influence over agency decision-making. The CFPB’s proposed budget should therefore be subject to review before the financial calendar dictates they be enacted. This would allow the Executive time to understand how the portion of the CFPB’s budget that comes from taxpayers is being spent, and what goals that spending is working to achieve.

¹¹⁸ 12 U.S.C. 5491 §1011 (c) (3) (2010).

¹¹⁹ *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177 1, 10 (D.C. Cir. Dec. 11, 2016).

¹²⁰ *Myers v. United States*, 272 U.S. 52, 117 (1925).

In addition, a process should be established by which the OMB can make justified suggestions to the CFPB's budget proposal. Since the constitutionality of the CFPB depends on the Executive's ability to influence agencies to ensure that the laws are faithfully executed, there needs to be some mechanism by which the Executive can enforce its will. If the CFPB disagrees with the OMB's suggestions, it should be mandatory that it present a valid reason why it will not adopt the suggestion. In order to further increase accountability, the disagreement should go through a thorough review process by an outside arbiter. Perhaps if the rule still cannot be agreed upon, Congress should vote on that part of the appropriations process. Regardless, for meaningful executive oversight and CFPB independence to exist, there should be a cooperative negotiation process between the two agencies that allows the president's administration to exert some kind of control over the CFPB.

Such reforms would fix the constitutional problems presented by the CFPB's funding structure because the President would be allowed to exercise his Article II powers. The OMB-CFPB budget process would evolve into a feedback mechanism by which the president could influence future decisions at the agency without directly mandating what the agency does. It would also strengthen the separation of powers because it would dilute the concentration of funding authority. Someone directly elected by the people would have a say in the process by which the CFPB gets its funding, which would diminish the agency's ability to operate in an executive, legislative, and quasi-judicial sphere absent any meaningful checks from other government entities.

Conclusion

Despite the myriad new challenges the United States faces in the twenty-first century, the Constitution remains largely the same document it was when written in 1789.¹²¹ The vision of the Founding Fathers was a government composed of separate and coequal branches, and that vision has remained constant for centuries. Even the unique challenges posed by the Great Recession are not enough to warrant executive agencies independent of the president; these problems can be solved in ways consistent with the intent of the Founders.

When passing legislation, Congress should keep this history in mind. It has the power to monitor agencies and should be looking at the effectiveness of those agencies in

¹²¹ US CONST.

light of the Constitution and the goals those agencies were established to accomplish. If either of these criteria fall short of the high standard to which they should be held, Congress has a duty to intervene. The CFPB both fails to pass the test of constitutionality and fails to protect consumers without damaging critical sectors of the economy.¹²² In addition, empirical evidence shows that the CFPB's unique degree of independence allows it to make regulatory rules that are less transparent to the public.¹²³ Therefore, the agency's independence renders it politically unaccountable and it must be reformed.

The best way to meet the objective of constitutionality is to address the philosophical foundation of the CFPB. In her law review article that created the idea of the CFPB, then-professor Elizabeth Warren called for the creation of an agency with a "broad mandate" to a "single, highly motivated federal regulator."¹²⁴ The problem with this view is that it is inconsistent with the Founders' idea of the executive branch. The ideas enshrined in the Constitution empower the legislative branch to solve the country's problems, and grant Congress the right to regulate interstate commerce.¹²⁵ While Congress has the full authority to create regulatory entities, housing them in the executive branch with minimal oversight defeats the purpose of the separation of powers.

The other major reason the CFPB should be reformed is less theoretical and more grounded in economic reality. The ability to control such a critical and powerful agency is essential because of the impact the CFPB can potentially have on the United States' economy. One of its powers is rule making for financial institutions, which includes the ability to impose new capital requirements on financial institutions. For the economy as a whole, an increase in capital requirement of banks by 1 percentage point is estimated to lead to a .02 percentage point reduction in annual growth over the first 8.75 years.¹²⁶ Economic growth rates directly affect peoples' lives, so it is critical that the CFPB is operating in a manner that helps the American people.

In particular, small banks are extremely important to the well being of the United States economy because they perform critical functions in areas where large banks might not

¹²² Marshall Breger and Gary Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, ADMIN. L. REV. 1112, 1115 (2000).

¹²³ Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, U.S. ADMIN. L. EJ. 1, 2 (2018).

¹²⁴ Bar-Gill and Warren, *supra* note 12, 98.

¹²⁵ US CONST. art I.

¹²⁶ BANK FOR INTERNATIONAL SETTLEMENTS, *ASSESSING THE MACROECONOMIC IMPACT OF THE TRANSITION TO STRONGER CAPITAL AND LIQUIDITY REQUIREMENTS*, 5 (2010).

operate. For example, data indicates that small banks make relatively more agricultural loans than small banks, helping an industry that is key to many states.¹²⁷ Community banks held 71 percent of total deposits in rural counties in 2011 (compared with 19 percent of overall deposits),¹²⁸ so they have an oversized impact on rural communities. Small banks are also better equipped to deal with the problems that arise in lower-income and predominantly minority areas made up of consumers that the government has a special interest in protecting.¹²⁹

Currently, the treatment of small banks by the CFPB is having a crippling effect on their ability to perform their critical lending functions. The major problem is the broad authority of the CFPB to pass regulations that affect small and large banks equally. Small banks are simply not equipped to handle the increase in compliance costs that results from the issuance of new regulation. Nor are these regulations particularly applicable to small banks; the kind of regulation needed after the Great Recession was specific to large financial institutions that invested heavily in mortgage-backed securities and other commodities. As stated by financial economists at the Congressional Research Service, there are many reasons for regulating small banks differently from large banks. They include “the systemic risk posed by large banks, economies of scale to regulatory compliance, a lack of critical mass of small banks to which some regulations would be relevant, and a desire by some policymakers to promote small banks.”¹³⁰ Therefore, the CFPB should be reformed to reject its harmful foundation of a “broad mandate” that allows the agency to do what it will absent meaningful oversight. A lack of meaningful oversight is directly contributing to the inability of Congress and the President to stop the enactment of harmful regulation.

The Founder’s messages, both enshrined in the Constitution and in the historical practice of those such as Hamilton, are what facilitates reasonable government intervention in society so long as it promotes the general welfare. It is noble and essential to protect consumers, but the CFPB must operate in an effective manner that does not compromise constitutional principles. It can be done, but such reforms require significant cooperation on the parts of Congress, the Executive Branch, and the CFPB itself.

¹²⁷ Tanya Marsh and Joseph Norman, *Reforming the Regulation of Community Banks After Dodd-Frank*, 90 INDIANA L. J. 179, 197. (2012).

¹²⁸ *FDIC Community Banking Study*, FDIC 3 (2012).

¹²⁹ Robert DeYoung, W. Scott Frame, Dennis Glennon, Daniel P. McMillen, and Peter J. Nigro, *Commercial Lending Distance and Historically Underserved Areas*, 18 (2007).

¹³⁰ Marc Labonte and Sean Hoskins, *An Analysis of the Regulatory Burden on Small Banks 2* (2015).

The Future of Organ Transplants: Ethical and Legal Ramifications of Patenting 3-D Bio-Printed Organs

Erin Swan

Introduction: The Organ Crisis and Biomedical Technology

By the time you finish reading this article, two people will have been added to the national organ donor transplant list. Currently there are 116,000 people in the United States waiting for a life saving organ on the National Organ Transplant List.¹ Unfortunately, the scarcity of compatible organs and the complications caused by long wait times results in the death of twenty-two people each day.² Rapid advances in technology coupled with breakthroughs in the medical community have created a growing market for 3-D printed body parts such as cartilage, tissues, and joints. In 2015 alone, the demand for joints and tissue that can be engineered to specifically fit an individual grew by thirty percent and generated \$537 million in revenue.³ It can be expected that, if the market for non-life saving devices has grown so precipitously, then the need for life saving organs would engender huge market potential. Groundbreaking medical technology, in tandem with possible financial remuneration, has improved 3-D printing capabilities and incentivized biomedical companies to begin printing organs out of synthetic material and bio-ink.⁴

The ability to print functional 3-D organs will save hundreds of thousands of lives. However, 3-D printing raises many questions about the patentability and ethics surrounding

¹ Organ Donation Statistics, U.S. DEP'T. OF HEALTH & HUM. SERV. (Aug. 2017), <https://www.organdonor.gov/statistics-stories/statistics.html>.

² *Id.*

³ *Growth of World 3D Printing Healthcare Market*, TODAY'S MEDICAL DEVELOPMENTS (Nov. 29, 2016), <http://www.todaysmedicaldevelopments.com/article/3d-global-medical-market-2021-112916/>.

⁴ Heidi Ledford, *Printed Body Parts Come Alive*, 520, NATURE, 273, 273 (2015).

bio-printed organs. A slew of legal problems will arise, as emerging technology will soon allow 3-D printed organs to become a reality. 3-D bio-printed organs ought to be patentable under current law if the 3-D organ is found to be a product of human ingenuity, non-naturally occurring, and not directed to or encompassing a human organism. While bio-printing technically can be patentable under current law, there are ethical questions surrounding whether or not it should be patentable. Part I of this article will outline the legal precedent for patenting a live organism as well as an explanation of the 3-D bio-printing process. Part II analyzes the legal classification of a 3-D printed organ and lays out the argument for why, under current law, it is subject to patentability. Part III will examine the future ethical ramifications of patentable 3-D printed organs and explore possible policy recommendations.

Part I: Patenting A Living Organism

A. A Brief Synopsis of 35 U.S.C. § 101

Patents are temporary government approved “monopoly rights” over a new invention or idea. Historically, patents were granted as an incentive to engender entrepreneurship and encourage disclosure. The short-term monopoly grants inventors exclusive financial rights and allows the individual or group to recover any development costs. The U.S. Patent Act regulates which inventions may be patented. In accordance with Section 101, an entrepreneur who discovers “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof may obtain a patent.”⁵ In the case of bio-medical patents, the claim may be drafted as a request for the process, the manufacture or product, or the use of a pre-existing product or device in a new way. Patent law states that the process for making an invention or the invention itself is both subject to patentability. The product by process claim allows for a wider breadth of invention protection and an alternative way to formulate a patent submission. For example, in February 2016, the United States Patent Office granted a patent for both the tangible product and process of additive manufacturing of a bioactive medical device. The process of creating the bioactive medical device as well as the 3-D printer itself was subject to legal protections.

⁵ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

B. Applying the Chakrabarty Two-Pronged Test

In the 1980 case *Diamond v. Chakrabarty*, the Supreme Court ruled in favor of genetic engineer Ananda Mohan Chakrabarty's petition to patent a living organism.⁶ Chakrabarty had attempted to file a patent for a genetically-altered bacterium that could break down multiple components of crude oil. The bacterium cleaned up oil spills at an unprecedented rate. However, the patent was rejected by the US Patent Office on the basis that (1) microorganisms are a product of nature and (2) that living things are not considered patentable under Section 101 of Title 35 U.S.C., which states that "whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."⁷ Chakrabarty challenged the decision, believing that the bacterium was a product of human manufacturing and thus was not naturally occurring.⁸ The Supreme Court ruling stated that microorganisms' status as "living" had no legal significance for the purpose of patent law.⁹ The Supreme Court ruled that a "live, human-made micro-organism is patentable subject matter under § 101."¹⁰ The decision rested on the detail that Chakrabarty's organism could be considered a "manufacture" or a "composition of matter" and thus a product of human ingenuity.¹¹ The monumental Supreme Court decision set an important precedent for the future patentability of living organisms and marked the launch of the biotechnology industry.

The *Diamond v. Chakrabarty* ruling expanded the breadth of patent-eligible subjects and created the *Chakrabarty* "two-pronged" test, that is now used to assess the patentability of living organisms.¹² A living organism may be deemed patentable if the organism is found to be (1) a product of human ingenuity and (2) the organism in question may not be found naturally occurring in nature.¹³ There is no exact definition of human ingenuity, and thus the term can be ambiguous. However, in *Diamond v. Chakrabarty*, Justice Burger wrote that a "non-naturally occurring manufacture or composition of matter" is considered to be a

⁶ *Diamond v. Chakrabarty*, 447 U.S. 303, 304 (1980).

⁷ 35 U.S.C. § 101 (2016).

⁸ *Diamond v. Chakrabarty*, *supra* note 6, at 306.

⁹ *Id.* at 307.

¹⁰ *Id.* at 306.

¹¹ *Id.* at 309.

¹² David Wang, *Are 3D Printed Tissues and Organs Patentable*, THE COLUMBIA SCIENCE AND TECHNOLOGY LAW REVIEW BLOG (Oct. 7, 2015), <http://stlr.org/2015/10/07/are-3d-printed-tissues-and-organs-patentable/>.

¹³ *Diamond v. Chakrabarty*, *supra* note 6, at 306.

product of human ingenuity.¹⁴ Within patent law, the term “manufacturing” is thought to be “the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery.”¹⁵ The second prong of the Chakrabarty two-pronged test requires the subject to be non-naturally occurring in nature.¹⁶ This prerequisite prohibits newly identified or discoverable products of nature from being patentable.

The Chakrabarty test was applied in the 2013 Supreme Court case *Association for Molecular Pathologists v. Myriad Genetics, Inc.* Myriad Genetics Inc. filed a petition to patent an isolated genomic human DNA on the basis that isolating and distinguishing a gene from other strands of DNA makes it patentable.¹⁷ The Supreme Court ruled against Myriad Genetics, stating that isolated genes lack significant alteration and are thus found to be naturally occurring in nature and not subject to patentability.¹⁸ While the two-pronged test was successfully applied in *Myriad*, the verdict of the case has caused ambiguity surrounding the distinction between a product of nature and a product of nature that has experienced significant alteration.¹⁹ This creates significant uncertainty for the future of the biotechnology industry. Biotechnology companies utilize living cells to manufacture synthetic material and/or products.²⁰ Thus, the second prong of the Chakrabarty test is likely to be implicated in future patent petitions.

C. Section 33 of the American Invents Act

In 2011, Congress passed the Leahy-Smith American Invents Act (AIA) to clarify patent procedures and eligibility. Section 33 of the Act places limitations on the patentability of live organisms relating to human beings. Section 33 was formulated to strengthen the USPTO’s longstanding policy that prevents the patenting of human beings. Section 33 states that “no patent may issue a claim directed to or encompassing a human organism.”²¹ However, Congress declared that this addition to patent law would not affect the

¹⁴ *Id.* at 306.

¹⁵ *Id.* at 308.

¹⁶ *Id.* at 308.

¹⁷ *Ass’n for Molecular Pathology v. Myriad Genetics*, 569 S. CT. U.S. 2107, 2116 (2013).

¹⁸ *Id.* at 2116

¹⁹ Tup Ingram, *Association for Molecular Pathology v. Myriad Genetics, Inc.: The Product of Nature Doctrine Revisited*, 29 BERKELEY TECH. L.J. 384, 394-395 (2014).

²⁰ *Id.* at 396.

²¹ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

patentability of human tissue, gene patents, and other inventions that were “derived from the human body.”²² The congressional record describes that act as necessary for preventing the patenting of clones.

One of the most problematic elements of Section 33 is the ambiguous language. The future interpretation of Section 33 remains unclear due to the phrases “directed to” and “human organism.” Under current patent law, neither phrase has a firm definition that can be used to help interpret future applications of the act. “Human organism” in particular proves problematic because it has competing definitions within the scientific community. Some schools of thought theorize that human organism is solely the human body and the complex systems within the body. Other scientists believe that the term includes all characteristics of humankind and or pertaining to human kind, including a “living entity that contains one or more cells belonging to the *Homo Sapiens*.”²³ The Supreme Court has added to the complication of the definition “human organism” by distinguishing between a human fetus and a human organism.²⁴ The vagueness of “directed to” and “human organism” leaves little guidance for courts attempting to apply the law.²⁵

Section 33 of the AIA was shaped by the legislative history of the controversial “Weldon Amendment.”²⁶ In the early 2000s, Congress was attempting to regulate controversial biomedical technologies.²⁷ The amendment stated, “None of the funds appropriated or otherwise made available under this [appropriations] Act may be used to issue patents on claims directed to or encompassing a human organism.”²⁸ The language chosen here was not an outright ban on patents encompassing human organisms, rather, it was meant to de-fund ethically controversial biomedical research. The legislative history of the Weldon Amendment is vital for a better interpretation of the language used in Section 33 of the AIA. Congressional records show that during the discussion of Section 33, the term “human organism” was appropriated from the Weldon Amendment and “was taken to include that human organisms, including human embryos and human fetuses, are not

²² 157 CONG. REC. E1177, E1177.

²³ *Growth of World 3D Printing Healthcare Market*, *supra* note 3.

²⁴ *Diamond v. Chakrabarty*, *supra* note 6, at 306.

²⁵ Ava Caffarini, *Directed To or Encompassing a Human Organism: How Section 33 of the America Invents Act May Threaten the Future of Biotechnology*, 12 J. MARSHALL REV. INTELL. PROP. LAW. 768, 776 (2013).

²⁶ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3 (2004).

²⁷ 157 CONG. REC. E1177, E1177.

²⁸ Consolidated Appropriations Act, *supra* note 26.

patentable.”²⁹ Yet, there was no clear definition incorporated within the AIA that could serve as a guideline for future legal interpretations.

D. Form Function, and Economics of 3-D Bio-printing

In the past ten years, the medical community has seen a rapid transformation in bio-printing technology. The jump from theoretical research to functional skin and joints has attracted substantial economic investment. Currently, the market for regenerative medicine, including the development of 3-D printed organs, is valued at \$660 million.³⁰ Investors include venture capitalists, universities, and an \$80 million grant from the Pentagon.³¹ The industry is expected to see a tremendous rise in revenue, and bio-technology experts expect to see the market reach \$6 billion by 2024.³² One of the major hurdles facing the future of 3-D printed organs is attracting investors.³³ Many potential investors are wary about financing a technology that may not have an exclusive market period and could still take a decade to perfect.³⁴ However, if 3-D printed organs are found to be patentable, the incentive to invest early in the industry will increase considerably.

Recently, the biomedical technology industry has experienced an explosion in regenerative medicine, specifically within the field of bio-printing. Bio-printing is the process of using 3-D printers to manufacture functioning synthetically composed cells, tissues, and organs.³⁵ Current biomedical printing technology allows for the successful production of human tissue, skin, and joints.³⁶ Furthermore, medical implants are currently being produced that contain live pathogens and act as antibiotics.³⁷ Medical experts project that, in the next ten years, radical advances in 3-D printing technology will make the possibility of printing human organs a reality.³⁸ 3-D printing technology layers biochemical and living cells with

²⁹ CONG. REC. E1177, E1179 (daily ed. June 23, 2011) (Nov. 5, 2003 speech of Rep. Dave Weldon, submitted into record).

³⁰ *Growth of World 3D Printing Healthcare Market*, *supra* note 3.

³¹ Colin Woodward, *Can an Old Mill Town Become the Silicon Valley of Human Organ Manufacturing?*, POLITICO MAG. Dec, 18, 2017, <https://www.politico.com/magazine/story/2017/12/18/human-organ-manufacturing-transplant-artificial-3d-printing-216104>

³² *Growth of World 3D Printing Healthcare Market*, *supra* note 3.

³³ Woodward, *supra* note 31.

³⁴ *Id.*

³⁵ Sean V Murphy, & Anthony Atala, *3D Bioprinting of Tissues and Organs*, 32 NATURE & BIOTECHNOLOGY 773, 773-774 (2014).

³⁶ Ledford, *supra* note 4, at 273.

³⁷ Colin Woodward, *supra* note 31.

³⁸ Murphy, *supra* note 35, at 774.

pinpoint accuracy to create functional components of human organs.³⁹ Basic 3-D bio-printing processes utilize biomimicry to replicate structural designs that appear in nature. Biomimicry replicates the composition and spatial placement of naturally occurring cells and tissues to create an artificially produced product.⁴⁰ This approach requires the use of a blueprint or digital file that can be created with modeling software.⁴¹ The organ blueprint is based off of a completed MRI or CT scan. CT scans are used to gain a comprehensive view of human skin layering and the volume of skin tissue. Both MRIs and CTs can be used with contrast dye to obtain accurate tissue depth and composition.⁴² The compilation of raw data is then used to create synthetic 3-D models that can be manipulated and altered with CAD-CAM modeling systems.⁴³ After the 3-D synthetic model is created, an electronic blueprint can be programed to fit the 3-D printer's capability.⁴⁴

In order to print anatomically correct organs, the 3-D printer must have the capacity to create complex vascular channels.⁴⁵ Vascular channels are conduits for blood and include all the arteries and veins within a human body.⁴⁶ In order to mimic vascular channels, bio-ink must be composed of multiple cell types that replicate the channel's biological functions.⁴⁷ Additionally, viable vascular channels require an in-depth understanding of cell gradients and tissue layering to prevent cell anoxia and diffusion.⁴⁸ The cells chosen for bio-printing must be malleable, sturdy, and adaptable. Typically, this necessitates the use of stem cells.⁴⁹ Bio-ink is then inserted into the printer, and multiple lasers are used to layer the ink in accordance with the original blueprint.⁵⁰ The blueprint acts as the scaffolding for the 3-D printed organ and ensures accurate composition.⁵¹ After an organ or tissue has been successfully printed, incubation time is necessary to ensure proper functionality.⁵² While 3-

³⁹ *Id.* at 778.

⁴⁰ Ledford, *supra* note 4, at 273).

⁴¹ *Id.* 273.

⁴² Murphy, *supra* note 35, 776.

⁴³ *Id.* at 780.

⁴⁴ *Id.* at 780.

⁴⁵ Judith L. Toffenetti & Atabak R. Royace, *Patentability of 3D-Printed Organs*, GENETIC ENGINEERING & BIOTECHNOLOGY NEWS (May 15, 2014), <https://www.genengnews.com/gen-exclusives/patentability-of-3d-printed-organs/77900129>.

⁴⁶ Murphy, *supra* note 35, 779.

⁴⁷ *Id.* at 780.

⁴⁸ *Id.* at 776.

⁴⁹ *Id.* at 778.

⁵⁰ *Id.* at 780.

⁵¹ *Id.* at 790.

⁵² *Id.* at 778.

D bio-printed organs would not be identical to biological organs, an operational 3-D organ would fulfill the same functions as a biologically produced organ.⁵³ Synthetically printed organs could be altered to specifically match individual needs including size and blood type.⁵⁴ The 3-D printed organs would replace human donors and would eliminate much of the need for organ transplant lists.

Part II:

Patent Eligibility of 3-D Printed Organs

The conjunction of live cells with synthetic material and advanced medical technology will soon challenge patent law. Currently, 3-D bio-printed organs could legally fit into the parameters of patentable material. Although functional 3-D organs are not yet a reality, biomedical entrepreneurs could efficaciously argue that bio-printed organs are a “manufacture” or composition of matter and that they pass the Chakrabarty two-pronged test.⁵⁵ In order to file under the manufacture claim, the subject must be an “article produced from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.”⁵⁶ A human organ produced through additive manufacturing requires multiple synthetic and organic inputs. Therefore, the patent claim could articulate that the synthetic organ falls under the manufacture category of patent law.

A. Prong One: The Human Ingenuity Clause

The first prong of Chakrabarty’s test would prove to be the most straightforward to satisfy, as it is clear that 3-D bio-printed organs are a direct result of human ingenuity.⁵⁷ A synthetically produced organ epitomizes the essence of human ingenuity. Bio-printed organs are the product of human manufacturing and the development requires multiple synthetic and organic inputs.⁵⁸ Human creativity and inventiveness are required to design and produce

⁵³ *Id.* at 773.

⁵⁴ *Id.* at 782.

⁵⁵ *Id.* at 773.

⁵⁶ Ryan M. Corbett, USPTO Issues Patent Eligibility Guidelines... So Now What?, INSIDE COUNSEL (Mar. 11, 2015), <http://www.insidecounsel.com/2015/03/11/uspto-issues-patent-eligibilityguidelines-so-now> [<https://perma.cc/D9D3-UXM4>].

⁵⁷ U.S. PATENT & TRADEMARK OFFICE, 2014 INTERIM GUIDANCE ON PATENT SUBJECT MATTER ELIGIBILITY 79 FR 74618-01 (2014).

⁵⁸ Murphy, *supra* note 35, at 773.

the bio-ink, the structural 3-D printer, and the imaging materials that work in tandem to create a functional organ. The stem cells and bio-ink that are manipulated to print and form synthetic organs, requires careful placement by biomedical engineers.⁵⁹

Biotechnology companies could use the past Supreme Court case *Association for Molecular Pathology v. Myriad* as the framework for avoiding failing the human ingenuity clause. In *Association for Molecular Pathology v. Myriad*, Myriad Genetics attempted to patent a strand of DNA that had been isolated from the surrounding nucleotides.⁶⁰ The majority opinion of the Supreme Court was that the DNA strand was not patentable as DNA is found naturally in nature and the process used to extract and isolate the strand in question was already widely known and in use.⁶¹ The Court also established that there was no significant alteration or manipulation to the isolated gene in question.⁶² The decision could be used as the basis to frame a strong argument for the patentability of 3-D organs. The process used to print functional organs would be key for validity of the argument. While many biotechnology companies are attempting to print live organs, nobody has been successful.⁶³ Thus, if a company was able to replicate and reproduce functioning organs, the biomedical company could then present an argument that the printing process itself is the direct result of human ingenuity.

The precedent set by *Diamond v. Chakrabarty* clearly indicates that genetically modified living organisms fall within the parameters of patent law.⁶⁴ The language that is used to structure patent law is very broad and allows for multiple interpretations. The term “human ingenuity” could reasonably include any human-made good or altered product, invention, or process.⁶⁵ Although the cells that compose the 3-D bio-printed organs are not manmade, there is significant alteration and additive material that are incorporated in the final product.⁶⁶ Thus, a 3-D bio-printed organ likely satisfies the first prong of Chakrabarty’s test.

⁵⁹ *Id.* at 774

⁶⁰ Ass’n for Molecular Pathology v. Myriad Genetics, Inc., *supra* note 17, at 2113.

⁶¹ *Id.* at 2112.

⁶² *Id.* at 2113.

⁶³ *Growth of World 3D Printing Healthcare Market*, *supra* note 3.

⁶⁴ Jasper L. Tran, *Patenting Bioprinting*, HARV. J. OF L. & TECH. (Sept. 25, 2015), <http://jolt.law.harvard.edu/digest/patenting-bioprinting>.

⁶⁵ Wang, *supra* note 12.

⁶⁶ Murphy, *supra* note 35, at 773.

B. *Prong Two: Non-Naturally Occurring in Nature*

The second prong of Chakrabarty's test will prove to be the more difficult standard to fulfill. The second prong necessitates that the product in question must not be naturally occurring in nature.⁶⁷ To better protect public domain from private enterprise, the USPTO has mandated that products found in nature, including newly discovered species, are not patentable.⁶⁸ In order to satisfy this requirement, a biotechnology company must cogently argue that while the organs found in the human body are products of nature, the 3-D bio-printed varieties differ significantly in composition and structure. Precedent from *Diamond v. Chakrabarty* should be used in order to prove that 3-D bio-printed organs are non-naturally occurring.⁶⁹

The majority opinion in the *Chakrabarty* decision articulated that while the bacterium could be found in nature, the genetically engineered bacterium had "markedly different" human-designed characteristics from the naturally occurring progenitor.⁷⁰ The added characteristics were purposefully inserted into the bacterium to consume and break down crude oil. The genetically altered functions differed tremendously from the bacterium found in nature. While the "markedly different characteristics" ruling did not become part of the two-pronged test, it was instrumental in illustrating the structural differences between bacterium in nature and Chakrabarty's genetically altered variety. The precedent set by this case clearly establishes that genetically modified life forms are eligible for patents.

The most explicit argument that could be made by a biomedical company should exemplify the structural differences between organs produced naturally and the 3-D versions that are printed with additive manufacturing. Current production techniques for printing 3-D organs require the use of both living and synthetic material for composition.⁷¹ The bio-ink that is used to construct synthetic organs utilizes organic and chemical polymers that differ greatly from the cell material that is found in human organs.⁷² The 3-D printed organs are able to mimic the size of naturally occurring organs, however, vascular structures differ

⁶⁷ *Diamond v. Chakrabarty*, *supra* note 6, at 308.

⁶⁸ *Id.* at 309.

⁶⁹ *Toffenetti & Royace*, *supra* note 45.

⁷⁰ *Diamond v. Chakrabarty*, *supra* note 6, at 308.

⁷¹ *Murphy*, *supra* note 35, at 775.

⁷² *Murphy*, *supra* note 35, at 776.

slightly.⁷³ Current technology does not allow biomedical engineers to perfectly mimic internal structures and human tissue.

Association for Molecular Pathology v. Myriad may once again be used to distinguish between an organ found in nature and an organ printed through additive manufacturing. An effective secondary argument for biomedical companies would be that scientists alter the order of stem cells when creating the organ scaffolding, this further removes the bio-printed organ from the natural realm.⁷⁴ Myriad Genetics' claim that an isolated strand of DNA was equivalent to other isolated chemical compounds was rejected on the grounds that there was no discernable difference between the isolated strand and those found in nature.⁷⁵ The production of bio-printed organs involves sequential depositing of layers in a soft biocompatible matrix (e.g., elastin, collagen) onto which stem cells are printed in a nonrandom, predetermined pattern.⁷⁶ The positioning of the stem cells necessitates human manufacturing. An organ comprised of both synthetic chemicals and organic material cannot be found naturally in nature. Consequently, a 3-D bio-printed organ could successfully pass the second prong of Chakrabarty's test.

C. Section 33 of the AIA: "Human Organism" and "Directed To"

In addition to the Chakrabarty test, biomedical companies must also satisfy Section 33 of the American Invents Act.⁷⁷ Section 33 specifies that no patent "may issue a claim directed to or encompassing a human organism."⁷⁸ This proves to be the most difficult stipulation to satisfy due to the ambiguity of the terms "human organism" and "directed to or encompassing."⁷⁹ However, the use of vague language also provides nuances that could allow a 3-D bio-printed organ to hold up under scrutiny. While the term "directed to" has been used in patent law vernacular for decades, it lacks a clear definition.⁸⁰ "Directed to" could be construed to mean, "to control or conduct the affairs of" which would dramatically

⁷³ Murphy, *supra* note 35, at 775.

⁷⁴ Andrew Armstrong, *3D Printed Human Organs and the Debate on Applicable Patent Law*, IPWATCHDOG (Oct. 7, 2015) <http://www.ipwatchdog.com/2015/10/07/3d-printed-human-organs-and-the-debate-on-applicable-patent-law/id=62307/>.

⁷⁵ Ass'n for Molecular Pathology v. Myriad Genetics, Inc., *supra* note 17, at 2113.

⁷⁶ Toffenetti & Royace, *supra* note 45.

⁷⁷ 35 U.S.C. § 101 (2016).

⁷⁸ Leahy-Smith America Invents Act, *supra* note 21.

⁷⁹ *Id.*

⁸⁰ Tabrez Y. Ebrahim, *3D Bioprinting Patentable Subject Matter Boundaries*, 41 SEATTLE U. L. REV. 1, 28 (2017).

alter the meaning of Section 33 of the AIA.⁸¹ However, any lawyer would be able to glean the apparent definition of “directed to” by looking at past context. The term “directed to” has been used in many patent claims and it appears to mean, “aimed toward a certain subject matter.”⁸² The presumed definition of “directed to” will only be problematic if the biomedical company is unable to prove that a 3-D bio-printed organ is not a “human organism.”

The term “human organism” is undefined in the AIA, and there is a lack of consensus among the legal community as a whole.⁸³ The ambiguity surrounding the definition of “human organism” leaves little guidance for both the USPTO and the court system. Depending on the interpretation approach used to define each term, the phrase “human organism” could have multiple definitions.⁸⁴ Congressional records show that during the discussion of the Section 33 a statement from Representative Weldon was introduced that clarified his 2003 Weldon Amendment.⁸⁵ Congressman Weldon stated that the amendment:

Should not be construed to affect claims directed to or encompassing subject matter other than human organisms, including but not limited to claims directed to or encompassing the following: cells, tissues, organs, or other bodily components that are not themselves human organisms (including, but not limited to, stem cells, stem cell lines, genes, and living or synthetic organs); hormones, proteins or other substances produced by human organisms; methods for creating, modifying, or treating human organisms, including but not limited to methods for creating human embryos through in vitro fertilization, somatic cell nuclear transfer, or parthenogenesis; drugs or devices (including prosthetic devices) which may be used in or on human organisms.⁸⁶

A claim attempting to patent a 3-D organ would only need to demonstrate that a 3-D bio-printed organ is a compilation of stem cells and chemical compounds that are assembled to create synthetic organs.⁸⁷ If the USPTO office is using statutory interpretation to discern the meaning of human organism, it is reasonable to believe that congressional records and laws

⁸¹ Caffarini, *supra* note 25, at 768.

⁸² *Id.* at 779.

⁸³ Caffarini, *supra* note 25, at 781.

⁸⁴ Yaniv Heled, *On Patenting Human Organisms or How the Abortion Wars Feed Into The Ownership Fallacy*, 36 CARDOZO L. REV. 241, 257 (2014).

⁸⁵ CONG. REC. E1177, E1179 (daily ed. June 23, 2011) (Nov. 5, 2003 speech of Rep. Dave Weldon, submitted into record).

⁸⁶ 149 CONG. REC. E2417 (daily ed. Nov. 22, 2003) (statement of Rep. David Weldon).

⁸⁷ Heled, *supra* note 84, at 255.

will be used for the basis of any interpretation.⁸⁸ Pursuant to the statement made by Congressman Weldon, synthetic organs do not fall into the category of “human organism” and therefore are patentable.

The incongruent application of the term “human organism” provides the perfect loophole for any patent application. It would be feasible to argue that the basis of the human organism claim was derived from the Weldon Amendment, which was drafted in 2003.⁸⁹ Thus, the bill was drafted when 3-D bio-printed organs were not even conceivable, let alone feasible.⁹⁰ The unclear language of “human organism” failed to anticipate an era of biomedical innovations that would blur the boundaries between the living and the artificial.

In the event that the USPTO denies 3-D printed bio-organs on the basis of the “human organism” clause, then the biomedical company could frame the synthetic organ as a medical implant.⁹¹ In April 2017, two biomedical engineers were granted a patent for “bio-hybridized” heart implant valves that are more hospitable to human hearts and will reduce the rate of transplant rejection.⁹² Much like 3-D printed organs, the implant combines both synthetic and organic materials to create a hybridized life saving medical device.⁹³ The implant was successfully patented as an “implant medical device” and did not face scrutiny from the “human organism” clause.⁹⁴ A 3-D bio-printed organ could be classified as a medical device, as it includes synthetic material and is intended to improve the health and wellbeing of recipients. A biomedical company would only need to find examples of other patents that combine living organisms with biomedical technology to substantiate their claim.

Part III:

Ethical Ramifications of Patentable 3-D Organs And Policy Recommendations

⁸⁸ Jacob S. Sherkow & Henry T. Greely, *The History of Patenting Genetic Material*, 49 ANNUAL REV. OF GENETICS. 161, 182 (2015).

⁸⁹ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3 (2004).

⁹⁰ Ebrahim, *supra* note 80, at 17.

⁹¹ Caffarini, *supra* note 25, at 778.

⁹² Tom Fleischman, *Patented Biomedical Implant Could Improve Heart Patient Outcome*, CORNELL CHRONICLE, Aug. 9, 2017, <http://news.cornell.edu/stories/2017/08/patented-biomedical-implant-could-improve-heart-patient-outcome>.

⁹³ *Id.*

⁹⁴ Joshua Hunsberger, et al. *Bioengineering Priorities on a Path to Ending Organ Shortage*, 2 CURRENT STEM CELL REP. 118, 127 (2016).

A. Ethical and Moral Ramifications

In the past five years alone, the biomedical industry has experienced colossal growth in technological breakthroughs. The ever-evolving industry has the opportunity to generate life-saving technology. However, there are many moral and ethical considerations that accompany technological innovation. Historically, the USPTO has stated that patents are meant to inspire inventiveness and encourage entrepreneurs to share their ideas in exchange for an exclusivity period.⁹⁵ The exclusivity period acts as a limited monopoly and allows inventors to recoup their financing from the research stage and attract other potential investors during the development of their invention.⁹⁶ Patents also prevent freeriding, which reduces incentives for ingenuity because inventors feel their invention would not be worth the time, and effort it required.

Once 3-D bio-printed organs are deemed patentable, there will be compelling financial incentives to invest in the new technology. The cost of the first functional bio-printed organ could cost upwards of \$500 million to \$1 billion.⁹⁷ This price reflects the research and investment that would be required for vascularization, cell mapping, cell manufacturing, immunosuppressant therapy, and organ implementation.⁹⁸ That cost does not include the countless clinical trials that will be required by the FDA.⁹⁹ The first biomedical company to patent a 3-D organ will doubtlessly need immense investment to cover the cost of research and printing. The investors will eventually require a return on investment with interest, which will increase the cost of bio-printing.¹⁰⁰ The price per organ would increase so that the biomedical companies could earn a profit while paying out investor dividends.¹⁰¹ The financial cost and potential payout for 3-D bio-printed organs will make the biomedical industry very lucrative but inaccessible to those most in need.

The first biomedical company to patent a bio-printed organ will have exclusive rights over the production and sale of organs. The biomedical firm will have sole rights over

⁹⁵ Sherkow *supra* note 88, at 170.

⁹⁶ Woodward, *supra* note 31.

⁹⁷ Ahu Arslan-Yildiz et al. *Towards Artificial Tissue Models: Past, Present, And Future of 3D Bioprinting*, 8 BIOFABRICATION, (2016).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Matt Simon, *When Copyright Can Kill: How 3D Printers Are Breaking the Barriers Between "Intellectual" Property and the Physical World*, 3 PACE. INTELL. PROP. SPORTS & ENT. L.F. 60 (2013).

¹⁰¹ Arslan-Yildiz *supra* note 97.

the bio-printed organ will not be incentivized to price organs competitively.¹⁰² Patients or families who need a lifesaving transplant will not have the option of price comparison and the “real price” per organ is likely to be inflated in the initial rollout of synthetic organs. The price of 3-D printed organs will remain unattainable for many until market competition creates competitive pricing. Until then, patients who lack any other transplant option will face astronomical organ costs that are not likely to be covered by health insurance. Insurance providers often choose not to cover high-cost experimental procedures especially if there are viable alternatives such as human-to-human donation. Insurance companies will only begin to provide coverage if the application of 3-D bio-printed organs becomes the preferred method of transplant.

The high price and privatization of 3-D bio-printed organs will create huge ethical implications for hospitals. Currently, the governing body for organ donations and transplants in the US is the United Network for Organ Sharing (UNOS).¹⁰³ UNOS has been the governing body for transplant allocation since 1984.¹⁰⁴ Every transplant hospital in the country must be a member of the Organ Procurement and Transplant Network (OPTN), which is operated by UNOS under a contract by the US Department of Health and Human Services.¹⁰⁵ UNOS manages strict guidelines for which hospitals may become designated donor and transplant centers as well as guidelines about donor and recipient eligibility.¹⁰⁶

UNOS and OPTN have strict guidelines that determine to whom and how organs are allocated. Patients in need of lifesaving organ transplants are referred by physicians and placed on an organ transplant list that is divided by organ type.¹⁰⁷ The patient’s placement on the list varies depending on the severity of the medical condition, age of the patient, and chance of transplant survival.¹⁰⁸ Typically, the most desperate patients are placed at the top unless there is a very high possibility of rejection. UNOS then examines health status, recipient age, blood type, tissue vitality, and location to determine organ allocation.¹⁰⁹ UNOS

¹⁰² Sara Patuzzo et al. *3D Bioprinting Technology: Scientific Aspects and Ethical Issues*, SCI ENG ETHICS 1, 14 (2017), <https://www.ncbi.nlm.nih.gov/pubmed/28660387>.

¹⁰³ US Department of Health and Human Services, Section on Organ Procurement and Transplant Network, *Governance*, <https://optn.transplant.hrsa.gov/governance/about-the-optn/>.

¹⁰⁴ National Organ Transplant Act, 42 U.S.C. § 274e (1984).

¹⁰⁵ US Department of Health and Human Services, Section on Organ Procurement and Transplant Network, *Governance*, <https://optn.transplant.hrsa.gov/governance/about-the-optn/>.

¹⁰⁶ *Id.*

¹⁰⁷ United Network for Organ Sharing, Section on Policy, <https://unos.org/policy/>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

guidelines are meant to create an equitable system for organ donation that disregards socio-economic status.¹¹⁰

Both UNOS and the National Organ Transplant Act explicitly state that organ donation in exchange for financial remuneration is unethical and illegal.¹¹¹ The National Organ Transplant Act (OTA) declares “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”¹¹² The statute was put into place to ensure that direct donation does not occur as a result of coercion. The OTA is meant to protect vulnerable populations and lower income individuals who may not understand the severity and lifelong impact organ donations have on the human body.¹¹³

The guidelines set up by UNOS and the OTA are in place to protect economically disadvantaged populations. According to UPTN bylaws, “financial incentives will be considered as any material gain or valuable consideration obtained by those directly consenting to the process of organ procurement, whether it be the organ donor himself (in advance of his demise), the donor's estate, or the donor's family.”¹¹⁴ There is significant concern among organ transplant governing bodies that financial remuneration in exchange for donation could lead to the development of organ brokers and unqualified transplant sites. Organ brokers would act as an intermediary between the potential donor and recipient for a certain percent of the profit.¹¹⁵ Many developing countries have seen organ brokers approach children, disabled persons, and uneducated individuals who do not understand the long-term consequences of donation.¹¹⁶

Patented bio-printed organs could offer the perfect solution to the ongoing organ shortages that patients face across the U.S. However, 3-D bio-printed organs are part of a privatized industry and will be available for purchase, which will lead to unequal access to treatment. The high cost of synthetically produced organs will create a market that is exclusive to the wealthy.¹¹⁷ 3-D printed organs would not be required to go to patients at the

¹¹⁰ US Department of Health and Human Services, *supra* note 105.

¹¹¹ National Organ Transplant Act, 42 U.S.C § 274e (1984).

¹¹² National Organ Transplant Act, 42 U.S.C § 274e (1984).

¹¹³ Peter Dabrock, *Playing God? Synthetic Biology as a Theological and Ethical Challenge*, 3 SYS. & SYNTH. BIOL. 47 (2009).

¹¹⁴ United Network for Organ Sharing, *supra* note 107.

¹¹⁵ Hunsberger, *supra* note 94, at 127.

¹¹⁶ Patuzzo, *supra* note 102.

¹¹⁷ Simon, *supra* note 100, at 60.

top of the transplant list. Instead, allocation would be based on financial capabilities. While bio-printed organs may be able to fulfill the current deficit in supplies, there are many obstacles facing organ distribution.¹¹⁸ 3-D bio-printed organs have the potential to completely eliminate the effectiveness of the UNOS transplant list and the guidelines regulating donation. Individuals who choose to donate their own organs or families who choose to donate the organs of a loved one may start to question if they are eligible for financial remuneration. There could be significant blowback from donors who believe that if the wealthy can purchase synthetic organs then donors should be entitled to a financial incentive.

3-D bio-printed organs would be available for patients who do not fit UNOS parameters for transplant eligibility. For example, UNOS requires individuals who have struggled with alcoholism to be sober for one year before they can be placed on the liver transplant list.¹¹⁹ Patients who are deemed to have a very high risk of organ rejection often do not qualify for the transplant list. 3-D bio-printed organs would provide the perfect solution for these individuals but create significant financial barriers.

The quality and safety of 3-D printed organs is another major concern that will arise with patentability. UNOS operates in tandem with accredited transplant hospitals and medical professionals to ensure that transplants are safe and successful. 3-D printed organs would need regulatory guidelines that could guarantee some method of standardization for each organ printed.¹²⁰ Patients choosing to undergo a transplant with a 3-D bio-printed organ would then be required to seek out a board-certified doctor to perform the procedure. As there is already an underground market for human organs, it is plausible to assume that black market operations could arise, spurring patients to seek out non-legitimate doctors. Transplants are inherently risky procedures with a high likelihood of organ infection and rejection.¹²¹ Any transplant not performed in a professional environment carries a much greater chance of serious illness or death. Additionally, a patent on bio-printed organs does not guarantee that there is quality control on each organ that is printed.¹²² While any organ transplant would require a team of trained medical professionals, there is no board that

¹¹⁸ Fleischman, *supra* note 82.

¹¹⁹ United Network for Organ Sharing, *supra* note 107.

¹²⁰ United Network for Organ Sharing, *supra* note 107.

¹²¹ *Id.*

¹²² Hunsberger, *supra* note 94, at 125.

oversees the production and testing of every organ printed. UNOS provides clear guidelines on organ viability and every patient is aware of the risk from transplant complications. Even with a baseline quality assurance, patients would have to make their own risk-benefit analysis to determine whether or not a 3-D bio-printed organ is optimal.

Despite the multitude of foreseen problems, the benefits of 3-D bio-printed organs are numerous. Synthetically produced organs will reduce the need for human donors and the extended periods of wait time on the transplant list. Additionally, bio-printed organs will be altered to fit individual blood type and organ size, eliminating the need for long-term immunosuppressant therapy. Functioning 3-D printed organs will lessen the pressure on the national transplant list and ultimately eliminate the waiting period. Both the scientific community and medical community are well aware of the endless opportunities that bio-printing presents.

B. Policy Recommendations

Historical inconsistencies with patent rulings and outcomes have made legal precedent very difficult. Incoherence in application of patent law has produced grey legal boundaries. Just as technology and biomedicine constantly evolves, the law must follow suit to match the rapid pace of technological advancements. The current framework for assessing patentability is not robust enough to cover the scope of future patent claims. However, expanding upon the current patent law regime to clarify ambiguous language could easily alter patent law.

The most problematic language resides in Section 33 of the AIA with the term “human organism.” The inconclusive definition of human organism creates inconsistent interpretation and provides no guidelines for the USPTO. The USPTO could look at the congressional records to determine the explicit and implicit connotations surrounding the term “human organism.” The congressional records have defined “human organism” as “human embryo, fetus, infant, child, adolescent or adult.”¹²³ To remain consistent with congressional intent, stem cells and other derivatives of the human body not considered organisms, such as tissues and genes, should be explicitly excluded from the definition of “human organism.”¹²⁴ If this definition were to be implemented into USPTO guidelines

¹²³ 157 CONG. REC. E1184 (daily ed. June 23, 2011).

¹²⁴ Caffarini, *supra* note 25, at 779.

there would be a standard for patent disputes dealing with “human organisms.” If patent law does not adopt a definition for human organism there are likely to be future challenges to patent validity.

Currently there is an interim guideline that has been provided by the USPTO to assist in distinguishing patentability for claims that include elements of natural phenomena. The guideline examines if a patent claims a process, machine, manufacture, or composition of matter.¹²⁵ If the claim falls into one of the categories above, then a secondary question is asked: “Is the claim directed to a law of nature, a natural phenomenon, or an abstract idea.”¹²⁶ If the answer is no, then the claim is eligible for patenting. However, if the answer is yes, then a third question is posed. The final question: “Does the claim recite additional elements that amount to significantly more than the judicial exception?” If the answer is yes, then the claim is eligible for a patent.¹²⁷ The guidelines presented by the patent office are meant to ensure that any claim to a living organism or natural phenomena is markedly distinct from those that occur in nature.

The interim guidelines could be modified and used to guide decision making for 3-D bio-printed organs. The USPTO could adopt the definition of human organism stated above, and add the term “human organism” to question number 2. The second question would then read as “Is the claim directed to a law of nature, a natural phenomenon, an abstract idea, or a human organism?”¹²⁸ Once again, if the answer were yes, then the third question would be addressed. The third question would maintain that 3-D bio-printed organs must have some structural or material differences from organs that are found in the human body. If the USPTO were to state that structural or compositional differences are required for patentability, there would be a clear standard for acceptable claims. If the USPTO chooses to implement the aforementioned guidelines, patent officers could mitigate drawn out lawsuits regarding patent rejections over ambiguous language. The USPTO would be able to apply a standardized measure of assessment for all patent claims that incorporate human organisms. The clarification of the term human organism would maintain the

¹²⁵ U.S. PATENT & TRADEMARK OFFICE, 2014 INTERIM GUIDANCE ON PATENT SUBJECT MATTER ELIGIBILITY 79 FR 74618-01 (2014), [Http://Federalregister.Gov/A/2014-29414](http://Federalregister.Gov/A/2014-29414)

[[Https://Perma.Cc/2drb-4pfb](https://Perma.Cc/2drb-4pfb)].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

USPTO's longstanding policy of denying patents that attempt to clone humans or chimera while still incentivizing biomedical innovations.

If the above approaches and adaptations are not seen as viable solutions for patent law, then legislation could be passed that would distinguish between the patenting of a 3-D bio-printed organ and the method that is used to create the organ. Biomedical companies could patent the process for cell scaffolding or vascularization methods instead of the final product. If the methodology used to create the organ were eligible for patenting, then multiple biomedical companies would be able to patent their individual methods. Biomedical companies would be impeded from creating monopolies or artificially raising the price of synthetic organs because there will be multiple versions of bio-printed organs on the market.

Part IV: Conclusion

3-D bio-printing presents a unique ethical conundrum. Synthetic organs have the possibility to save the two lives that have been added to the National Transplant List since you began reading the article. Currently, 3-D bio-printed organs would be eligible for patents, as they pass the Chakrabarsky two-pronged test and Section 33 of the AIA. Patents grant biomedical companies a period of economic exclusivity. The short-term monopoly attracts potential investments but also creates price hikes that could jeopardize organ accessibility to the very people that 3-D printed organs were designed to help. The advent of bio-printing has exposed the incongruities within patent law and will necessitate an evolution in patentable subject matter.

3-D bio-printed organs have the possibility to redefine regenerative medicine and save hundreds of thousands of lives every year. However, advances in biomedical technology will continue to push the boundaries of what is legal and what is right. The current developments in technology threaten to expose the inconsistencies and ambiguous language found within patent law. A clear standard for patenting bio-printed material will prevent differing interpretations based solely on moral beliefs. The USPTO must standardize definitions for terms such as "human organism" to allow for consistent patent rulings. There is a vast array of ethical concerns that will result from 3-D bio-printing. Unfortunately, the moral ramifications do not have a clear-cut solution. Instead, the production of bio-printed organs is set to redefine the worth of a human life.

An Ambiguous Anatomy of Addressing Abuses: The Applicability of the Alien Tort Statute to Human Rights Violations

Robert Wu

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

— *Alien Tort Statute*¹

Introduction

In Eastern India, enslaved children hammer away for hours within mines, searching for specks of mica that give makeup and beauty products their signature shine.² In the coastal waters off Thailand, indentured fishers continuously toil on unsafe fishing boats, knowing that, at any moment, for any reason, they could be fired, tortured, and have their passports thrown away.³ Across the globe, corporate dollars and government funds can be invested toward terrorist organizations or rebel groups, which in turn inflict harm on defiant

¹ Alien Tort Statute, 28 U.S.C. § 1350 (2006).

² *Blood Mica: Deaths of child workers in India's mica 'ghost' mines covered up to keep industry alive*, Reuters, August 2, 2016.

³ *Promises unmet as Thailand tries to reform shrimp industry*, Chicago Tribune, September 22, 2016.

employees, political opponents, and innocent civilians.⁴ These scenarios are morally reprehensible and illegal in the eyes of international law – yet there are very few methods for victims to obtain legal relief for their suffering, especially in countries that lack a strong, independent judicial system. In recent decades, the Alien Tort Statute, a one-sentence portion of the Judiciary Act of 1789, has provided a legal avenue for these human rights victims, allowing aliens to sue in United States federal courts and bring abusers to justice.

The Alien Tort Statute (“ATS”) itself is incredibly short, yet straightforward: it gives aliens the ability to press charges in U.S. courts for “violations of the law of nations (a term that arguably refers to globally accepted norms for humane treatment) or a treaty of the United States.”⁵ Initially, the ATS experienced a period of dormancy: its main application in the courts was for obvious crimes committed by a foreigner on United States soil.⁶ This custom of limited interpretation suddenly dissolved in the 1980s, with the Second Circuit’s ruling in *Filártiga v. Peña-Irala*, a landmark case which affirmed the ATS as a means for aliens to sue governments for certain human rights violations in U.S. court.⁷ With judicial precedence established through *Filártiga*, hundreds of human rights cases flowed into U.S. federal courts, with foreign plaintiffs using the ATS to establish standing. However, recent Supreme Court decisions have limited the parameters under which the ATS applies, depriving many victims of their chance to bring purported abusers to legal justice.⁸

The statute’s use in attaining justice for human rights violations is controversial, with most arguments falling into two divisions. One group, traditionally composed of human rights activists, believe that the ATS should be interpreted as a wide-ranging tool to assist in holding malicious actors accountable for their abusive actions.⁹ Opponents fear that a broad reading of the ATS would dampen corporate innovation, raise market prices on goods across a variety of markets, greatly hinder the U.S.’ relations with foreign countries, flood the federal

⁴ Ayodeji Rotinwa and Stephanie Busari, *Ogoni 9 widow Esther Kiobel lands day in court against oil giant Shell*, CNN, June 30, 2017.

⁵ Alien Tort Statute, *supra* note 1.

⁶ Beth Stephens, *The Curious History of the Alien Torts Statute*, 89 NOTRE DAME L. REV. 1467, 1468 (2014) (cases that requested relief under the ATS were initially primarily limited to foreigners suing for abuses committed on American soil with no other judicial remedy available).

⁷ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁸ *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

⁹ Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW, 461, 482 (1989) (interpreting the ATS as an important check on abusive actors and perpetrators of human rights abuses around the world).

court system with countless aliens seeking jurisdiction, and even put the country at risk of being sued for its controversial uses of torture and weaponized drones.¹⁰ This article will not argue purely in favor of one or the other: the balance between affirming the values of international human rights movement, and the domestic and international ramifications of a broadly-interpreted ATS, is precarious. Instead, this article will examine the history of the ATS, present its core issues that require clarification and, finally, present recent pieces of similar legislation that offer possible solutions to clarifying and resolving the statute's most controversial portions in a balanced manner.

II: The Status Quo: The Establishment and Progressive Interpretations of the Alien Tort Statute

A. *Establishment and Initial Dormancy*

The Alien Tort Statute originated not as a tool to prosecute human rights abuses around the world, but as a means to assure foreign governments that their citizens would have access to judicial remedies while visiting the United States. Most notably, in 1784, French diplomat François Barbé-Marbois was assaulted during a visit to the United States, but his status as a foreigner left him unable to pursue judicial action in federal court against the assailant.¹¹ The ambassador's assault made headlines around the globe and led Congress to draft and include the 33-word statute in the Judiciary Act of 1789.¹² Indeed, the original intent of the ATS is clear among scholars and courts alike. Beth Stephens of the *Notre Dame Law Review* writes, "The Framers enacted the ATS in order to provide a federal court forum in which foreigners could seek remedies for at least some violations of international law," conditional upon two conditions being met.¹³ First, that the plaintiff was an alien; and second, that the claim alleged a violation of whatever was commonly understood to be international law – the ATS provided a legal avenue for foreigners to sue for justice in an

¹⁰ Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 363 (1997) (explaining that a more liberal interpretation of the ATS would damage American corporations and hold the United States government liable for extrajudicial killings vis a vis drone warfare and/or torture of suspected terrorists for intelligence purposes).

¹¹ Stephen Breyer, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES*, 135 (2016) (Barbé-Marbois' alien status and lack of protection for international officials helped necessitate the need for ATS-esque remedies).

¹² *Id.*

¹³ Stephens, *supra* note 6 at 1470.

American federal court. Of course, the standard of what constitutes “international law” is nebulous – its characterization was later clarified in court cases defined later in this article.

Yet, for almost 200 years after its establishment, the ATS remained relatively inactive in its use in judicial settings. Between the statute’s establishment in 1789 and 1979, the statute was cited exactly 21 times among reported decisions.¹⁴ Only one, a 1961 Maryland District Court case, directly interpreted the statute; *Adra v. Clift* interpreted a claim brought under the ATS, but ultimately denied jurisdiction to a Lebanese plaintiff who wished to sue his ex-wife for damages for interfering with his custodial rights and falsifying an American passport to bring their children to the United States.¹⁵ Even so, *Adra* was not a groundbreaking interpretation of the statute--the court’s justification for denying the plaintiff’s claims was based on the judgment that the ATS only applied in situations where a *single act* was *both* an actionable tort and a violation of the law of nations.¹⁶ Interfering with custodial rights was deemed to be solely an actionable tort and passport falsification, while reprehensible and clearly a violation of international law, was not an actionable tort for the Plaintiff.¹⁷

Instead, during this period, the ATS was primarily used by justices writing legal opinions as a justification for their courts to grant judicial standing to foreign nationals. The most prominent example of this use came from *Banco Nacional de Cuba v. Sabbatino*, where the Supreme Court referenced the ATS while providing a list of statutes that indicated “a desire to give matters of international significance to the jurisdiction of federal institutions.”¹⁸ Until 1979, the use of the ATS was mostly a formality; it helped shape court decisions, but was never used to bring relief for human rights violations.¹⁹

¹⁴ Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 15–16 (1986) (where most court cases that involved the ATS used the statute as an example of the importance of international affairs to U.S. governance, in the sense that the Framers created a judicial remedy for citizens of other nations).

¹⁵ *Adra v. Clift*, 195 F. Supp. 857, 864 (D. Md. 1961).

¹⁶ *Id.* at 865.

¹⁷ *Adra v. Clift*, 195 F. Supp. 857, 866 (D. Md. 1961).

¹⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (The Court ruled that federal courts were to follow the Act of State Doctrine, which requires that propriety of decisions of other countries relating to their internal affairs would be honored and not questioned in United States courts. The ATS was cited as a statute that reflects the importance of international affairs and country sovereignty).

¹⁹ Stephens, *supra* note 6 at 1468.

B. Filártiga v. Peña-Irala: The Second Circuit Opens the Floodgates for Human Rights

The legacy of the civil rights movement and horror of the Vietnam War sparked a movement toward international human rights in the 1970s.²⁰ Inspired by activists and non-profit organizations, the American public and politicians began to pay far more attention to those oppressed in other nations.²¹ In 1973, Congress held its first hearing on human rights and later passed legislation that limited foreign aid to nations that met benchmarks for civic freedom.²² Upon taking office in 1977, Jimmy Carter committed his administration to a foreign policy centered on human rights. In his inaugural address, the President expressed a “clearcut preference” for nations that, “share with us an abiding respect for individual human rights.”²³ While his administration’s legacy surrounding human rights is questionable, Carter’s public rhetoric in support of freedoms around the globe contributed greatly to the expansion of human rights consciousness and advocacy across the nation.²⁴

It was within this climate of growing human rights activism that the Filártigas filed their lawsuit in the U.S. District Court for the Eastern District of New York. Their case centered around their son, seventeen-year-old Joelito Filártiga, a Paraguayan national who was murdered in retaliation for his father’s advocacy work.²⁵ Americo Peña-Irala, the police officer that killed Filártiga, escaped prosecution in Paraguay, and, with the help of the national government, quietly moved to Brooklyn.²⁶ Seeking justice for their son’s murder, the Filártigas moved to United States and, in April 1979 with the assistance of New York’s Center for Constitutional Rights, filed suit against Peña-Irala, citing the ATS as its grounds for jurisdiction.²⁷ The District Court quickly dismissed the case, holding that international

²⁰ Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 J. AM. HIST. 1231, 1234–35 (1999) (noting that Vietnam War protests and the Civil Rights Movement laid the foundation for a wave of activism in favor of human rights).

²¹ *Id.*

²² Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004), at 1236.

²³ Jimmy Carter, Inaugural Address (Jan. 20, 1977), available at <http://www.jimmycarterlibrary.gov/documents/speeches/inaugadd.phtml> (when addressing how a priority of the Carter administration would be on alleviating international human rights abuses in foreign countries).

²⁴ Hauke Hartmann, *U.S. Human Rights Policy Under Carter and Reagan, 1977–1981*, 23 HUM. RIGHTS. Q. 402, 418–20 (2001) (Carter’s human rights record was marred by a series of differing standards, most notably in regions where the threat of Communist governments were present. In El Salvador, the Carter administration continued to fund and arm repressive governments, fractured ruling coalitions, and juntas in order to displace any Communist efforts).

²⁵ *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

²⁶ *Id.* at 878-879.

²⁷ *Filártiga*, *supra* note 25 at 878-879.

human rights norms did not apply in country-vs-citizen relationships – in this case, the Filártigas’ claims against the Paraguayan.²⁸ The decision cited two prior Second Circuit rulings, *Dreyfus v. Von Finck* and *IIT v. Vencap*, which stated that international law had neither applicability nor governance over a state’s treatment of its own citizens.²⁹ Undeterred, the Filártigas appealed to the Second Circuit, and the appeal was argued in October 1979.

Eight months later, the Second Circuit issued its decision: a judgment in favor of the Filártigas.³⁰ The justices’ narrow decision held that, in this specific case, the ATS afforded the appellants jurisdiction because the claim — torture— was a violation of international law. Additionally, the state which the accused fled to escape liability – Paraguay — failed to assert diplomatic and judicial immunity on his behalf. The Second Circuit also ruled that the key reason for dismissal—*forum non conveniens*—or the principle that courts should refuse to take jurisdiction over matters where a more appropriate forum exists, was unimportant in this case. While the crime could have been litigated in a Paraguayan court under a charge of battery, the court held that the ATS granted federal jurisdiction in a U.S. court because Peña-Irala’s conduct met the international definition of torture that is accepted by “the general assent of civilized nations.”³¹ The Filártigas’ success led to an influx in human rights cases filed in American courts.³² Suddenly, international victims of human rights abuses had a pathway to justice through the American court system, and this created a wave of litigation by victims inspired by *Filártiga*.³³

In fact, while (as described above) the Court’s decision fell upon narrow, case-specific consideration, in dictum, the opinion appears to suggest broader implications. The final paragraph of the opinion reads:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights

²⁸ Filártiga *supra* note 25 at 880 (overturning the district court decision in *Filártiga v. Peña-Irala*, No. 79-917 (E.D.N.Y. May 15, 1979)).

²⁹ See *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976), *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

³⁰ Filártiga, *supra* note 25 at 878-879.

³¹ Filártiga, *supra* note 25 at 881.

³² William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT. AND COMP. L. REV. 221, 221 n.2 (1996) (noting that many more cases filed in federal court after the landmark decision claimed ATS jurisdiction for international human rights violations).

³³ *Id.*

and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. . . . Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.³⁴

This final paragraph, in essence, is a strong affirmation and acknowledgement of the broader impact of the decision: it created a path, through the ATS, for individuals around the world to escape brutality. This impact of *Filártiga*, especially when considering the pursuit of global human rights, cannot be understated. The decision interpreted the ATS to allow for international law to be enforced in U.S. federal courts, allowing victims and survivors of human rights abuses to seek judicial remedies. Through its dismissal of Peña-Irala's claim of *forum non conveniens*, the court asserted that the United States was a perfectly acceptable venue to prosecute such abuses, so long as the case was legitimate. Finally, the opinion offered a ringing endorsement of not only the existence of human rights norms, but also, the necessity of judicially enforcing them. *Filártiga*, consequentially, was *Brown v. Board of Education* for international human rights law litigants, granting victims access to justice in a United States courtroom.³⁵

C. *Post-Filártiga*: A Mediocre Honeymoon Period

For the next twenty-four years, the courts uniformly followed the Second Circuit's judgment, and, despite *Filártiga's* rapidly expanding use in the federal court system, the

³⁴ *Filártiga*, *supra* note 25 at 890.

³⁵ Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (analogizing *Filártiga* to *Brown* in terms of access to freedoms and litigation and establishing a right and pathway for judicial remedies for abuses).

Supreme Court denied review of the ATS whenever it was requested.³⁶ Most human rights suits quickly led to out-of-court settlements and court reports show that fifty ATS cases were litigated in federal court.³⁷ Of those trials, seven led to judgment for the plaintiffs, upholding claims for violations such as summary execution, crimes against humanity, and genocide; those held liable included not only those behind the execution of abuses but also parties who were involved with the planning of heinous acts.³⁸ The rest of the cases were dismissed on grounds that included a failure to state an international law violation, the American citizenship status of plaintiffs, the immunity of certain defendants, the expiration of a statute of limitations, and the political question doctrine.³⁹

Despite these failures, human rights advocates continued to support the ATS as a means of enforcing norms around the globe. Each positive court decision created a data point that later institutions could cite when explaining the importance of international human rights norms. The statute offered victims of severe abuses the ability to present their claims and fight for justice, and, while any victories were primarily symbolic because the federal law provided no assistance collecting judgment from international officials, proponents felt strongly that favorable decisions were advances towards holding future perpetrators accountable.⁴⁰

Even so, the courts had established a tentative consensus about the ATS' applicability and limitations in federal suits. While it was generally accepted that the statute allowed for aliens to sue over certain human rights abuses, claims were often struck down by various barriers, including foreign immunity, lack of jurisdiction over the defendant, the political question doctrine, or the aforementioned *forum non conveniens*.⁴¹ Without the guidance of a Supreme Court decision, the lower courts crafted their own explanations and

³⁶ See, for example: *Karadžić v. Kadic*, 518 U.S. 1005 (1996) (cert. denied); *Marcos-Manotoc v. Trajano*, 508 U.S. 972 (1993), (cert. denied); *Tel-Oren v. Libyan Arab Republic*, 470 U.S. 1003 (1985), (cert. denied) (The Court failed to grant certiorari in all of these notable ATS cases, and many others).

³⁷ Stephens, *supra* note 6 at 1490.

³⁸ See, for example: *Hilao v. Estate of Marcos*, 103 F.3d at 772; *Kadic v. Karadžić*, 70 F.3d 232, 244 (2d Cir. 1995) (these decisions implicated, under the statute's jurisdiction, both those involved in the planning of crimes and lower-level officers who carried out such offenses).

³⁹ See, for example: *Miner v. Begum*, 8 F. Supp. 2d 643, 644 (S.D. Tex. 1998) (dismissing claim asserting ATS jurisdiction because plaintiffs were U.S. citizens); *Brancaccio v. Reno*, 964 F. Supp. 1, 4 (D.D.C. 1997) and *Lafontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994) (D.C. Cir. 1992) (dismissing based on political question doctrine).

⁴⁰ Dolly Filártiga, Foreword to Beth Stephens' *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS*, 2d ed. 2008), at xvii–xviii.

⁴¹ See *Miner and Brancaccio*, *supra* note 39.

interpretations of the statute, with inconsistencies ranging from what cases qualified under political question doctrine to whether the inclusion of an American citizen among plaintiffs would automatically disqualify consideration under the statute.⁴² This created a shaky foundation for ATS cases in that while favorable decisions were undoubtedly symbolic advances for human rights, the decisions themselves lacked any sort of enforcement or consistency.

D. Sosa v. Alvarez-Machain: The Supreme Court Takes a Stand on the ATS

The Supreme Court finally accepted an ATS case for review two decades after *Filártiga* with its granting of cert to *Sosa v. Alvarez-Machain*.⁴³ The events surrounding *Sosa* began in 1985, when a U.S. Drug Enforcement Administration (DEA) officer was brutally tortured and murdered by a Mexican drug cartel.⁴⁴ After a long investigation, the DEA concluded that Humberto Alvarez-Machain, among other cartel members, was responsible for the officer's murder. U.S. officials then hired a group of Mexican citizens, among them Jose Francisco Sosa, to kidnap Alvarez-Machain and bring him to the United States for indictment.⁴⁵ Alvarez-Machain was ultimately acquitted of the criminal charges and, upon returning to Mexico, filed a suit against the DEA and the Mexican citizens who abducted and brought him to the United States.⁴⁶

The District Court found that the DEA had acted lawfully when arresting Alvarez-Machain and was removed from any liability in the case. However, it also held that Sosa, under the ATS, was liable for Alvarez-Machain's illegal abduction.⁴⁷ On appeal, the Ninth Circuit upheld the claims against Sosa and reinstated the claims against the United States for illegal capture.⁴⁸ Finally, the stage was set for the ATS to be examined by the Supreme Court: Sosa hoped for the dismissal of the suit on the theory that the statute failed to grant jurisdiction over violations of international law and that the courts would therefore be unable

⁴² See Miner, Brancaccio, and Lafontant, *supra* note 39.

⁴³ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁴⁴ Randal C. Archibold & Karla Zabludovsky, *Mexican Tied to Killing of D.E.A. Agent Is Freed*, N.Y. TIMES, Aug. 10, 2013, at A4.

⁴⁵ *Id.*

⁴⁶ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

⁴⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698-699 (2004).

⁴⁸ *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003).

to hear the case. Alvarez-Machain argued that Sosa should remain liable for his role in illegal kidnaping.

The Court pleased neither party. In a 6-3 decision, the Justices reversed the Ninth Circuit's decision and found that Sosa was not liable under the Court's interpretation of the ATS. First, the Court addressed the core of the *Filártiga* decision, asserting that federal courts indeed did hold the jurisdiction to hear and rule upon violations of international law.⁴⁹ Justice Souter, on behalf of the Court, wrote:

“No development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filártiga v. Peña-Irala* has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.”⁵⁰

This declaration did not come without limitations. The opinion later cautioned that federal courts should be careful in its use of the ATS in international human rights cases, given its potentially dangerous impact on foreign relations.⁵¹ However, it also emphasized that the federal judiciary enjoyed constitutional authority to recognize international claims, rejecting arguments that doing so would interfere with the executive branch's jurisdiction over foreign affairs.⁵² In this respect, *Sosa* reaffirmed the ATS's jurisdiction for human rights abuses in federal court.

While this holding reaffirmed access to justice in U.S. courts for victims, the Court proceeded to seriously limit the class of victims eligible for such relief. The Court ruled that the modern international norms that were actionable under the ATS were those “of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”⁵³ Through this limitation, the Court limited the scope of violations encompassed by the ATS to international norms that existed during the statute's creation in 1789. Additionally, any modern interpretations of human rights violations under the ATS had to meet three standards to be considered

⁴⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

⁵⁰ *Id.* at 724-725.

⁵¹ *Id.* at 725-728.

⁵² *Id.* at 729.

⁵³ *Id.* at 724-725.

applicable to eighteenth-century norms: universal in global acceptance (meaning that a particular violation was unacceptable in most, if not all, of the world), specific in terms of charges and violations, and obligatory in enforcement.⁵⁴ These standards were established by the Court to define “a violation of the law of nations” – a particular offense had to be clear, universal, and mandatory in punishment to qualify. Under these standards, the Court then held that the abuses alleged by Alvarez-Machain failed to meet these standards and ruled in favor of Sosa.

Although *Sosa* greatly clarified (and limited) the types of issues that could sustain claims under the ATS, it offered little assistance in clarifying how the statute was supposed to function with regards to evaluating the merits of qualified cases. This ambiguity created two opposing lines of analysis for the decision.⁵⁵ Human rights attorneys argued that the Court affirmed the federal court system’s authority to recognize causes of action for certain human rights violations—effectively, a resounding affirmation of *Filártiga*. Opponents of such lawsuits focused on the Court’s lengthy warning against misuse or overextension of ATS power and its potential to damage foreign relations. *Sosa* effectively created a cautious period of ATS court cases, where the guidelines for *what* qualified as a case were well-defined but little else was consistent.⁵⁶

E. Kiobel v. Royal Dutch Petroleum Co.: Clarifying Extraterritoriality

Kiobel v. Royal Dutch Petroleum Co. was the next Supreme Court case to interpret the ATS. The Court’s grant of certiorari in *Kiobel* was expected, as two circuit courts had split on the original question of whether federal courts could recognize ATS claims against corporations.⁵⁷ However, during oral argument, debate quickly shifted away from corporate liability to a distinctly different issue: whether the ATS grants jurisdiction over abuses and claims that occur in foreign states.⁵⁸

⁵⁴ *Id.*

⁵⁵ Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. 28, 28 (2007) (describing the *Sosa* decision as “something of a Rorschach blot, in which [we] each . . . see[] what [we were] predisposed to see”).

⁵⁶ *See* *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1016 (7th Cir. 2011) (noting that *Sosa*’s discussion of the ATS “is best understood as the statement of a mood—and the mood is one of caution”).

⁵⁷ *See: Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 84 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011).

⁵⁸ Transcript of Oral Argument at *3–4, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011) (No. 10-1491), 2012 WL 628670. (Justice Kennedy moved to discuss the presumption of extraterritoriality within the first two minutes of the oral argument).

The plaintiffs represented as *Kiobel* were Nigerian citizens who claimed jurisdiction under the ATS for human rights abuses stemming from the crushing of a peaceful resistance movement against oil development and drilling in the country.⁵⁹ Specifically, the suit alleged that Royal Dutch Shell, a petroleum manufacturer, compelled its Nigerian subsidiary to work with the Nigerian government to suppress resistance to oil development in the Ogoni Niger River Delta.⁶⁰ The plaintiffs sought damages under the ATS. The defendants called for dismissal based on two arguments: that no norm exists between nations to hold corporations liable for widespread abuses and that international law is a more convenient forum to issue penalties upon non-state actors for international crimes.⁶¹

Instead of ruling on the circuit split, the Supreme Court chose to address the case in a different light. *Kiobel* set the standard that the ATS does not apply extraterritorially. That is, potential human rights lawsuits must have some connection to the United States to be considered under the ATS. In the majority opinion, the Court, referencing the French ambassador incident,⁶² reasoned that the presumption against extraterritoriality exists to protect against “unintended clashes between our laws and those of other nations which could result in international discord” and to avoid “unwarranted judicial interference in the conduct of foreign policy.”⁶³ Additionally, the Court held that the ATS does not recognize claims that are solely filed by foreign citizens against foreign citizens, based solely on extraterritorial conduct, or if the defendant has a mere presence in the United States.⁶⁴ Yet, its conclusion creates an exception to those restrictions, noting that claims that “touch and concern the territory of the United States . . . with sufficient force” will “displace the presumption against extraterritoriality.”⁶⁵ The phrase “touch and concern . . . with sufficient force” was not further defined, leaving another puzzle for ATS legislation.⁶⁶

Sosa and *Kiobel* are, as of publication, the only two Supreme Court decisions that have covered and clarified the parameters of the ATS’s jurisdiction, yet both opinions only

⁵⁹ *Kiobel v. Royal Dutch Shell Petroleum Co.*, 133 S.Ct. 1659, 1662 (2013).

⁶⁰ *Id.*

⁶¹ *Id.* at 1665.

⁶² Breyer, *supra* note 11.

⁶³ *Kiobel*. *supra* note 59, at 1664 (majority opinion) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1784 (2014)

added to the confusion over what qualifies as a viable claim under the ATS. A third case, *Jesner v. Arab Bank, PLC*, was accepted for oral argument and debated in October 2017. The suit deals directly with the core question *Kiobel* ignored earlier: whether the ATS forecloses corporate liability. While a decision has not yet been issued as of the printing of this law review, *Jesner* will likely also be a narrow decision with regards to corporate liability. The transcript of the oral argument heavily suggests that a “two-step test” will be considered for ATS cases: first, whether an acceptable norm is being violated under international law (and whether corporations are part of that scope of liability), and second, whether that norm is specific, universal, and obligatory (the *Sosa* test) to warrant a federal ATS claim.⁶⁷ Yet, the mere discussion of a so-called “Jesner Two-Step Test” implies a narrow decision, where the specific *Jesner* case will either succeed or fail to meet its conditions, but the door will be left ambiguously open for other cases to test its limits.⁶⁸

III: ATS Ambiguities That Demand Clarification

For the near future, the jurisdiction that the ATS affords will be somewhat ambiguous and ill defined, with *Sosa* and *Kiobel* providing some guidance in the types of claims that do not qualify for consideration. Yet, those two decisions also are ambiguous in their implications. *Sosa*, for example, restricts torts accepted under the ATS to those that were common in the 18th century yet also leaves the door open for others, so long as one can prove that they were specific, obvious, and universally enforced.⁶⁹ *Kiobel* limits the jurisdiction of ATS claims to those that originate in the United States but grants consideration to issues that “touch and concern” the country, a phrase that welcomes a variety of different interpretations.⁷⁰

⁶⁷ William Dodge, *Oral Argument in Jesner v. Arab Bank: Gimme Two Steps?* JUST SECURITY, October 13, 2017 (noting that *Jesner* “may not be the ideal case” to consider a broad approach to corporate liability, and that “it would be better to clarify” the nature of potential tests for the statute to operate.

⁶⁸ *Id.*

⁶⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-725 (2004).

⁷⁰ See Ralph Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's Filartiga*, 89 NOTRE DAME L. REV. 1695, 1707-1716 (2014) (outlining numerous types of cases that may “touch and concern” sovereign nations, including where a national of the state committed an egregious act, a company affiliated with the state committed a violation of international law, or if a grave violation of international law, regardless of the nationality of the perpetrator, occurs. The various types of cases presented indicate a high level of ambiguity among legal scholarship over what exactly the phrase can apply to.)

It is unlikely that the Supreme Court will issue a comprehensive interpretation of the ATS in the near future—the precision the Court has shown in previous opinions demonstrates its caution with the potential implications of any sweeping opinions.⁷¹ But by remaining nuanced and narrow in its decisions, the Court has failed to clarify four core controversies that lie at the heart of interpreting the statute from textual issues to what torts qualify as violations of the law of nations to the grounds on which the United States has to hear international ATS cases and finally to liability concerns, in the context of foreign official immunity and the United States government.

A. Supreme Court Text-Specific Controversies: Sosa and Torts that Violate the Law of Nations

The first ATS controversy that warrants clarification is what violations plaintiffs can assert under the statute. *Sosa* provides some guidance. As mentioned earlier, it limits all violations that are to be considered under the ATS to those that existed and were widely accepted at the time of the statute's creation in the eighteenth century.⁷² Yet it also allows for other norms to be accepted, so long as they can be proved to be specific in description, obligatory in enforcement, and universal in acceptance.⁷³

Without that second clarification, the ATS would be limited to a very specific set of abuses. Case law from the 1700s provides that around the time of America's founding, there were three established violations accepted under the statute: assaulting a foreign dignitary, piracy, and violations of safe conduct.⁷⁴ In fact, it is the belief of some scholars that these are the *only* cases that should be offered jurisdiction under the ATS.⁷⁵ However, various court decisions have expanded upon that ground—*Filártiga*, *Sosa*, and *Kiobel* all considered ATS violations that were beyond those original three abuses, extending to premeditated murder (*Filártiga*), kidnapping (*Sosa*), and violent suppression of peaceful speech (*Kiobel*).⁷⁶

⁷¹ *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1016 (7th Cir. 2011) (noting that the Court's discussion of actionable ATS claims "is best understood as the statement of a mood—and the mood is one of caution").

⁷² *Kiobel*, *supra* note 59, at 1659.

⁷³ *Sosa*, *supra* note 69.

⁷⁴ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813–15 (D.C. Cir. 1984) (Bork, J., concurring).

⁷⁵ See Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 481–83 (1995) (arguing that premeditated murder, kidnapping, and suppression of peaceful speech were not all considered to be in the international framework of universally reprehensible and equally punishable actions at the time of the creation of the ATS, meaning that the statute's jurisdiction has expanded).

⁷⁶ See *Filártiga*, *supra* note 25; *Kiobel*, *supra* note 59; and *Sosa*, *supra* note 69.

Indeed, abuses beyond those that were established in the 1700s have been accepted for review under the ATS. But what is the boundary on those abuses? In the aftermath of *Filártiga*, lower courts have ruled that these crimes can include torture, degrading treatment of prisoners, summary execution, genocide, forced disappearances, war crimes, and crimes against humanity.⁷⁷ With very little literature from the 1700s to confirm that these were all indeed *specific, obvious, and universal* abuses around eighteenth-century civilization, courts have been forced to make their own judgments and assumptions as to which crimes were morally reprehensible and universally shunned, creating significant disagreements among courts.⁷⁸

There is also a growing number of scholars who believe that the ATS endorses a continuously evolving list of statutes, allowing federal courts to adjust and recognize claims for modern human rights violations. Most of these claims are based on textual and linguistic considerations. Primarily, scholars point to the ambiguity of the statute when it defines actionable torts as those “in violation of the law of nations” instead of providing a precise list of violations at the time.⁷⁹ The Framers, according to this line of thinking, understood that what they considered to be modern international law was very different from previous renditions of it and that, in the future, there would be additional variations as well.⁸⁰ By choosing to use broad language to define these terms, Congress may have intended for “violations of the laws of nations” to have an evolving meaning. Such an interpretation, then, would include crimes against humanity, genocide, and other rights violations prohibited under international norms.

B. Supreme Court Text-Specific Controversies: *Kiobel*’s “Touching and Concerning With Force”

Kiobel addressed another controversy that comes from ATS ambiguity: what standards must abuses meet to dismiss concerns of extraterritoriality? The opinion provides a very narrow guide as to what *does not* apply, as *Kiobel* was not awarded claims because neither party “touched or concerned” the United States in a significant way.⁸¹ The plaintiffs in *Kiobel*

⁷⁷ See *Hilao v. Estate of Marcos*, 103 F.3d at 772; *Kadic v. Karadžić*, 70 F.3d 232, 244 (2d Cir. 1995).

⁷⁸ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813–15 (D.C. Cir. 1984) and *Kadic v. Karadžić*, 70 F.3d 232, 244 (2d Cir. 1995) (circuit split over whether foreign states and their respective governments can be held liable under the ATS).

⁷⁹ See William S. Dodge, *The Paquete Habana: Customary International Law as Part of Our Law*, INTERNATIONAL LAW STORIES 175, 194–96 (John E. Noyes et al. eds., 2007).

⁸⁰ The Records of the Federal Convention of 1787, 615 (Notes of James Madison).

⁸¹ *Kiobel*. *supra* note 59 at 1662.

were not American citizens and most had never been to the United States. And Royal Dutch Shell, while having an American company (Shell Inc.), did not meet the Justices' standards of "touching and concerning the United States."⁸² These judgments create a simple inference: in order for something to be considered as "touching and concerning" with force, an appellant or respondent must have some significant tie to the United States.

The Court gave two reasons as to why maintaining extraterritoriality was crucial (and why only matters that touch and concern the United States with force dismiss it). The first regarded foreign affairs: respecting extraterritoriality helps "protect against unintended clashes between our laws and those of other nations which could result in international discord" and to avoid "unwarranted judicial interference in the conduct of foreign policy."⁸³ In essence, claims that originate in foreign countries have the potential to damage foreign relations, and thus the matter must be so pressing that it outweighs such concerns. The other reason went back to the tale behind its foundation: the assault of French diplomat François Barbé-Marbois.⁸⁴ The majority stressed that there is nothing in the ATS' legislative history that suggests it was meant to act as a means for the United States to meddle with other nations' affairs, instead emphasizing the need to avoid international friction.⁸⁵ This created the conclusion that extraterritorial claims were not included in the Framers' intentions and thus are unable to qualify for jurisdiction under the ATS without "touching and concerning" the United States.⁸⁶

However, with little clarification on what *does* qualify for an ATS claim, the majority opinion fails to provide clarity on which abuses actually concern the United States and warrant jurisdiction under the ATS. Justice Breyer gives a brief framework in his concurrence, and while not the majority opinion, it does provide a potential insight into what future ATS-based rulings may include. Breyer wrote that three categories fit under international law and warrant ATS jurisdiction: when the offense occurs on U.S. soil, when the defendant is a U.S. national, or when either the defendant or plaintiff have successfully sought safe haven (or escape from prosecution or violence) in the United States. Breyer's concurrence notably does *not* grant automatic jurisdiction under the statute to other, more-

⁸² *Id.*

⁸³ *Id.* at 1669.

⁸⁴ *Id.* at 1666-1667.

⁸⁵ *Id.*

⁸⁶ *Id.*

common groups of ATS claims. These include claims which are filed by foreign citizens, filed against foreign actors, based solely on extraterritorial conduct, or where the defendant has a mere presence in the United States. Breyer's opinion, while not that of the Court's, offers a potential, albeit liberal and optimistic, remedy to the confusion.

Of course, the ambiguity of the interaction between the ATS and extraterritoriality can remain – such has been the status quo for the past five years. While *Kiobel* restricts federal jurisdiction over claims of human rights abuses, litigants still have the ability to seek justice in state courts (assuming a U.S. state has a connection to a plaintiff or defendant) or in their native countries, if their legal systems are fair and adhere to international customs.⁸⁷ But by failing to allow federal jurisdiction over these claims, the Supreme Court has created a medium with similar qualities to those that helped necessitate the creation of the statute: where without a clear federal standard and venue for foreigners to press charges, matters could then be litigated in state courts, where a dizzying array of unique state laws, norms, and interpretations await.

C. Clarifying Potential Defendants: Jesner and Corporate Liability

The other core concern that surrounds ATS litigation, beyond *what* can be litigated, is *who* exactly can be named in such lawsuits. The next two sections will cover two of the more controversial aspects of the statute's litigation: corporations and governments.

Corporate liability has always been a controversial topic under the ATS. Before *Jesner* was heard in October 2017, *Kiobel* was granted certiorari because of a circuit split over the interaction between corporations and the ATS, and, as mentioned earlier, the Justices chose to address that case using an extraterritoriality lens instead. There are two landmark circuit court cases that both independently appear to hold that corporations can be held liable under the ATS. In *Kadic v. Karadžić* (1996), the Second Circuit ruled that a non-state actor could be held liable when committing crimes that were unrelated to a state's functions, including genocide, war crimes, and crimes against humanity; or when complicity acting with a state to commit such abuses, including torture and summary execution.⁸⁸ For this case, this meant

⁸⁷ Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013) (presenting that pathways for justice for aliens exist beyond the ATS, most notably in U.S. state courts for crimes committed in the United States, in native countries' court systems for abuses outside of America, and potentially supranational courts).

⁸⁸ *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995).

that survivors of the Bosnia-Herzegovina genocide had jurisdiction to sue Radovan Karadžić, the leader of the Bosnian Serbs, under the ATS.⁸⁹

Later, in 2002, the Ninth Circuit granted *Doe v. Unocal* the right to proceed to a trial – affirming that ATS claims against corporations were legitimate and admissible.⁹⁰ (*Doe* involved a lawsuit over human rights violations committed in Burma by the Unocal Corporation). As the case proceeded onward, the Ninth Circuit held that Unocal could be held liable for aiding the Burmese military forces in torturing and executing citizens and forcing political prisoners into labor camps.⁹¹ While *Doe* was ultimately settled out of court (partially by the *Sosa* oral argument), by allowing the case to proceed, the Ninth Circuit panel implied that at least in its view, corporates could be held liable under the statute.

A ruling that the ATS allows for claims that encompass corporate liability would be legally damaging to many United States businesses. At minimum, it would subject a wide variety of companies that exploit others overseas to potentially lengthy lawsuits and expensive settlements. In 2002, in the immediate aftermath of the *Doe* holdings, investors on Wall Street were worried about the impact that “large human rights damage awards might have on the corporations in which they invested.”⁹² The economic impact of allowing corporations to be held accountable under the ATS would be large and potentially damaging to economics across the nation.

D. Clarifying Potential Defendants: Government and Government Officials

A large number of ATS claims have sought to hold government officials liable, especially those in charge of massive human rights abuses. The first major complication with prosecuting foreign nationals under the ATS is foreign immunity. No international law or treaty exists that establishes a clear agreement on legal immunity across state lines; those that have attempted, including the International Criminal Court (which ignores immunity when hearing human rights cases) and the United Nations (who have failed to pass legislation

⁸⁹ *Id.*

⁹⁰ *Doe v. Unocal Corp.*, Nos. BC 237980, BC 237679 (Cal. Super. Ct. Sept. 10, 2002).

⁹¹ *Doe I v. Unocal Corp.*, 395 F.3d 932, 962–63 (9th Cir. 2002).

⁹² David Corn, *Corporate Human Rights*, THE NATION, July 15, 2002 (Noting that as long as ATC lawsuits continue, all corporations, domestic and international, “have to take notice. A plaintiff’s win would compel transnationals to consider bringing their activities overseas into sync with international human rights standards.”)

regarding international immunity) usually become shells or *faux* judiciaries that have little enforcement authority.⁹³

Without any international pact, the United States has sought its own method for granting foreign government nationals immunity. The Foreign Sovereign Immunities Act (FSIA), enacted in 1976, conditionally granted immunity to foreign states and their agencies and representatives. Yet FSIA rarely applied to ATS claims because egregious human rights abuses were not entitled to immunity under the legislation. In *Doe v. Liu Qi*, an ATS case involving a Chinese official's acts of torture and arbitrary detention, the District Court ruled that foreign immunity was not grantable because the acts themselves were violations of not only international norm but also Chinese law.⁹⁴ This ruling came despite the Chinese government officially submitting a brief calling for Qi to be granted immunity.⁹⁵

The Supreme Court has also weighed in on the FSIA with regards to foreign officials. In *Samantar v. Yousuf*, the Supreme Court reviewed whether the FSIA applied to foreign officials (and not just agencies, subsidiaries, and representatives of foreign governments).⁹⁶ In a unanimous decision, the Court held that FSIA did not apply to foreign government officials but that international common law could potentially grant immunity instead on a case-by-case basis.⁹⁷

While the status of foreign nationals as defendants under the ATS is undetermined, immunity is easily (and controversially) granted to U.S. government officials. In the aftermath of the September 11 attacks, courts saw a wide swath of lawsuits holding officials from President Bush to Secretary of State Powell at least partially responsible for damages like mistreatment of detainees, torturing others, and giving weapons to terrorist actors.⁹⁸ While U.S. officials themselves are not automatically given immunity, the Westfall Act (1977) allows the government to substitute itself in litigation (except for Constitutional claims) involving a government official if such official engaged in actions as part of their

⁹³ Rome Statute of the International Criminal Court art. 27, July 17, 1997, 2187 U.N.T.S. 90, U.N. Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, G.A. Res. 59/38, U.N. Doc A/59/38.

⁹⁴ *Doe v. Qi*, 349 F. Supp. 2d 1258, 1283–88 (N.D. Cal. 2004).

⁹⁵ Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits at 3, 5, attached to Notice of Filing of Original Statement by the Chinese Gov't, *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

⁹⁶ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2279 (2010).

⁹⁷ *Id.* at 2292–2293.

⁹⁸ Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 175–79, 222–23 (2006).

employment.⁹⁹ Effectively, through substitution, the official is dismissed from the lawsuit, and the government, which is swapped in, receives automatic protection under the presumption of government immunity in federal court cases. It is unlikely that the government would *ever* expose itself to be defendants of any ATS cases, though it bears consideration as to how hypocritical it appears in blocking off any opportunities of such a case occurring.

IV: Sketching the Limits of a Framework that Clarifies the ATS

It is incredibly unlikely that the boundaries of the ATS's jurisdiction will ever be fully detailed. The Supreme Court's caution in handling cases regarding the statute is evidenced by refusing to acknowledge it for twenty years before a nuanced *Sosa* decision, changing its original question in *Kiobel*, and more recently, implying a narrow, procedural ruling in *Jesner*. The Court's unwillingness to resolve the broader issues of the ATS appears to reflect its refusal to issue large, sweeping changes in international policy; instead choosing to take smaller bites at clarifying specific scenarios under the legislation.

However, inaction is an action itself, and the lack of a clear standard for applying the ATS creates a massive gap in the realm of human rights protections. Instead, a permanent solution to resolving the statute's ambiguity may come from Congress, which can amend the ATS or dissolve it completely. Indeed, past Congresses have passed various pieces of legislation that have clearly defined the rights and boundaries of various entities to sue perpetrators, albeit in far more specific and limited forms.

In 1992, Congress passed the Torture Victim Protection Act (TVPA), a law that granted U.S. citizens and aliens the right to sue an individual for torture or extrajudicial execution with very precise limitations.¹⁰⁰ To classify as a TVPA claim, a violation must be committed under "actual or apparent authority, or color of law, of any foreign nation."¹⁰¹ The TVPA has two important distinctions from the ATS: it clearly identifies two specific causes of action—torture and extrajudicial execution—that would automatically trigger its

⁹⁹ Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679 (2006) ("Westfall Act") (allowing government officials to be removed from liability if, under a specific set of circumstances, alleged crimes occurred during an official's duties as an employee of the United States Government. In turn, the United States Government receives an automatic presumption of government immunity in federal court cases.)

¹⁰⁰ 28 U.S.C. § 1350 note (2006).

¹⁰¹ TVPA, 18 U.S.C. § 1350 note, § 2(a).

application. Perhaps more importantly, it was written in a way that only targeted foreign bodies and made domestic entities, such as the Federal Bureau of Intelligence, members of the Executive Branch, or the Central Intelligence Agency, immune from its needling, preventing the possibility of foreigners suing the United States for torture-based claims.

Two years later, Congress enacted the Anti-Terrorism Act (“ATA”), giving a U.S. citizen who was “injured in his or her person, property, or business by reason of an act of international terrorism” the right to sue for losses.¹⁰² Like the TVPA, the ATA clearly defines its limits: only U.S. nationals may claim its jurisdiction and international terrorism itself is clarified to be a violent criminal act that is either committed internationally or “transcends national boundaries” and “appears intended to intimidate or coerce” the general public or members of a government.¹⁰³

Finally, in 1996, the legislative branch amended the Foreign Sovereign Immunities Act (“FSIA”), creating an exception to foreign state immunity that allows civil suits against countries designated as official state sponsors of terrorism for specific despicable acts.¹⁰⁴ The acts specified included torture, aircraft sabotage, extrajudicial killing, hostage-taking, or the acquiring of materials required to execute the aforementioned acts (and commissioning the actual crime to a third-party actor).¹⁰⁵

All three of these specifications follow the same general trend. They all have an incredibly limited scope, granting causes of action for very specific, carefully defined acts of terrorism, execution, or torture. Their careful wording limits potential suits to those that target foreign entities, granting immunity to the United States. There are temporal and legal requirements to qualify for jurisdiction: all three acts contain statutes of limitations and require the exhaustion of domestic remedies before filing in federal court. Most importantly, their creation and passage during a wave of anti-terrorism, and within an elected legislative body, contributed greatly to their passage and noncontroversial acceptance among the American population and media.

The success of the TVPA, ATA, and FISA Amendment as legislative changes for human rights abuses provides a clear framework for how the ATS could be revised if Congress ever took such clarifications. Amending the ATS in a similar fashion to these three

¹⁰² 18 U.S.C. § 2333(a) (2006).

¹⁰³ 18 U.S.C. § 2331(1) (2006).

¹⁰⁴ 28 U.S.C. § 1605(a) (2006).

¹⁰⁵ *Id.*

more recent amendments, with guidance on specific causes of action, the implementation of statutes of limitations and an attempt of other judicial resolutions, and a restriction on lawsuits for only foreign actors, would appear reasonable. Yet, even this restrictive interpretation of the ATS still leaves open the major concerns attributed to supporters of a “narrow” reading: diminished relations with foreign nations, frustration by domestic corporations over continued restrictions, and a limitation on labor practices that remain efficient by using exploitation to reduce cost margins. Ultimately, without a resolution on the issue of corporate liability or what cases “touch and concern” the United States enough to warrant ATS jurisdiction, the statute will remain ambiguous in application.

Conclusion:

So long as the textual ambiguities described above remain, the ATS can only be a limited tool in the fight for global human rights accountability. Each successful ATS claim, settlement, and victory—even if it claims no monetary damages—creates an additional data point toward advancing the cause of international human rights. They give voice and drive awareness toward the abuses of individuals in foreign lands. At minimum, their successes inspire other survivors of abuses to come forth and tell their story, shedding light on the overall human rights endemic.

Additionally, ATS claims have both provided the foundation for and been greatly strengthened by the global accountability movement for human rights. Despite pushback from major corporations and international actors, the expansion of ATS legislation (and similar laws in Europe) has created unprecedented efforts to prosecute those who violate human rights, with abused victims seeking accountability in both criminal and civil suits in domestic courts and international tribunals. They have inspired legislation from global actors committing to the fight against injustice and accentuated the impact that non-state actors can have in establishing global norms. Most importantly, they have provided at least some form of a check on exploitative corporations and abusive government officials, putting them on notice that there is a possibility they will be held accountable for abuses. With every successful ATS claim, the human rights community gradually increases awareness of the consequences of committing human rights violations across the world.¹⁰⁶

¹⁰⁶ Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

The complicated history of ATS litigation mirrors the strengths and weaknesses of international human rights laws and norms. While states and actors are happy to endorse human rights norms, they rarely create mechanisms to enforce them, and when those tools are created, they are so limited and nuanced that few use them. With *Fiártiga*, ATS legislation found its voice because it generated potentially enforceable judgments against defendants who were clearly guilty and wielded significant power. Yet any efforts to strengthen the enforcement of these norms—via the ATS or other mechanisms—are strong-armed by corporations and anti-globalists who promote less regulation and enforcement. As a whole, the ATS has never been what its supporters or opponents have wanted it to be. It isn't powerful or weak. It is simply a modest effort to provide some accountability for issues that are a "*violation of the law of nations*" - interpretable as human rights violations that are considered universal in recognition, acceptance, and punishment. So long as no other options are offered for victims and survivors of human rights abuses to claim redress, the ATS will continue to be used as a tool to obtain justice and grant voice to the oppressed around the world.

Patent Obviousness: An Incorrect Federal Circuit Ruling for Apple Inc. and Samsung Electronics Co.

Alaina Pak

“[N]onobviousness attempts to measure an even more abstract quality than novelty or utility: the technical accomplishment reflected in an invention. This requirement asks whether an invention is a big enough technical advance; even if an invention is new and useful, it will still not merit a patent if it represents merely a trivial step forward in the art. This is why nonobviousness is the final gatekeeper of the patent system.”¹

-Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*

Introduction

United States patent law is derived from Article 1, Section 8, Clause 8 of the United States Constitution and gives Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”² The first patent system came to life in 1474 through the Venetian Senate and has developed alongside innovation and economic competition

¹ Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 809, 812 (1988)

² U.S. Const. art. I, § 8, cl. 8.

throughout many pinnacle periods,³ including the Industrial Revolution.⁴ The theory behind the patent law system is that inventions are difficult to regulate as public goods because, without such a system, countless inventions could be readily reproduced for undeserving profit. Thus, patent protection gives people the financial incentive to continue creating and investing in new inventions.⁵

A patent is a proprietary right to exclude that is granted by the Federal Government.⁶ To be granted a patent, inventors must first file an application with the United States Patent and Trademark Office (USPTO), which determines if the claimed invention is patent eligible.⁷ The general requirements are that the invention comprises patent eligible subject matter, is useful, is novel, is non-obvious, and is sufficiently described in the application.⁸ The non-obviousness requirement is arguably the most crucial requirement for patentability because it evaluates the claimed invention's technical accomplishment or progress in the art.⁹ The progress aspect of patents embodies the very purpose of the patent system itself, as dictated by the U.S. Constitution.¹⁰ To better conceptualize this idea, imagine the ubiquitous smartphone structure. If a patent-seeking party today were, for example, to place the home button at the top half of the phone instead of at the bottom half and perhaps change the typically circular button with a square shaped one, this would likely be seen as lacking inventive step over existing technology and should ideally not be rewarded with patent rights. However, the addition of a portable wireless charging has been patented as a sufficiently inventive step,¹¹ and similarly focused patents will likely surface in the coming years. Overall, the patent law system has necessarily adapted and developed alongside technology because it has had to work with incrementally improving technology as it was invented and patented.

³ MARK A. LEMLEY ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2016 at 3-4 to 3-5 (Clause 8 Pub'l'g 2016).

⁴ H. I. DUTTON, *THE PATENT SYSTEM AND INVENTIVE ACTIVITY DURING THE INDUSTRIAL REVOLUTION 1750-1852* (1984).

⁵ Lemley, *supra* note 3, at 3-17.

⁶ *Id.* at 3-12 to 3-13.

⁷ *Id.*

⁸ *Id.* at 3-10 to 3-11.

⁹ *Id.*

¹⁰ U.S. Const. art. I, § 8, cl. 8.

¹¹ U.S. Patent No. 9,793,758 (issued October 17, 2017).

Here, in *Apple Inc. v. Samsung Electronics Co.*, the United States District Court for the Northern District of California addressed Apple's patent infringement suit alleging that Samsung infringed on three of its patents as well as Samsung's countersuit that Apple's patent claims are obvious and therefore invalid.¹² This Article will focus on the development and analysis of the non-obviousness requirement as it relates to a specific patent feature in *Apple Inc. v. Samsung Electronics Co.* in the United States Court of Appeals for the Federal Circuit (CAFC), en banc. Moreover, in the case of *Apple*, the CAFC failed to arrive at a suitable decision based on judicial precedent and sound reasoning. The CAFC is the exclusive appellate court that can hear or entertain appeals for patent cases.¹³

According to 35 U.S.C. §103, patents can exhibit obviousness if the invention would have been obvious to a person having ordinary skill in the art (PHOSITA) at the time of invention.¹⁴ Judicial law has, of course, expanded on this statutory groundwork and this will be discussed below. Other important terminology for understanding patent law in the context of this Article includes claims and prior art. Claims are the portion of the patent that describe the metes and bounds of the invention.¹⁵ Moreover, the assertions and arguments over everything from obviousness to infringement are directed to specific claim of a patent, rather than the patent as a whole. Prior art generally refers to the description of an invention that is available to the public or previously disclosed before the effective filing date of the patent.¹⁶ Prior art that is similar or identical to the patent at hand may play a role in arguing for that patent's novelty or obviousness. Specific cases of prior art are also commonly described as references when they are used to show a patent's lack of novelty.

Part I

A. Overview

This Article argues that the CAFC ruled incorrectly in the case of *Apple Inc. v. Samsung Electronics Co.* This Article will begin by addressing the court's choice to hear the case en banc. While this does not directly relate to the argument about Apple's obviousness claim,

¹² *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1038 (Fed. Cir. 2016) (en banc).

¹³ Federal Courts Improvement Act of 1982, P. L. 97-164, 96 Stat. 37, 28 U.S.C. Sec. 1295; *see* U.S. Const. art. I, §1

¹⁴ 35 U.S.C. § 102(a) (2012).

¹⁵ Lemley, *Supra* note 3, at 3-11.

¹⁶ 35 U.S.C. § 102(a) (2012).

it will establish the significance of this case's implications. Next, the analysis will cite case law to confirm that the majority should not have been able to rely on the reasoning that it provided to justify its holding. Moreover, the court incorrectly found patent '721 to be non-obvious by betraying precedent decisions regarding the motivation to combine as well as weighing secondary considerations to determine patent obviousness. Judicial precedent provides the United States law with certainty, practicality, and uniformity, so to betray precedent is to dismiss the pursuit of these qualities in the law. Finally, this Article will discuss the potential, and likely, repercussions of the *Apple* decision in terms of future patent validity standards as well as confusion in examination standards for the patent examiners of the USPTO.

B. *Procedural Background*

For brevity, the patents mentioned in this Article will be later referred to by their last three numbers. For example, patent 8,074,172 will be referred to as '172. In this case of *Apple Inc. v. Samsung Electronics Co.*, the United States District Court for the Northern District of California held that Samsung infringed Apple's patent numbers 8,074,172, 5,946,647, and 8,046,721.¹⁷ All of Samsung's requests for judgment as a matter of law were denied.¹⁸ If granted, Samsung's motion for judgment as a matter of law would have meant that the court would make the requested judgments before or despite a jury verdict, given that the existing evidence was not sufficient for a jury judgment.¹⁹

Patent '172 is directed toward an Apple autocorrect feature and patent '721 is directed toward an Apple swipe-to-unlock feature.²⁰ Patent '647 discloses a system and method for detecting structures and linking actions to those structures.²¹ This Article will almost exclusively focus on the decision surrounding Apple's '721 patent. Patent '721 raised disagreement between the district court and the CAFC about the patent's obviousness, which is a significant topic to cover and so is what this Article will primarily discuss. This Article also proposes that the CAFC did not appropriately weigh the information available in its decision. The '172 patent raised similar issues about obviousness and also dealt with

¹⁷ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

¹⁸ *Id.*

¹⁹ *See Friends of Animals v Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067-68.

²⁰ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

²¹ *Id.*

infringement, which would likely become redundant to analyze in light of the '721 patent. Furthermore, the majority's reasoning for the '721 patent non-obviousness is also reasonably representative of the reasoning for the '172 patent non-obviousness as well as analyzes factors that do not appear for the '172 patent.²² Patent '647, on the other hand, was part of litigation solely for inspection for infringement and would not add to the discussion of patent obviousness.

Samsung appealed numerous matters including the denial of their request for judgment as a matter of law of obviousness for Apple's patent '721.²³ The CAFC decision in *Apple* reversed the jury verdict for Samsung's infringement of patent '647 as well as reversed patents '721 and '172 non-obviousness.²⁴ This reversal was both because Apple failed to prove infringement of the '647 patent and because the court found that the '721 swipe-to-unlock feature and the '172 autocorrect feature were obvious based on prior art.²⁵

Given that the jury verdict for the '647 patent was found to have relied on independent research and evidence not on record at the CAFC,²⁶ the CAFC granted en banc. En banc, French for "on the bench," means a decision by a court with all of the judges present and participating.²⁷ The majority states that it also took the case en banc to "[a]ffirm [their] understanding of the appellate function...as requiring appropriate deference be applied to the review of fact findings."²⁸ Thus, in this case, we should expect the court's decision to play a clarifying role for the law and carry substantial weight in the future ways patent obviousness is analyzed.

C. Relevant Statute and Judicial Law

The Leahy-Smith America Invents Act (AIA) is a federal statute that was signed into law in 2011 and designed to reform the United States patent system.²⁹ One substantial example of this reform is that the law changed the United States patent system from first-

²² *Id.*

²³ *Id.*

²⁴ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *En Banc*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁸ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

²⁹ Ryan G. Vacca, *Patent Reform and Best Mode: A Signal to the Patent Office or a Step Toward Elimination?*, 75 Alb. L. Rev. 279, 280 (2011).

to-invent to a first-inventor-to-file system, thereby eliminating interference proceedings which existed to manage priority determinations for similarly timed inventions.³⁰ In accordance with post-AIA 35 U.S.C. § 103,

[a] patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102 (conditions for patentability; novelty), if the differences between the claimed invention and the prior art are such that the claimed invention would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.³¹

Again, patent claims are obvious and therefore no longer eligible for protection, and, in this case, invalidated if the invention would have been obvious to a PHOSITA at the time of invention.

Graham v. John Deere Co. was an infringement suit heard by the Supreme Court after disagreement over the validity of a patent between two circuit courts over a shock-absorbing device for plow shanks.³² The Supreme Court ruled that neither circuit court tested for obviousness correctly and the patent was indeed obvious, and therefore invalid under 35 U.S.C. § 103.³³ *Graham* established the standard that while the obviousness of an invention is based on underlying facts, it is ultimately a question of law, meaning that it must be answered by applying legal principles to the interpretation of the law.³⁴ *Graham* also outlines the factual inquiries for obviousness.³⁵ The factual inquiries articulated by the Court are: (1) Determining the scope and content of the prior art; (2) Ascertaining the differences between the claimed invention and the prior art; and (3) Resolving the level of ordinary skill in the pertinent art.³⁶ Further, objective evidence, also known as secondary considerations supporting non-obviousness, may include evidence of commercial success, long-felt but unsolved needs, failure of others, and unexpected results.³⁷

³⁰ Leahy-Smith America Invents Act, sec. 3, 125 Stat. at 285.

³¹ 35 U.S.C. § 103(a) (2012)

³² Lemley, *supra* note 3, at 3-58 to 3-59.

³³ *Id.*

³⁴ *See* *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1356–57 (Fed. Cir. 2012).

³⁵ *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966).

³⁶ *Id.*

³⁷ *Id.*

Even with the precedent from *Graham*, the question of what prior art can be allowed and used against a claim to show obviousness remains. Answering this question, *In re Bigio* established that,

[i]n order for a reference to be proper for use in an obviousness rejection under 35 U.S.C. 103, the reference must be analogous art to the claimed invention. A reference is analogous art to the claimed invention if: (1) the reference is from the same field of endeavor as the claimed invention (even if it addresses a different problem); or (2) the reference is reasonably pertinent to the problem faced by the inventor (even if it is not in the same field of endeavor as the claimed invention).³⁸

Moreover, the references used to show that a patent is obvious can be valid only if they are from a related field in relation to the invention in contest.³⁹

Prior to *KSR v Teleflex*, the “teaching, suggestion, motivation (TSM)” test was historically required in the CAFC.⁴⁰ It followed that if there was no explicit teaching, suggestion, or motivation to combine references, then the patent was not obvious.⁴¹ However, the Supreme Court established a more flexible standard for showing obviousness, including factors established in *Graham* and an “obvious to try” standard.⁴² The Court expressed its displeasure with the longstanding TSM requirement because of the inappropriate rigidity.⁴³ Moreover, the Supreme Court case *KSR v. Teleflex* made it easier to reject and invalidate patents based on obviousness. Now, obviousness can still be demonstrated despite a lack of explicit motivation to combine prior art references.⁴⁴

Other relevant cases from the CAFC and the Supreme Court include *George M. Martin Co. v. Alliance Machine Systems International LLC*, *Sakraida v. Ag Pro, Inc.*, and *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.* These cases set standards for weighing factors that may come into play during an obviousness dispute. *George M. Martin Co.* established that when the prior art and the claimed invention have only small differences, the secondary consideration of long-felt need holds little clout.⁴⁵ Thus, the Court gave more weight to the

³⁸ *In re Bigio*, 381 F.3d at 1325 (Fed. Cir. 2004).

³⁹ *Id.*

⁴⁰ *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418-19 (2007).

⁴¹ *Id.*

⁴² *Id.*

⁴³ R. Polk Wagner, *The Supreme Court and the Future of Patent Reform*, FED. LAW., Feb. 2008, at 35, 39.

⁴⁴ *KSR Int'l Co. v. Teleflex Inc.*, *supra* note 40.

⁴⁵ *George M. Martin Co. v. Alliance Machine Sys. Int'l LLC*, 618 F.3d 1294, 1304 (Fed. Cir. 2010).

inventive-step, or innovative contribution, of the patent over its secondary factors. *Sakraida* further specified that secondary considerations are directed to the inventive portion of the claimed invention, a detail that will come into play in the *Apple* case.⁴⁶ Finally, *Kinetic Concepts, Inc.* decided that obviousness is a question of law based on underlying facts.⁴⁷ Thus, the jury should be given deference for the factual matters, and then the determination of obviousness becomes a matter of law.⁴⁸

The Manual of Patent Examining Procedure (MPEP) is published by the USPTO and is used by patent attorneys, patent agents, and patent examiners.⁴⁹ While the MPEP is by no means a source of law, it does embody the source or reference for examination standards and guidelines that are used during patent prosecution based on the current standard. According to the MPEP, “[t]he weight to be given any objective evidence is made on a case-by-case basis. The mere fact that an applicant has presented evidence does not mean that the evidence is dispositive of the issue of obviousness.”⁵⁰

D. Holding

The CAFC affirmed the district court judgment—essentially disagreeing with its own previous decision—and found that Samsung infringed Apple’s patents ‘172, ‘647, and ‘721.⁵¹ Again, this Article will focus on the arguments surrounding Apple’s patent ‘721. This case was ultimately decided by a combination of jury deference and *Graham* factors.

The court found that the ‘721 patent, claiming a slide-to-unlock feature, was non-obvious and valid, as well as that Samsung infringed claim 8 of the ‘721 Apple patent,⁵² as shown below.

7. A portable electronic device, comprising:
 - a touch-sensitive display;
 - memory;
 - one or more processors; and

⁴⁶ *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 278 (1976).

⁴⁷ *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1356–57 (Fed. Cir. 2012).

⁴⁸ *Id.*

⁴⁹ *Critikon v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1257 (1997).

⁵⁰ MPEP 2141.01(a)

⁵¹ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

⁵² *Id.*

one or more modules stored in the memory and configured for execution by the one or more processors, the one or more modules including instructions:

to detect a contact with the touch sensitive display at a first predefined location corresponding to an unlock image;

to continuously move the unlock image on the touch-sensitive display in accordance with the movement of the detected contact while continuous contact with the touch-sensitive display is maintained, wherein the unlock image is a graphical, interactive user-interface object with which a user interacts in order to unlock the device; and

to unlock the hand-held electronic device if the unlock image is moved from the first predefined location on the touch screen to a predefined unlock region on the touch-sensitive display.

8. The device of claim 7, further comprising instructions to display visual cues to communicate a direction of movement of the unlock image required to unlock the device.⁵³

Samsung failed to present clear and convincing evidence to establish obviousness and invalidate Apple's claim.⁵⁴ Samsung had argued that Apple's patent claim 8 was invalid because it was obvious in light of the combination of two references—inventions called Neonode and Plaisant.⁵⁵ Neonode is an invention that discloses a “right sweep to unlock” feature and Plaisant is an invention that discloses a “slider toggle” that is described to be not a preferred methodology, but it does make the phone less likely to be unlocked inadvertently.⁵⁶ The majority claimed that the motivation to combine is question of fact.⁵⁷ Moreover, the jury found that a PHOSITA would not have been motivated to combine references.⁵⁸ This reasoning is one of the primary concerns in the *Apple* decision and will be discussed in subsequent sections.

The court also applied *Graham* factors to patent '721.⁵⁹ These included the secondary considerations to guard against hindsight: commercial success enjoyed by devices

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

practicing the patented invention, industry praise for the patented invention, copying by others, and the existence of a long-felt but unsatisfied need for the invention.⁶⁰ The court cited incidents of industry praise,⁶¹ cited commercial success and a survey of the slide-to-unlock feature value for commercial products,⁶² and determined that there was a long-felt need by the industry for this invention.⁶³

Part II

A. Taking the Case En Banc

The *Apple* case was the first time in 26 years that the CAFC had taken an obviousness case en banc.⁶⁴ While the court's decision to take the case en banc does not directly relate to the assessment of obviousness, it does suggest the significance of this case's implications. As the dissenting judges in *Apple* support, cases are traditionally accepted en banc if they contain a topic of "exceptional importance."⁶⁵ Here, the choice to hear the dispute en banc indicates the weight of this decision and area of patent law, the potential effect on patent prosecution, future directions, as well as its importance to the judges. This further bolsters the consequences of the court's decision, as will be discussed in the following analyses.

The majority made the appropriate decision to accept the case again, this time en banc. The majority argument was that they did not decide to hear the case en banc because they wanted to "decide important legal questions about the inner workings of the law of obviousness."⁶⁶ Rather, they did so "to affirm [their] understanding of [their] appellate function, to apply the governing law, and to maintain [their] fidelity to the Supreme Court's *Teva* decision."⁶⁷

⁶⁰ *Graham v. John Deere Co.*, *supra* note 35.

⁶¹ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1074 (Fed. Cir. 2016) (en banc) (Dyk, J., dissenting).

⁶⁵ *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1087 (Fed. Cir. 2016) (en banc) (Reyna, J., dissenting).

⁶⁶ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

⁶⁷ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

The procedural history also indicates that the case was taken again in order to correct the jury deference because the jury wrongly relied on extra-record evidence in reaching their decision.⁶⁸ Moreover, *Teva v Sandoz* held that “when reviewing a district court’s resolution of subsidiary factual matters made in the course of its construction of a patent claim, the CAFC must apply a ‘clear error,’ not a *de novo*, standard of review.”⁶⁹ The clear error standard of review is applied to a trial court’s factual findings.⁷⁰ Thus, another review in the CAFC was appropriate in this case.⁷¹

The dissenting judges, however, claimed that there was no need to take this case en banc,⁷² citing that there is usually supplemental briefing or arguments from parties including the USPTO first.⁷³ Additionally, the dissenting judges stressed that taking a case en banc must be “granted only when necessary to secure or maintain uniformity of the court’s decisions or when the proceeding involves a question of exceptional importance,”⁷⁴ but that this case, “neither resolves a disagreement among the court’s decisions nor answers any exceptionally important question.”⁷⁵ In his dissent, Judge Reyna argued, “it is difficult to understand how this case would satisfy the requirements for en banc review if the majority’s purpose were not to clarify the law.”⁷⁶ Here, however, the majority did in fact use this case to clarify the law in that they did not proceed consistently with *KSR* and the ruling will have significant impact on obviousness questions going forward. The decision to take this case en banc supports that the court had the intention of using this case ultimately to refine the obviousness area of patent law.

While this case was rightly accepted for en banc review, the decision unfortunately ended up making the matters at hand worse by rejecting judicial precedent and delivering a decision that will likely have future ramifications. The majority found that very minimal advances nonetheless demonstrated claim non-obviousness.⁷⁷ They also weighed motivation

⁶⁸ *Id.*

⁶⁹ *Teva Pharm., Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 835 (2015).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1063 (Fed. Cir. 2016) (en banc) (Prost, C.J., dissenting).

⁷³ *Id.*

⁷⁴ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 65.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

to combine as a matter of fact when it should have been weighed as a matter of law.⁷⁸ These majority findings contradict the precedents set in *George M. Martin Co.*,⁷⁹ as well as in *Kinetic Concepts, Inc.*, respectively.⁸⁰ Moreover, the *Apple* decision muddied the waters for determining patent claim obviousness. Because the case was reviewed en banc and en banc decisions may hold greater persuasive influences than other decisions,⁸¹ this decision in *Apple* to clarify patent obviousness law will likely be cited in future questions of obviousness. The detrimental effects of this decision, as discussed in the following implications section, will be exacerbated by its status as an en banc review.

B. *The Motivation to Combine*

Contrary to the majority reasoning in *Apple*, *KSR* held that evidence of a specific motivation to combine references is not required to prove obviousness.⁸² Thus, under *KSR*, the existence of a known problem solved by the combination of prior art references can render that combination obvious as a matter of law and without further evidence of a specific motivation to combine.⁸³

In *Apple*, the jury found that a PHOSITA would not have been motivated to combine the cited references, as will be outlined below.⁸⁴ Furthermore, in remaining true to the benchmark findings of *KSR*, this does not lead to the conclusion that the patent claim is not obvious,⁸⁵ as was wrongly decided here in *Apple*.⁸⁶

Apple's '721 patent included the slide-to-unlock feature.⁸⁷ The majority found that the prior art references called Neonode and Plaisant could be reasonably combined to anticipate the claimed invention in the '721 patent.⁸⁸ The motivation to combine the

⁷⁸ *Id.*

⁷⁹ *George M. Martin Co. v. Alliance Machine Sys. Int'l LLC*, 618 F.3d 1294, 1304 (Fed. Cir. 2010).

⁸⁰ *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, *supra* note 47.

⁸¹ See Second Circuit Courts Comm., *En Banc Practices in the Second Circuit: Time for a Change?* 5 (2011), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf. at 12

⁸² *KSR Int'l Co. v. Teleflex Inc.*, *supra* note 40.

⁸³ *Id.*

⁸⁴ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

⁸⁵ *KSR Int'l Co. v. Teleflex Inc.*, *supra* note 40.

⁸⁶ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

⁸⁷ *Id.*

⁸⁸ *Id.*

references, however, was a contested matter.⁸⁹ Again, even when the jury found that there was not a motivation to combine Neonode and Plaisant, it should not have meant that the patent claim is non-obvious, in accordance with *KSR*.⁹⁰ Additionally, the motivation to combine should not have been a factual inquiry for the jury to decide.⁹¹ The motivation to combine is a decision made based on a theoretical person having ordinary skill in the art and, here in *Apple*, this decision is in contradiction of the reasoning from *Kinetic Concepts Inc.* in that motivation to combine should ultimately be a question of law.⁹²

Moreover, the majority reasoning here in *Apple* contradicts the decisions in *Kinetic Concepts Inc.* and *KSR*. Whether the references, in combination, can encompass all elements of a claim should be a question of fact,⁹³ and the motivation to combine, if it is necessary to prove, should be a question of law.⁹⁴ Furthermore, the jury in *Apple* should not have decided if there was motivation to combine the references and the court should not have given the jury deference on this matter. Even so, the jury's conclusion that there was a lack of motivation to combine the references is not sufficient evidence to show non-obviousness.⁹⁵ Overall, the ruling not only failed to apply the relevant judicial law but also contradicted it.

C. Application of Secondary Considerations

The majority in *Apple* was also flawed in its reasoning regarding the application of secondary considerations.

The references Neonode and Plaisant were agreed to be within an analogous art to Apple's claimed invention,⁹⁶ thereby fulfilling the requirement for the references to be proper for use in an obvious rejection under 35 U.S.C. 103, according to *In re Bigio*.⁹⁷ The

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1051 (Fed. Cir. 2016) (en banc); see also *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1068 (Fed. Cir. 2016) (en banc) (Prost, C.J., dissenting).

⁹² *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, *supra* note 47.

⁹³ See *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1051 (Fed. Cir. 2016) (en banc); see also *Apple, Inc. v. Samsung Electronics Co., LTD.*, 839 F.3d 1034, 1068 (Fed. Cir. 2016) (en banc) (Prost, C.J., dissenting).

⁹⁴ *KSR Int'l Co. v. Teleflex Inc.*, *supra* note 40.

⁹⁵ *Id.*

⁹⁶ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

⁹⁷ *In re Bigio*, *supra* note 38.

next step in determining obviousness is deciding if a person having ordinary skill in the art would have thought the claimed invention to be obvious.⁹⁸ Neonode in itself discloses a touch screen mobile device with a swipe-to-unlock feature.⁹⁹ The Plaisant reference discloses a touchscreen toggle design including a slider toggle.¹⁰⁰ Samsung's expert, Dr. Greenberg, testified that a PHOSITA would find it natural to combine these references.¹⁰¹ This would solve the ubiquitous problem of pocket dialing.¹⁰² Apple's expert countered that a PHOSITA would not find it natural to combine these references because Plaisant refers to a different category of devices, devices mounted to walls.¹⁰³ This nuance, however, is thoroughly unconvincing of the obviousness issue since the analogous art characteristic of the references was never contested.¹⁰⁴

Thus, the *prima facie* case of obviousness was so strong that secondary considerations were not effective for non-obviousness.¹⁰⁵ Despite this, the majority placed significant weight upon the evidence of secondary considerations.¹⁰⁶ *George M. Martin Co.* established that, when prior art and the claimed invention only have small differences, the secondary consideration of long-felt need holds little clout.¹⁰⁷ *KSR* and *Graham* also kept the influence of secondary considerations light.¹⁰⁸ Therefore, a convincing secondary consideration should not instantly prove that the patent is valid, nor should it outweigh a minor difference between prior art and the claimed invention. Even the commercial success factor that the majority cited was not a sound survey to determine that success came from the claimed feature.¹⁰⁹ Furthermore, when using them, secondary considerations are directed to the inventive portion of the claimed invention.¹¹⁰ Meanwhile, to defend the '721 patent, the majority used secondary considerations not directed to the claimed inventive portion of

⁹⁸ 35 U.S.C. § 103(a) (2012)

⁹⁹ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 278 (1976).

¹⁰⁶ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 71.

¹⁰⁷ *George M. Martin Co. v. Alliance Machine Sys. Int'l LLC*, *supra* note 45.

¹⁰⁸ *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007); *see also Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

¹⁰⁹ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 71.

¹¹⁰ *Sakraida v. Ag Pro, Inc.*, *supra* note 104.

claim 8 (“the image associated with the slide to unlock feature”).¹¹¹ Overall, the majority decision that the Apple patent is not obvious was reached using secondary considerations that were unsound and given too much weight in consideration of the established precedent.

Part III

A. Lowered Bar for Non-obviousness

The first—and greatest—detrimental effect of the *Apple* decision is the lowered standard for non-obviousness.¹¹² If the government is to grant property rights to inventors, it should be reasonable and intuitive that their inventions are sufficiently inventive over what already exists in the world. The legal and economic systems should not reward, incentivize, or provide legal protection to merely minimal improvements. Thus, lowering the bar for non-obviousness moves judicial law in a damaging direction.

One of the more immediate and tangible consequences of a lowered non-obviousness bar is an exacerbated patent troll issue. The problems with patent trolls will be worsened because they may now have an easier time amassing and keeping patents with little inventive-step or contribution at all. This goes against the very heart of what a patent was created to protect, reaching back to the beliefs of James Madison and the reasons that the patent system was created.¹¹³ Patents should be contingent on true innovation and advancement for society through incentives – not about stockpiling effortless nuances in hopes of taking advantage of the patent system for a later payout.¹¹⁴ The ability or incentive to stockpile patents in this way shifts the focus from real progress to a fight over claiming technologies.

B. Reduced Clarity for Examiners

¹¹¹ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 64.

¹¹² *Id.*

¹¹³ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON, 1788, at 442-43 (Julian P. Boyd ed., 1956).

¹¹⁴ Lemley, *supra* note 3, at 3-17.

Again, a reference is analogous art to the claimed invention if: (1) the reference is from the same field of endeavor as the claimed invention, even if it addresses a different problem; or (2) the reference is reasonably pertinent to the problem faced by the inventor, even if it is not in the same field of endeavor as the claimed invention.¹¹⁵ However, the majority in *Apple* dismissed the Plaisant prior art reference for '721 because it is a different type of device (wall-mounted, not portable), despite its relevance to solving the same problem as that of the Apple.¹¹⁶

This demonstrates a contradiction that will likely cause an expansion of gray area for patent obviousness—a step backwards. These gray areas will lead to inconsistencies in patent grants, since examiners will not have clear and consistent guidelines for examining patents. This will also result in even more patent litigation, in which parties will inevitably contest patent obviousness, with still no clear or reliable evaluative measures in the courts. Obviousness is already a complicated area of patent law, and the *Apple* decision served to further complicate these matters.

Conclusion

Overall, this Article argues that the CAFC ruled incorrectly in the case of *Apple Inc. v. Samsung Electronics Co.* This Article addressed the court's choice to hear the case en banc and the significance of this case's implications. Next, the analysis confirmed that the majority should not have been able to rely on the reasoning that it provided to justify its holding that the Apple patent is non-obvious. First, the court used the jury conclusion that a PHOSITA would not have been motivated to combine Neonode and Plaisant to show non-obviousness. However, the jury should not have been able to make a decision on the matter of law to begin with. In the future, motivation to combine will likely remain a question of law based on reasoning in *Kinetic Concepts Inc.*¹¹⁷ But, if the courts progressively treat motivation to combine as a question of fact, obviousness will still ultimately be decided as a question of law.¹¹⁸ Next, the majority decision also relied on weighing secondary considerations inappropriately according to judicial precedent. Secondary considerations

¹¹⁵ MPEP 2141.01(a)

¹¹⁶ *Apple, Inc. v. Samsung Electronics Co., LTD.*, *supra* note 12.

¹¹⁷ *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, *supra* note 47.

¹¹⁸ *Sundance Inc. v. DeMonte Fabricating, Ltd.*, 550 F.3d 1356, 1365 (Fed. Cir. 2008).

should almost never hold the amount of clout that they did in *Apple*. They should be exactly what they are: secondary. For decades, even convincing secondary considerations have been treated as peripheral to the prima facie cases of obviousness, and a large change in this intuitive reasoning is improbable.¹¹⁹ However, the exact weighing of these factors has yet to take on a truly consistent form. Finally, this Article discussed future consequences of the *Apple* decision, including a lowered obviousness bar and increased gray areas for examination, as well as the reason for and importance of consistently progressing patent law. Regarding another CAFC obviousness decision, Judge Newman affirmed that “[i]t is time to remedy our inconsistent treatment of the procedures and burdens in applying the evidentiary factors of obviousness.”¹²⁰ As suits and countersuits over obviousness—notably including those between Apple and Samsung—continue into the next years, the CAFC will likely make a strong attempt to tackle the question of proper weight and procedure for secondary considerations, given the explicitly mounting concerns of CAFC judges.

KSR v. Teleflex was a step in the right direction because it eliminated the standard that just one factor (no explicit teaching, suggestion, or motivation to combine references) could prove that a patent was non-obvious.¹²¹ However, one critique of *KSR* is that, while it increased ways to argue for patent obviousness, it opened up a gap of indeterminacy with respect to the methodology that patent examiners and courts utilize to decide if a patent is obvious. Going forward, courts should remain true to *KSR* and keep established matters of law out of the jury’s hands, which the CAFC’s decision in this case failed to do, though there remains the open issue of the exact methodology for obviousness determinations.

Unfortunately, because of the nature of obviousness, many determinations will always need to be done on a case-by-case basis. This is not an exception to patent law, but rather a norm. While analyzing patents on a case-by-case basis does not sound ideal for efficiency, it is an inherent sign that patent law is maintaining its purpose. Each patent is theoretically an invention that is new to the world. Patent law must be applied to the new invention. It follows that the law will always need to adapt and be flexible to the technology that arises over time. Moreover, no set of rules or laws will ever be able to predict or account

¹¹⁹ See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007); see also *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

¹²⁰ *Merck Sharp & Dohme Corp. v. Hospira, Inc.*, 874 F.3d 724, 731 (Fed. Cir. 2017) (Newman, J., dissenting).

¹²¹ See *KSR Int’l Co. v. Teleflex Inc.*, *supra* note 40.

for the entire future of human innovation. Part of what makes patent law so difficult is that from prosecution to litigation, it is crucial to choose and use the most precise words in patent claims. This is extremely meaningful because the words make up the metes and bounds of what exactly is being granted the exclusionary right of a patent. Attorneys, inventors, experts, and juries will surely always be able to argue over the meaning and scope of words in the context of patent claim language. This is especially exemplified by claim construction hearings. Moreover, there is an inherent language limitation when it comes to patent claim construction, which is an additional reason why patent law will never be able to abide by a single set of stagnant rules. The future of patent law lies in our ability to be judicially consistent when possible and thoughtfully adapt the law to innovations of the time.

The Disenfranchised: A Disparately Impacted Group

Nora Baroukbian

“A man without a vote is in this land like a man without a hand.”
-Henry Ward Beecher

Introduction

All American citizens are granted the right to life, liberty, and due process. Not all inalienable rights are explicitly stated, but are rather “found to be implicit in the concept of ordered liberty.”¹ Such implied fundamental rights include: the right to marry,² the right to procreate,³ and the right to freedom of movement.⁴ Whether or not the right to vote is fundamental remains in dispute. Discerning its status is essential to confirming its level of protection under the law. As determined in *Korematsu v. United States*, laws that discriminate a suspect class or infringe on a fundamental right warrant strict scrutiny.⁵ After reviewing prior holdings of the Supreme Court, this article posits that the right to vote is fundamental, and *ipso facto*, should be reviewed under strict scrutiny, the highest level of scrutiny. Upon reviewing permanent disenfranchisement laws under the lens of strict scrutiny, this article proposes a less restrictive approach to permanent disenfranchisement.

There are several categories of disenfranchisement laws: permanent disenfranchisement of all people with felony convictions; permanent disenfranchisement of people with specific criminal convictions; voting rights restored upon completion of

¹ Palko v. Connecticut, 302 U.S. 319, 324-325 (1937).

² Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).

³ Skinner v. Oklahoma, 316 U.S. 535, 536-37 (1942).

⁴ United States v. Guest, 383 U.S. 745, 759 (1966).

⁵ Korematsu v. United States, 323 U.S. 214, 216 (1944).

sentence (including prison, parole, and probation); voting rights restored automatically after release from prison and discharge from parole; and voting rights restored automatically after release from prison.⁶ Iowa, Florida, and Kentucky permanently disenfranchise all people with felony convictions, unless the government approves restoration of those rights.⁷ Alabama, Arizona, Delaware, Massachusetts, Mississippi, Nebraska, Nevada, Tennessee, and Wyoming have state specific restrictions that permanently bar some criminals from re-enfranchisement, unless the government approves the restoration of an individual's rights.⁸

Although it may be presumed that a released convict has served his or her time and is ready to re-enter society, permanent disenfranchisement laws curb a convict's ability to successfully rejoin society as a positively contributing member; a burden that disproportionately affects African Americans. This "collateral consequence" or "invisible punishment" following the mark of a felony conviction punctures the core of an American's identity and undermines the notion that a released convict is ready to rejoin society.⁹ In 2016, 6.1 million voting-age Americans, or 2.5 percent of the U.S. voting-age population, were unable to vote in the presidential election due to felony disenfranchisement laws. In other words, one out of every 40 adults were unable to vote because of a felony conviction.¹⁰ Alarming, one out of every 13 voting age African Americans is disenfranchised.¹¹ African Americans account for 2.2 million of the 6.1 million total disenfranchised population. Voting age African Americans are over four times more likely to lose their voting rights than the rest of the voting age population.¹² In short, permanent disenfranchisement laws have a disproportionate effect on the African American population.

Considering the exponential growth of the disenfranchised population in recent years, this issue will continue to have far-reaching impacts on all of society. Arguably, such laws had the potential to have changed the results of a contested presidential election.

⁶*Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/sites/default/files/analysis/Criminal_Disenfranchisement_Map.pdf (last visited Jan.30, 2018).

⁷ *Id.*

⁸ *Id.*

⁹ MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 9-16 (2002).

¹⁰ Christopher Uggen, Ryan Larson & Sharon Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT, 3 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

¹¹ *Id.* at 2.

¹² Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT, 2 (2016), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

Specially, re-enfranchising the 600,000 former felons in Florida could have altered the 2000 presidential election, when George W. Bush won the state by only 537 votes, and ultimately the election.¹³ Part I of this article focuses on the legal claim to the fundamental right to vote. The right is grounded in the proper interpretation of the Constitution and prior holdings of courts. As such, the right to vote warrants strict scrutiny review. This paper argues that contrary to the United States Supreme Court's decisions in *Richardson* and *Hunter*, states that have permanent disenfranchisement laws need to demonstrate a compelling and necessary governmental interest for the regulation. Additionally, that regulation must be narrowly tailored to effectuate that goal. Part II measures permanent disenfranchisement laws against the requirements of the Equal Protection Clause and evaluates the law's racial impact using the framework the Supreme Court established in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*¹⁴ This paper finds that disenfranchisement laws generate further inequality by interminably stripping individuals of a fundamental right. Considering the Fourteenth Amendment's promise that "no State shall ... deny to any person ... the equal protection of the laws," this paper argues that Iowa, Kentucky, and Florida should reconsider relaxing the qualifications for restoration of the right by either implementing a restoration guideline or adopting a discretionary approach to determine matters on a case-by-case basis. Part III explores the social benefits of franchising former felons.

I. The Right to Vote

Voting is a fundamental aspect of our citizenship, and it is through this expression that a citizen is able to partake in our democratic government. A "government of the people, by the people, for the people" is conserved through voting.¹⁵ As early as 1886, the Supreme Court alluded to how the right to vote is "regarded as a fundamental political right, ... preservative of all right."¹⁶ Seventy-eight years later, when the right of suffrage was at stake

¹³ *Gore v. Harris*, 772 So.2d 1243, 1247 (Fla. 2000).

¹⁴ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) [hereinafter *Texas Dep't of Housing*].

¹⁵ Abraham Lincoln, *Gettysburg Address*, CORNELL UNIVERSITY LIBRARY, http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm.

¹⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

in *Reynold v. Sims*, the Supreme Court declared that “undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”¹⁷

Throughout history, disadvantaged groups have fought for and procured the right to vote by claiming it as a natural right. Beginning with the Civil War, a national movement commenced urging the extension of the right to vote to all races. The next suffrage movement sought to expand the right to vote to all sexes.¹⁸ Finally, the Constitution was amended to include the Fifteenth and Nineteenth Amendments to insure that a citizen’s right to vote could neither be abridged on account of race, color, or previous condition of servitude,¹⁹ nor sex.²⁰ One of the few disenfranchised groups remaining is composed of former felons.²¹ But, the Supreme Court has determined that states do not need to prove that their felony disenfranchisement laws serve a compelling state interest, owing to Section 2 of the Fourteenth Amendment.²² Section 2 of the Fourteenth Amendment allows states to deny the right to vote in cases of an individual’s “participation in rebellion, or other crime,” without it proportionally reducing the size of the state’s delegation in the House of Representatives.²³

However, if the Supreme Court reverses the right to vote as “the essence of a democratic society,” then, understandably, the permanent suppression of such a right ought to be considered undemocratic.²⁴ As Justice Marshall wrote in his dissent for *Richardson v. Ramirez*:

“Constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.” *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (CA9 1972). ...Accordingly, neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment nor that such disenfranchisement was specifically excepted from the special remedy of §2 can serve to insulate such disenfranchisement from equal protection scrutiny.²⁵

¹⁷ *Reynold v. Sims*, 377 U.S. 533, 562 (1964).

¹⁸ *Voting Rights: The Fight Continues Today*, VOTING RIGHTS MATTER, <https://votingrightsmatter.com>.

¹⁹ U.S. CONST. amend XV.

²⁰ U.S. CONST. amend XIX.

²¹ Jamin B. Raskin, *Lawful Disenfranchisement: America's Structural Democracy Deficity*, HUMAN RIGHTS MAGAZINE, Spring 2005, https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/spring2005/hr_spring05_lawful.html.

²² *Richardson v. Ramirez*, 418 U.S. 24 (1974).

²³ U.S. CONST. amend. XIV, § 2.

²⁴ *Reynold*, *supra* note 17 at 555.

²⁵ *Richardson*, *supra* note 22, at 77.

Justice Marshall noted that Section 2 of the Fourteenth Amendment, like all laws, should undergo constant re-examination in response to the needs of a changing society. The mere existence of a law should not be reason for its continued enforcement without question.

Voting is an indispensable right in which “no right is more precious,”²⁶ and “depriving citizens of a political right should only be undertaken for compelling reasons and only to the extent necessary to further those interests.”²⁷ Considering the pricelessness of our democratic freedom, grounded in the ability to vote, States should be required to measure disenfranchisement laws that permanently deny former felons suffrage against the requirements of the Equal Protection Clause. Infringement of a fundamental right triggers strict scrutiny review. When reviewing a law under the lens of strict scrutiny, a court first determines whether there is a compelling and necessary government interest for the law and then determines whether the challenged law is a narrowly tailored means of furthering those interests.²⁸

Permanent disenfranchisement laws raise the question: why do we treat former felons as second-class citizens when “the lifetime branding cuts against everything we believe about citizens having the power to overcome the errors of the past?”²⁹ The disappointing answer lies in the history of modern day disenfranchisement laws. Felony disenfranchisement laws were expanded in the 1860s and 1870s in response to reconstruction after the Civil War, as backlash to the Fifteenth Amendment, ratified in 1870.³⁰ Broad and sweeping disenfranchisement laws were adopted by states in order to exclude blacks from voting. During the Reconstruction Era, Jim Crow laws emerged in the South to exclude blacks from full social and political participation. Through the use of poll taxes, grandfather clauses, literacy tests, property taxes, and blatant intimidation, African Americans were denied the right to vote.³¹ Once new laws and protections outlawed such practices, disenfranchisement laws were strategically utilized to maintain power in the desired

²⁶ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²⁷ THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (1998).

²⁸ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800-801 (2006).

²⁹ JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VERSUS THE AMERICAN People* 38 (2003).

³⁰ Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES, (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html>.

³¹ George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851 (2004): 107.

hands of the wealthy, white elites.³² Southern states attuned their disenfranchisement laws to target offenses which were believed to be committed mainly by the black population.³³ “Among the disqualifying crimes were those to which [the Negro] was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man was as disposed as the Negro, were significantly omitted from the list.”³⁴

The same legal impositions and discrimination promoted by Jim Crow have been reintroduced upon labeling an individual a felon.³⁵ According to Michelle Alexander, author of *The New Jim Crow*, “as a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow.”³⁶ By restricting the political voice of certain populations within society, permanent disenfranchisement laws resemble methods implemented during the Jim Crow era.

Iowa, Florida, and Kentucky have codified the permanent disenfranchisement of former felons. The original text of the Iowa Constitution disqualifies any “idiot, or insane person, or person convicted of any infamous crime” from the privilege of voting for an elector. Section 5 was repealed in 2008 and substituted with, “a person adjudged mentally incompetent to vote or a person convicted of any infamous crime shall not be entitled to the privilege of an elector.”³⁷ In Florida, upon conviction of a felony, civil rights, including the right of suffrage, are suspended until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights by the governor.³⁸ Similarly, Kentucky disenfranchises those “convicted of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.”³⁹

Disenfranchisement laws, which strip millions of individuals of their precious right

³² W. E. Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT'S ROLE IN VOTING RIGHTS DISPUTES, 1845-1969* (1974).

³³ Pippa Holloway, ‘*A chicken-stealer shall lose his vote*’: *Disenfranchisement for larceny in the South, 1874-1890*, 75 *JOURNAL OF SOUTHERN HISTORY*, 931-62 (2009).

³⁴ Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 *YALE L.J.* 540 (Nov. 1993) (quoting FRANCIS B. SIMKINS, *PITCHFORK BEN TILLMAN*, *SOUTH CAROLINIAN* 297 (1944)).

³⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2011).

³⁶ *Id.* at 8.

³⁷ IOWA CONST. art. II, § 5.

³⁸ FLOR. CONST. art. IV, § 8.

³⁹ K.Y. CONST. § 145.

to vote, have been upheld as constitutional by the Supreme Court, in light of Section 2 of the Fourteenth Amendment of the Constitution.⁴⁰ In *Richardson v. Ramirez*, three individuals brought a class action suit against California's Secretary of State and election officials, claiming the state's disenfranchisement law violated their Fourteenth Amendment rights.⁴¹ The respondents had been convicted of felonies and completed their sentences and paroles, but were each refused registration to vote. The plaintiffs contended that the state had no compelling interest to establish voting restrictions permanently prohibiting ex-convicts from voting, only to be restored by court order or executive pardon. The California Supreme Court held that the law was unconstitutional. However, on appeal, the United States Supreme Court held that the state does not need to prove that its felony disenfranchisement laws serve a compelling state interest.⁴² The Supreme Court asserted that Section 2 of the Fourteenth Amendment allows for states to deny the right to vote in cases of an individual's "participation in rebellion, or other crime," without it proportionally reducing the size of the state's delegation in the House of Representatives.⁴³ Within their dissent, Justices Marshall and Brennan explored the motives for disenfranchisement. They concluded, "the Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance."⁴⁴ In an effort to avoid the loss of Southern representation and the resulting enfranchisement of African Americans, Section 2 of the Fourteenth Amendment was construed to be a "special remedy" of reduced representation to prevent African Americans from voting.⁴⁵

Eleven years later, in *Hunter v. Underwood*, the Supreme Court invalidated an Alabama disenfranchisement provision, holding that Section 182 of the Alabama Constitution violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁶ The Supreme Court found that a neutral state law does not violate the equal protection clause when it results in a racially discriminatory impact, however, proof of racially discriminatory intent or purpose amounts to a violation.⁴⁷ The Supreme Court notes that Alabama's disenfranchisement law

⁴⁰ *Richardson*, *supra* note 22.

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. CONST. amend. XIV, § 2.

⁴⁴ *Richardson*, *supra* note 22, at 73.

⁴⁵ *Id.* at 74.

⁴⁶ *Hunter v. Underwood*, 471 U.S. 222 (1985).

⁴⁷ *Id.* at 228.

was racially motivated, having been adopted at the Alabama Constitution Convention that was “part of a movement that swept the post-Reconstruction South to disenfranchise blacks.”⁴⁸

In spite of the Supreme Court’s decisions in *Richardson* and *Hunter*, a necessary and compelling state interest, narrowly tailored in the least restrictive way, should be required if a state infringes on the fundamental right to vote. Moreover, the racial impact of permanent disenfranchisement should not be ignored seeing that “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”⁴⁹ Applying permanent disenfranchisement laws to a framework for disparate impact claims, established in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, confirms the law’s racially discriminatory effects.⁵⁰

II. Disparate Impact Framework

The framework set forth in *Texas Department of Housing* reviewed housing disparate impact claims. Although voting laws are not equivalent to housing laws, if both practices result in a disparate impact, then both issues “create, reinforce or perpetuate” discrimination against a group of a protected class like race.⁵¹ As the Supreme Court held in *Anderson v. Celebrezze*, a law that “unnecessarily burdens the availability of political opportunity” is difficult to justify by the state. The framework for disparate impact claims, established in *Texas Department of Housing*, demonstrates how permanent disenfranchisement laws perpetuate discrimination and constrain the political opportunity of a racial group.⁵² Under a burden-shifting framework, the plaintiff must first demonstrate a *prima facie* showing of disparate impact. That is, the plaintiff “has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.”⁵³ After a plaintiff establishes a *prima facie* showing of disparate impact, the burden shifts to the defendant to “prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, non-

⁴⁸ *Id.* at 229.

⁴⁹ *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

⁵⁰ Texas Dep’t of Housing, *supra* note 14.

⁵¹ 24 C.F.R. § 100.500(a) (2014).

⁵² Texas Dep’t of Housing, *supra* note 14.

⁵³ 24 C.F.R. §100.500(c)(1) (2014).

discriminatory interests.”⁵⁴ In this case, since voting warrants strict scrutiny, the state must demonstrate an interest that is compelling and necessary, rather than substantial and legitimate. Lastly, the plaintiff must offer an alternative practice that could serve the government’s “the substantial, legitimate, nondiscriminatory interests” that would bear a less discriminatory effect.⁵⁵

In its previous application of a disparate impact framework, the Supreme Court prioritized the effects discriminatory practices rather than focus on discriminatory intent. In *Griggs v. Duke Power*, an employer required a high school education or the passing of a general intelligence test as a condition of employment.⁵⁶ The Supreme Court found that the employment requirements did not show a demonstrable relationship to the successful performance of the jobs for which the standards were required. Furthermore, the Supreme Court held that the requirements were used to disqualify black applicants at a substantially higher rate than white applicants. The Supreme Court maintained that the lack of discriminatory intent was irrelevant, and instead considered the consequences of the employment practices. “Tests could be used to measure job performance if they measured the person for the job and not the person in the abstract.”⁵⁷ Similarly, prior felony convictions fail to serve as a proxy between the “qualities of mind or character voters ought to possess.”⁵⁸ States should not be able to use conviction records to permanently disqualify voters when such records do not measure voting competency, but rather arbitrarily judge a felon. Similar to the intelligence tests, permanent disenfranchisement laws disqualify black at a higher rate than white voters and have no role in determining competency. For such reasons, permanent disenfranchisement laws should be reevaluated.

By applying the *Texas Department of Housing* framework to permanent disenfranchisement laws, this article will highlight the disproportionate dimensions of disenfranchisement, assert that such laws do not achieve a compelling and necessary governmental interest, and identify other alternatives.

A. Prima Facie Claim

⁵⁴ 24 C.F.R. §100.500(c)(2) (2014).

⁵⁵ 24 C.F.R. §100.500(c)(3) (2014).

⁵⁶ *Griggs v. Duke Power*, 401 U.S. 424 (1971).

⁵⁷ *Id.* at 424.

⁵⁸ Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150 (2004).

The challenged practice —permanent disenfranchisement laws— strips voting age blacks of their voting rights more than the rest of the voting population. As of 2010, blacks are incarcerated five times more often than whites. In five states —Iowa, Minnesota, New Jersey, Vermont, and Wisconsin— the disparity is more than 10 to 1.⁵⁹ Blacks constitute 13 percent of the U.S. population but 40 percent of the U.S. incarcerated population. On the other hand, whites (non-Hispanic) constitute 64 percent of the U.S. population but 39 percent of the U.S. incarcerated population.⁶⁰ As of 2014, the 6.8 million correctional population was composed of 2.3 million African Americans.⁶¹ In Florida and Kentucky, respectively 23 percent and 22 percent of African Americans are disenfranchised.⁶² As of 2014, 7.7 percent of black adults were disenfranchised, compared to 1.8 percent of the non-African American population.⁶³ The Sentencing Project estimates that three out of ten black men will be disenfranchised at some point in their lifetime. ⁶⁴ “The geographic concentration of mass incarceration translates the denial of individual felons’ voting rights into disenfranchisement of entire communities.”⁶⁵ As a result of mass imprisonment, an entire community’s political voice has been and will continue to be lost.⁶⁶

B. *Necessary and Compelling Interests*

The Supreme Court has addressed a similar issue regarding the loss of citizenship in the case of *Trop v. Dulles*. The Supreme Court asserted, “the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be.”⁶⁷ In 1944, United States Army Private Trop escaped from his stockade at Casablanca. He was convicted of desertion, sentenced to three years at hard labor, and dishonorably discharged from the army. Eight years later, when he applied for a passport, his application was rejected. Under Section 401 (g) of the 1940 Nationality Act, Trop lost his citizenship due to his conviction of desertion and dishonorable

⁵⁹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT, 3 (2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁶⁰ Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY, May 28, 2014, <https://www.prisonpolicy.org/reports/rates.html>.

⁶¹ *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/>.

⁶² *Felony Disenfranchisement in the United States*, THE SENTENCING PROJECT, 1 (2014), <http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>.

⁶³ *Id.* at 1.

⁶⁴ *Id.* at 2.

⁶⁵ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1292 (2004).

⁶⁶ *Id.* at 1291.

⁶⁷ *Trop v. Dulles*, 356 U.S. 93 (1958).

discharge.⁶⁸ The question posed to the Court is whether or not denationalization may be inflicted as a punishment under Section 401 (g).⁶⁹ In attempting to answer this question, the Supreme Court considered the penal versus regulatory nature of the statute. Justice Warren attempted to illustrate how Section 401 (g) serves a regulatory purpose by likening the law to the concept of felony disenfranchisement. Justice Warren offers a situation of an “ordinary felon” who commits a bank robbery, and upon committing the felony, loses his right to vote. Since the purpose of the statute is to “designate a reasonable ground of eligibility for voting, th[e] law is sustained as a non-penal exercise of the power to regulate the franchise.”⁷⁰ However, Justice Warren fails to identify the particular legitimate, non-penal purpose disenfranchisement serves.⁷¹ Ultimately, the Supreme Court held that denaturalization, as a punishment, is unconstitutional. Likewise, “to impose a permanent ban or to require an additional waiting period on the quintessential element of citizenship, the right to vote, is to deny that which is given by birth or achieved by naturalization — citizenship.”⁷² *Trop v. Dulles* calls into question whether felony disenfranchisement laws violate the same tenets of law or whether felony disenfranchisement laws serve a “regulatory” purpose, as Justice Warren superficially maintains.

Throughout history, the “central traditional non-penal [regulatory] justification for felon disenfranchisement” claims that “ex-offenders should not be permitted to vote because they lack the qualities of mind or character voters ought to possess.”⁷³ However, since *Richardson v. Ramirez* has ruled that states are not required to justify felon disenfranchisement laws, such claims of regulation hinged on competency have not been corroborated by scientific evidence. Blanket disenfranchisement laws were not created with precise classification. Such laws are an overly broad exclusion in an attempt to prohibit an ‘unpalatable’ group from voting. In a memorandum to the Court in support of the respondents in *Richardson*, the Secretary of State of California contends that:

it is doubtful . . . whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as

⁶⁸ *Id.* at 86.

⁶⁹ *Id.* at 94.

⁷⁰ *Id.* at 96-97.

⁷¹ Karlan, *supra* note 58, at 1152.

⁷² S. David Mitchel, *The New Invisible Man: Felon Disenfranchisement Laws Harm*, ESERVER (Dec. 2014), <https://bad.eserver.org/issues/2004/71/mitchell>.

⁷³ Karlan, *supra* note 58, at 1152.

any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.⁷⁴

When reviewing the benefits of permanent disenfranchisement, one turns up empty handed. There is neither a deterrent, nor rehabilitative value to disenfranchisement.⁷⁵ Rather, such laws operate as a “permanent political estrangement and civic incorrigibility.”⁷⁶ Additionally, these punishments “create a permanent diminution in social status of convicted offenders, a distancing between ‘us’ and ‘them.’”⁷⁷ For such reasons, if disenfranchisement laws were reviewed under strict scrutiny, Kentucky, Florida, and Iowa’s permanent prohibition on the right to vote would fail to serve compelling and necessary interest.

In 2016, Virginia, one of the few remaining states that permanently disenfranchised felons, reversed their stance. When asked why felons accused of violent crimes were re-enfranchised, Governor Terry McAuliffe of Virginia responded that “once you have served your time, once you have paid your debt to society, the judge [and] jury have determined what your sentence would be, [so] once you complete that, why should you not be back in?”⁷⁸ If the criminal justice system has determined that you have fully served your sentence, the law should not still be structured to treat you as a criminal, for life. Governor McAuliffe contended that a judge and jury determine what your debt is, and by completing your time, you are cleared of your debt for it has been paid off.⁷⁹ Understandably, the purpose of incarceration is to have felons redress their wrongs, be rehabilitated, and reintegrate themselves into society. How can one complete this final goal of reintegration if unable to vote?

If a law infringes on a fundamental right, the state must prove that the regulation serves a necessary and compelling governmental interest. Moreover, that law has to be a narrowly tailored means of furthering those interests.⁸⁰ Based on the Supreme Court’s decision in *Trop*, the Secretary of State of California’s memorandum, and Governor

⁷⁴ Memorandum of the Secretary of State of California in Opposition to Certiorari, in *Class of County Clerks and Registrars of Voters of California v. Ramirez*, No. 73-324.

⁷⁵ Raskin, *supra* note 29, at 38.

⁷⁶ *Id.*

⁷⁷ Mauer, *supra* note 9, at 19.

⁷⁸ *Felons Who’ve Paid Their Debt Deserve to Vote, Says Virginia Gov. McAuliffe*, PBS, Apr. 22, 2016, <https://www.pbs.org/newshour/show/felons-who-ve-paid-their-debt-deserve-to-vote-says-virginia-gov-mcauliffe>.

⁷⁹ *Id.*

⁸⁰ Winkler, *supra* note 28.

McAuliffe's remarks, this article reasons that the permanent deprivation of a citizen's right to the franchise does not satisfy a compelling and necessary governmental interest. Furthermore, such laws are not narrowly tailored in the least restrictive mean to further those interests.

C. Alternative Practice Serving the Same Interest

The federal government has imposed certain suffrage restrictions through the Fifteenth Amendment in order to prohibit voting discrimination on account of race, color, or previous condition of servitude; the Nineteenth Amendment in order to prohibit voting discrimination on account of sex; and the Twenty-Sixth Amendment in order to prohibit states from depriving any person who is at least 18 years of age of the right to vote because of age. But, owing to the Tenth Amendment, states have the reserved right to determine voting rights within their borders. Notwithstanding the fact that states may set their own suffrage qualifications, permanent disenfranchisement laws should be reevaluated for less restrictive approaches given that they fail to serve a compelling and necessary interest and withdraw political influence from a group of similarly situated people. These less restrictive practices may include approaches such as restoration guidelines and discretionary determination, as discussed below.

Contrary to popular belief, the disenfranchised population hardly represents persons currently in jail. In reality, 77 percent of the disenfranchised population consists of people who live in their communities, either under probation, parole, or completed sentence.⁸¹ Forty-seven states offer suffrage rights to former felons in a variety of ways. If Kentucky, Florida, and Iowa do not want to grant immediate restoration upon release, they can consider alternatives, such as:

1. *Restoration Guidelines*

Similar to how Congress enacted federal sentencing guidelines that impose mandatory minimum sentences for certain crimes, state legislatures can enforce their own version of voting restoration guidelines.⁸² Such guidelines will place a time cap on how long a felon can

⁸¹ Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT, 1 (2016), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

⁸² *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*, UNITED STATES SENTENCING COMMISSION 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

be disenfranchised after completion of their post-sentence supervision. These guidelines will take into account the offense level of the crime committed and the offender's criminal history. Upon taking these two factors into consideration, the table will specify a timeline within which the court may restore the convict's voting rights. The goal of such an initiative would be to alleviate the impact of indefinite disenfranchisement through narrowly tailored guidelines that would be applied consistently throughout the state. The benefits of restoration guidelines include reduced restoration disparities as well as a chance to reinstate former felons who may have been indeterminately barred from voting.

2. *Discretionary Determination*

If Kentucky, Iowa, and Florida believe that such issues pertaining to voting rights must be resolved on a case-by-case basis, then the states could take a more discretionary approach using the courts. In reviewing cases individually, several opinions should be collected and considered. First, a judge would hear the prison's advisory board recommendation upon the convict's release. Second, the judge would follow up with the convict's probation officer after a designated time recommended by the state. Supplemental recommendations could be submitted by an employer on behalf of the former felon. Once the judge has considered the facts pertaining to the specific individual, he or she could make an informed decision on whether or not reinstate the former felon's voting right. The discretion allotted to judges minimizes the indifference of a blanket prohibition. Ex-convicts will understand that the restoration of their right is conditional upon their good behavior, thereby motivating them to act in accordance with societal expectations. If a judge chooses to deny the former felon the right to vote, the former felon becomes eligible for reconsideration the following year.

The goal of such an initiative would be to give former felons something to strive for. A judge may conclude that he or she does not believe the former felon deserves the restoration of the right to vote because the probation officer has expressed concern of the individual's behavior, or

that the individual has not been complicit with certain duties. After the judge expresses such concern with the former felon, that individual would be able to modify his or her behavior accordingly. Similar initiatives encouraging individual assessments have been implemented in the workforce. In 2012, the Equal Opportunity Commission (hereinafter “EEOC”) issued an updated guidance on the use of criminal records in hiring practices. Employers have been instructed to inform applicants that they may be excluded from the hiring process because of past criminal conduct, providing the prospective candidate with “an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstance.”⁸³ The individual assessment takes into account the facts and context surrounding the offense, the age at the time of offense/release, employment history before/after the offense, rehabilitation efforts, and employment/character references.⁸⁴ While such efforts by the EEOC promote the assimilation of former felons into society, enfranchisement laws with similar goals have yet to be concertedly endorsed.

These two options serve as less restrictive alternatives than permanent disenfranchisement laws. Florida, Kentucky, and Iowa should reconsider the purpose of permanent disenfranchisement, pay heed to the voting disparities of their state, and bare in mind that the disenfranchised population will continue to grow. Eventually, large portions of the state will be unable to cast their vote or express their voice in politics, burdening some races more than others. Thus, Florida, Kentucky, and Iowa should consider shifting away from the “overly cumbersome, and anti-democratic” use of permanent disenfranchisement laws; as recommended by The Sentencing Project, a national non-profit organization which undertakes research and advocacy on criminal justice policy issues.⁸⁵

⁸³ U.S. EQUAL EMP. OPPORTUNITY COMM’N, 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACTS OF 1964 (2012).

⁸⁴ *Id.*

⁸⁵ Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*, THE SENTENCING PROJECT, 4 (2005), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Barred-for-Life-Voting-Rights-Restoration-in-Permanent-Disenfranchisement-States.pdf>.

III. Benefits to Reinstating Voting Rights

Re-enfranchising former felons can prove to be advantageous to Kentucky, Florida, and Iowa. According to the American Probation and Parole Association (hereinafter “APPA”), restoring voting rights among released convicts promotes rehabilitation and reintegration.⁸⁶ Civic participation plays an “integral part” in the successful transformation of a deviant to a law-abiding citizen. Over 600,000 people annually leave prison, but, unfortunately, two out of three people are rearrested within three years of their release.⁸⁷ The “greatest challenge” former felons face is the “transition from a focus on one’s self as an individual that is central to the incarceration experience, to a focus on one’s self as a member of a community that is the reality of life in our democratic society.”⁸⁸ The APPA stresses the belief that successful rehabilitation requires full civic participation. Accordingly, civic participation, such as voting, volunteer work, and neighborhood involvement solidifies a positive identity transformation post-release.⁸⁹ The right to vote and participate in elections confirms memberships into a community of individuals.⁹⁰ For such reasons, re-enfranchising released felons is central to actualizing the mission of acclimation and rehabilitation.

Attachments to social institutions, such as family and labor markets, wield social control over an individual and increase the reciprocal obligations between a person and his or her conforming behavior.⁹¹ “The more weakened the groups to which [an individual] belongs, the less he depends on them, the more he consequently depends only on himself and recognizes no other rules of conduct than what are founded on his private interests.”⁹² For that reason, re-enfranchisement has the potential to fortify social bonds between former felons and society. Recent research suggests a correlation between voting and crime by studying the rates of recidivism in voters as opposed to non-voters after the 1996 presidential

⁸⁶ Letter from American Probation and Parole Association Exec. Director Carl Wicklund, to Senator Joan Carter Conway, (Feb. 26, 2015), <http://www.brennancenter.org/sites/default/files/legislation/APPA%20letter%20Maryland%20SB%20340%20%282%29.pdf>.

⁸⁷ Council of State Governments, *Chartering the Safe & Successful Return of Prisoners to Community*, RE-ENTRY POLICY COUNCIL 3 (2005), <https://csgjusticecenter.org/reentry/publications/the-report-of-the-re-entry-policy-council-charting-the-safe-and-successful-return-of-prisoners-to-the-community/>.

⁸⁸ Wicklund, *supra* note 86, at 3.

⁸⁹ Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANNUAL REVIEW OF SOCIOLOGY 89, 97 (2003).

⁹⁰ ALEXANDER A. SCHUESSLER, *A LOGIC OF EXPRESSIVE CHOICE* (2000).

⁹¹ ROBERT SAMPSON & JOHN LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 18 (1993).

⁹² EMILE DURKHEIM, *SUICIDE* 209 (GEORGE SIMPSON E.D.) (1951).

election.⁹³ Using longitudinal data, Uggen and Manza conclude that the effects of voting signal a real “prosocial orientation” connected to less crime. There was a “clear difference” in rates of arrest and incarceration among levels of political participation.⁹⁴ About 5 percent of those that voted in the 1996 election were arrested at some point between 1997-2000 in contrast to 16 percent of the non-voters. Overall, there was a statistically significant difference between rates of arrest and rates of incarceration in the years following the election among those who participated and those who did not. Furthermore, voting effects were visible on self-reported criminal behavior. Nearly 27 percent of voters reported violence or threats of violence, in comparison to 42 percent of non-voters.⁹⁵ In-depth interviews with released felons in Minnesota revealed the stigma imposed by a felony conviction and consequently the delineation as an “outsider” through disenfranchisement.⁹⁶ “The act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.”⁹⁷ In light of the fact that political participation may reduce subsequent criminal activity, Kentucky, Florida and Iowa should consider the implications of their permanent disenfranchisement laws and move to re-enfranchise released felons.

Conclusion

Unquestionably, the denial of the franchise to felons is a “fundamental matter” threatening the foundation of our “free and democratic society.”⁹⁸ Considering the invaluable right to vote, confirmed by *Reynold v. Sims*, permanent disenfranchisement laws should be reviewed under strict scrutiny. Doing so would reveal how permanent disenfranchisement laws fail to serve a compelling and necessary governmental interest; essential to satisfy strict scrutiny review. Alternatives, which seek to mitigate the disparate impact of disenfranchisement laws on minorities, are practicable. Given the trajectory of the criminal justice system, minorities will be unequally impacted if such laws persist. Moreover, political participation reinforces social bonds.⁹⁹ In turn, such bonds can reduce recidivism

⁹³ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 216 (2004).

⁹⁴ *Id.* at 204.

⁹⁵ *Id.* at 207.

⁹⁶ *Id.* at 212.

⁹⁷ *Id.* at 213.

⁹⁸ *Reynold v. Sims*, *supra* note 17, at 562.

⁹⁹ Durkheim, *supra* note 92.

and inspire prosocial behavior.¹⁰⁰ Accordingly, by modifying permanent disenfranchisement laws and implementing practices such as restoration guidelines and discretionary determination, there is the potential to reduce subsequent criminal activity. By weakening social networks, shattering the prospect of reintegration, and confiscating civil citizenship, permanent disenfranchisement laws serve an inutile purpose, inconsistent with democratic norms. In remarks to the NAACP, President Barack Obama exclaimed, “while the people in our prisons have made some mistakes -- and sometimes big mistakes -- they are also Americans, and we have to make sure that as they do their time and pay back their debt to society that we are increasing the possibility that they can turn their lives around ... and if folks have served their time, and they’ve reentered society, they should be able to vote.”¹⁰¹ The right to vote is a license to hope. Revoking such a right removes an individual from their dream of a better tomorrow.

¹⁰⁰ Sampson, *supra* note 91.

¹⁰¹ President Barack Obama, REMARKS BY THE PRESIDENT AT THE NAACP CONFERENCE (July 14, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

Genetic Discrimination in the Workplace

Alyssa Greenstein

Deoxyribonucleic acid (DNA) is the genetic code for all organisms, from those as simple as bacteria to those as complex to eukaryotes.¹ In humans, all characteristics that make up a person have roots in the information encoded in DNA.² The discovery of DNA has become one of the most prevalent developments in the scientific community since the mid-twentieth century, with the work of Rosalind Franklin, James Watson, and Francis Crick.³ However, as the extensive power of DNA is uncovered through scientific discovery, there is naturally more debate developing over various aspects of DNA. With each new scientific development, DNA, and what it holds, has become increasingly accessible to society. Due to this accessibility, concerns have arisen over who has a right to see a person's encoded DNA. This discussion is especially prevalent in the workplace and if an individual's DNA can be considered private property. Because genetic research and technology have developed at such a rapid pace, there is a lack of legislation that applies to the most recent cases involving DNA ownership. Congress should update and clarify legislation to specify that a person holds the right to privacy of their genetic information, and it should not have any bearing on someone's employment opportunities.

I. Background

The discovery of DNA began in the early 1900s when Alfred Hershey and Martha Chase identified DNA as the material that transfers genetic information between the parent and offspring.⁴ All that was known before this experiment was that genetic

¹ LISA A. URRY ET AL., *CAMPBELL BIOLOGY* 341 (11TH ED. 2016).

² *Id.* at 360.

³ *Id.* at 318.

⁴ *Id.* at 315.

information is passed between organisms; but scientists did not know whether it was proteins or DNA that passed on the genetic code.⁵ Hershey and Chase's elegant experiment involved bacteriophages, which are viruses that infect bacteria by inserting their genetic material into an *E. coli* bacteria.⁶ They radioactively labeled sulfur—which binds to proteins—and phosphorus—which binds to DNA—and tracked it after the phage infected the bacterium.⁷ The scientists observed that only the radioactive phosphorus had been transferred from the bacteriophage to the bacterium, meaning that DNA, and not protein, had entered the bacterium.⁸ From this observation, they concluded, "that the DNA injected by the phage must be the molecule carrying the genetic information that makes the cell produce new viral DNA and proteins."⁹ This experiment was the jumping point for the field of genetics because it officially proved that DNA was the basis for heredity, or the passing on of genetic information.¹⁰

Further experiments continued in the 1950s, which culminated in the discovery of the double helix structure of DNA.¹¹ Rosalind Franklin used X-ray crystallography, and the image showed, "spots and smudges. . . produced by X-rays that were diffracted (deflected) as they passed through aligned fibers of purified DNA."¹² James Watson and Francis Crick, scientists at Cambridge University, were able to use this image to determine the double-helix structure of DNA.¹³ They were the first people to model DNA properly, making the sugar-phosphate backbone face outward and the nitrogenous bases face inward toward the other strand of DNA that makes up the double helix.¹⁴ Furthermore, their model correctly showed how the two DNA strands in the double helix structure run antiparallel, meaning their nucleotide subunits run in opposite directions.¹⁵

Understanding the basic structure of DNA was the basis needed for later scientists to discover how DNA possesses the genetic code that dictates life. They realized that DNA is made of subunits called nucleotides, each of which are made of a deoxyribose

⁵ *Id.* at 315.

⁶ *Id.* at 316.

⁷ *Id.* at 316.

⁸ *Id.* at 316.

⁹ *Id.* at 317.

¹⁰ *Id.* at 316.

¹¹ *Id.* at 318.

¹² *Id.* at 317.

¹³ *Id.* at 317-318.

¹⁴ *Id.* at 318.

¹⁵ *Id.* at 318.

sugar, a phosphate group, and a nitrogenous base.¹⁶ There are four nitrogenous bases—adenine, thymine, guanine, and cytosine—that possess the all-powerful genetic code that determines almost everything about an organism.¹⁷

DNA is carefully separated, and a complementary strand of messenger RNA is used to ultimately make proteins through the processes of transcription and translation.¹⁸ In the end, DNA has been transcribed into RNA, which is then translated into proteins.¹⁹ This is called the “central dogma of biology” as named by Francis Crick; and, in the end, the proteins made through this process are what makeup all organisms and control their functioning.²⁰

One of the most recent research endeavors that has had a profound impact on the field of genetics is the Human Genome Project (HGP).²¹ The HGP was a project that had the end goal of sequencing, “approximately 100,000 genes which make up the human genome.”²² The HGP officially started in 1990 with funding and support coming from both the Department of Energy and the National Institutes of Health.²³ Some of the most notable accomplishments of the HGP are the gene maps made of the entire human genome, which showed both how genes are situated on the 23 pairs of chromosomes and how they are linked.²⁴ Linked genes are physically located close to each other on a chromosome and, the closer two genes are, the more likely they are to be passed down on to the next generation together.²⁵ Through the analysis of gene linkage through the gene maps created thanks to the work of the HGP, scientists hope to be able to further understand genetically inherited diseases and work towards finding more effective treatments for such diseases.²⁶

This project was extremely expensive, estimating about \$3 billion just for the initial sequencing.²⁷ Many biotechnology companies have bought rights to access genetic

¹⁶ *Id.* at 84.

¹⁷ *Id.* at 85.

¹⁸ *Id.* at 338.

¹⁹ *Id.* at 339.

²⁰ *Id.*

²¹ *Id.* at 503, 505

²² *Id.* at 505.

²³ *Id.* at 511.

²⁴ *Id.* at 512.

²⁵ Urry, *supra* note 1, at 301.

²⁶ KRISTEN M. RAFFONE ., *supra* note 21, at 512.

²⁷ *Id.* at 26

information in hopes of developing treatments for specific genetic diseases.²⁸ Hence, the HGP has not only provided hope for an exponential increase in genetic discovery but has also created a new business in the area of public health, with companies racing to be the first to produce a treatment to some of the world's most puzzling diseases.

II. Genetic Discrimination and the Law

As time passed, individualized genetic testing became more commonplace for health purposes; but, this ultimately resulted in the development of many legal issues surrounding DNA and genetic testing. Some of the earliest legislation surrounding DNA testing regarded the use of DNA screening and testing at crime scenes. The Violent Crime Control and Law Enforcement Act of 1994 allowed for the establishment of an index of DNA identification records for criminals and DNA samples taken from crime scenes.²⁹ From this law, the FBI created the Combined DNA Index System (CODIS) to keep a record of DNA of criminals to help with law enforcement efforts.³⁰ However, the Violent Crime Control and Law Enforcement Act was not interpreted to allow the collection of DNA samples at crime scenes, only the logging of the DNA samples. Therefore, Congress passed the DNA Analysis Backlog Elimination Act of 2000, which permitted the collection of DNA samples from criminals who had committed a federal crime.³¹

Furthermore, as DNA was used more often at crime scenes, issues regarding probable cause to issue a warrant for DNA became more common as well. For example, the case *Kohler v. Englade* in Louisiana in 2006 deals with a case of a man, Kohler, who was issued a warrant to for a DNA sample, as he was a suspect for a rape and murder case of three women in 2001.³² Kohler argued that there was not probable cause for his DNA to be taken after Detective Johnson submitted an affidavit for seizure.³³ Once it was determined that he had not committed the crime, he wanted his DNA to be erased from federal records. He believed the court did not have the right to issue the warrant for his DNA because the seizure was solely based on an affidavit.³⁴ This case exemplifies how

²⁸ *Id.* at 513.

²⁹ VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT, 42 U.S.C. § 210304 (1994).

³⁰ COMBINED DNA INDEX SYSTEM (CODIS),

[HTTPS://WWW.FBI.GOV/SERVICES/LABORATORY/BIOMETRIC-ANALYSIS/CODIS](https://www.fbi.gov/services/laboratory/biometric-analysis/codis)

³¹ DNA ANALYSIS BACKLOG ELIMINATION ACT, 42 U.S.C. § 2-3 (2000).

³² KOHLER V. ENGLADE, 470 F.3D 1104, 1105 (5TH CIR. 2006).

³³ *Id.*

³⁴ *Id.*

there is a lack of clarity in procedure for how the police and courts are to rightfully seize someone's DNA. The court held, in part, that "the district court erred in finding that the seizure warrant was supported by probable cause," a decision supporting restriction of DNA collection.³⁵

Additionally, there is a history of conflict with DNA testing and access to genetic information by employers. One of the earliest genetic diseases to be vastly researched was sickle cell anemia, which is a disease that causes red blood cells to become sickle shaped, rather than the typical round shape, resulting in symptoms such as physical weakness and, in severe cases, stroke or paralysis.³⁶ About one in ten African Americans carry this trait,³⁷ and in the 1970s, there was a widespread push for African Americans to be screened for this disease.³⁸ Many African Americans reported feeling pressured to give their DNA to employers. The results of the test served as unjust cause for employers to fire their employee if they had the sickle cell trait.³⁹

To prevent situations like this from recurring, Congress enacted legislation that specifically targets genetic discrimination in the workplace. The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is federal legislation that protects people's rights to privacy regarding genetic information in terms of health insurance. The law prevents health insurance companies from discriminating against people based on health status, medical history, and genetic information.⁴⁰ However, the law does not specifically define genetic discrimination because in 1996 there was not much precedent regarding this issue, thus leaving some room for interpretation on what constitutes discrimination based on someone's genetics.⁴¹

There are several other laws that do not directly refer to genetic discrimination but have been interpreted to apply to genetic information. For example, the Rehabilitation Act of 1973 aims to improve rehabilitation programs throughout the United States for individuals who are "handicapped" and disabled.⁴² The act never directly addresses genetic

³⁵ *Id.*

³⁶ Urry, *supra* note 1, at 286.

³⁷ *Id.* at 287.

³⁸ SICKLE CELL TRAIT DIAGNOSIS: CLINICAL AND SOCIAL IMPLICATIONS, [HTTPS://WWW.NCBI.NLM.NIH.GOV/PMC/ARTICLES/PMC4697437/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4697437/)

³⁹ *Id.*

⁴⁰ HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT, 42 U.S.C. § 702 (1996)

⁴¹ *Id.*

⁴² THE REHABILITATION ACT, 42 U.S.C. § 2 (1973)

diseases and disorders under the umbrella of handicapped, but it has been applied to situations involving genetic discrimination because it explicitly establishes protections in the workplace. For instance, one of the primary goals as stated in the act is to, “promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.”⁴³

A. The ADA and Genetic Discrimination

The American with Disabilities Act is a key piece of legislation for defining genetic discrimination. Similar to the Rehabilitation Act of 1973, the Americans with Disabilities Act does not refer to genetic disorders as a type of disability, but the act has been applied to genetic disorders in a limited capacity based on the definition of a “disability” as given.⁴⁴ The act defines a disability as, “a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.”⁴⁵ However, this definition only applies to people who have physical symptoms from their disability and have effects on their “major life activities.”⁴⁶ Such “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”⁴⁷ Thus, if a person has a genetic disorder that is symptomatic, this act will most likely apply to them. However, if their genetic disorder is asymptomatic, such as is the case with dementia, which does not appear until later in life, the act does not apply. Based upon the act, a person not showing any symptoms of their disease does not fit the given definition of “disabled” as stated above.

For several reasons, there is currently insufficient legislation to deal with all the complexities dealing with genetic discrimination in the workplace. Some of the legislation that is applied to genetic discrimination was written before the Human Genome Project was completed, so legislators did not have substantiated knowledge of the scope of power of genetics. For example, the Americans with Disabilities Act was written in 1990,⁴⁸ which

⁴³ *Id.*

⁴⁴ AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12102 (1990)

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

was when the HGP was in its beginning phases. Hence, when defining disability, the act, as stated previously, defines a disability as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁴⁹ Since genetic discrimination was not in the forefront when the ADA was written in 1990, so there is no mention of genetic discrimination. It is difficult to include genetic discrimination under either physical or mental discrimination, which is defined in the act.

For example, there was a case in the California Court of Appeals in the Ninth Circuit called *Chadam v. Palo Alto Unified School District* from 2016 involving genetic discrimination in a school. Though not a workplace, this case exemplifies a similar situation to how a workplace can genetically discriminate. The school district forced a student to transfer schools because he was a carrier for the cystic fibrosis (CF) disease but the student did not have the disease.⁵⁰ The parents of the student filed a claim, saying that forcing their child, who is referred to as “C.C.” in the case’s argument,⁵¹ to transfer schools violated his rights under the ADA.⁵² The school district won the case, as the “plaintiffs failed to allege that C.C. was a qualified individual with a disability, noting that plaintiffs repeatedly asserted that C.C. did not have cystic fibrosis.”⁵³ Therefore, the ADA did not apply to the student because the plaintiff did not argue their stance on the basis that the student, C.C., was disabled. The court ruled in favor of the defendant, arguing “that state law required it to transfer C.C. to another school to protect the health of other students as raising the ‘direct threat’ defense under Title II, citing 28 C.F.R. 35.139. E.R. 14.”⁵⁴ Given this reasoning, the court ruled that because the student was not technically disabled based on the ADA, that “therefore [the] defendant did not violate the ADA.”⁵⁵ The parents argued that their child “suffered humiliation, anxiety, deterioration of his grades, and various physical ailments,”⁵⁶ but the parents were not able to gain recognition by the court for these alleged consequences that their child experienced from transferring schools because of the verbiage of what constitutes a disability in the ADA.

⁴⁹ *Id.*

⁵⁰ CHADAM V. PALO ALTO UNIFIED SCHOOL DISTRICT 1, 3-6 (9TH CIR. 2016)

⁵¹ *Id.* at 7.

⁵² *Id.* at 7.

⁵³ *Id.* at 7.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 6.

Additionally, the ADA does not provide a specific method for determining whether something is genetic discrimination on the employer's part, so it is difficult to make a ruling in the court of law. There are specific guidelines in the ADA for determining whether someone is disabled and what rights disabled people have in their workplace.⁵⁷ However, given that the ADA does not specifically refer to genetic disability by name, these same guidelines cannot be applied to cases with such disabilities. This is seen in *Chadam v. Palo Alto Unified School District* because the student was not able to be identified as disabled by the ADA, so the court did not consider the effects that the plaintiff claimed to experience based on having to transfer schools.⁵⁸ The lack of inclusion of genetic diseases within the definition of "disabled" by the ADA makes it hard to defend those who are suffering from some sort of discrimination in the workplace, or in this case in a school, because of the lack of legislation on genetic discrimination.

There have also been many limitations put on governmental agencies that investigate discrimination in cases involving genetic discrimination. For example, in *EEOC v. Burlington Northern Santa Fe Railroad*, the Equal Employment Opportunity Commission (EEOC) wanted rights to conduct further investigation into the railroad company's alleged employer discrimination, but the BNSF challenged, "the scope of the EEOC's investigation and requesting documentation in support of a broader investigation."⁵⁹ The EEOC suspected that the company had been discriminating against more than the two employees that the case was originally about, but the court ruled that the EEOC should not be allowed to conduct such a broad and expansive investigation.⁶⁰ The original case consisted of two workers, Gregory A. Graves and Thomas A. Palizzi, filing for discrimination under the ADA after not being hired allegedly based on their genetic information that was obtained during medical screening after the initial offer of employment.⁶¹ The EEOC argued that it had the right to investigate charges under the ADA,⁶² but, in this case, the EEOC does not have the right to expand its investigation because it is not clearly charged under the ADA. The opinion references cases involving national origin discrimination and race discrimination, where the EEOC was allowed to

⁵⁷ AMERICANS WITH DISABILITIES ACT, *supra* note 44.

⁵⁸ CHADAM V. PALO ALTO UNIFIED SCHOOL DISTRICT, *supra* note 50 at 8.

⁵⁹ EEOC V. BURLINGTON NORTHERN SANTA FE RAILROAD 1, 3 (10TH CIR. 2012)

⁶⁰ *Id.* at. 5.

⁶¹ *Id.* at. 2.

⁶² *Id.* at. 5.

expand its investigation.⁶³ These cases were instances of more blatant discrimination because they dealt with race. However, in the case of the railroad, the claims of discrimination were not as clear because the company's actions were based on genetic information. Since genetic discrimination is not identified in the ADA, the court did not hold that the EEOC has the right to expand its investigation because no "pattern of practice," meaning pattern of discrimination, like that of the two workers, could be identified.⁶⁴ Without genetic disability qualified in the ADA, the courts have the ability to limit the investigation of genetic discrimination in the workplace by organizations such as the EEOC.

B. GINA and Genetic Discrimination

As genetic technology develops, legislation has been written that directly addresses current genetic discrimination in the workplace. There is still a lack of clarity within this legislation, namely the Genetic Information Nondiscrimination Act (GINA) of 2008. The general purpose of GINA is "to prohibit discrimination on the basis of genetic information with respect to health insurance and employment."⁶⁵ The law does clarify many aspects of genetic discrimination that were not previously defined in legislation, such as "genetic testing" and "genetic monitoring."⁶⁶ It also clearly defines who is protected from genetic discrimination in an employment relationship, and this includes the employee and their family members.⁶⁷ However, within these definitions, there are still loopholes that could make it easier for employers to get away with genetic discrimination. For example, GINA defers to Section 701 of the Civil Rights Act of 1964 for the definition of "Employment Agency" and "Labor Organization."⁶⁸ This statute defines an "employer" as:

a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the

⁶³ *Id.* at. 9.

⁶⁴ *Id.* at. 7.

⁶⁵ GENETIC INFORMATION NONDISCRIMINATION ACT, 42 U.S.C. (2008).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service.⁶⁹

Within this definition alone, there are several loopholes that certain employers could take advantage of. For instance, small businesses with less than fifteen employees do not fall under the category of “employer” and thus could work around abiding by GINA. Similarly, the Civil Rights Act does not have Indian tribes under the category of “employer” but that does not mean they do not have the capacity to genetically discriminate against the people who rely on the tribe for their livelihood. With close examination of the definitions within GINA, there is clearly still some gray area that could lead to the exploitation of employee’s genetic discrimination.

Similarly, there are still some exceptions written within GINA that allow employers to access their employee’s genetic information given certain circumstances. Some of these circumstances include: when the genetic information is acquired inadvertently; when obtained from publicly available sources, such as books and newspapers; and from genetic monitoring that is either voluntary or required by law for the safety of the employee.⁷⁰ Given that there are some exceptions for acquiring genetic information, it is possible for employers to obtain genetic information without the knowledge of the employee. Hypothetically, if an employer acquires genetic information legally through a public source, the employer could use this information to discriminate against the employee without them knowing that their employer has this information. The employer could justify their actions—such as demotion or firing,—through other reasoning, and the employee, not knowing their employer has this information, would not even know that they are being genetically discriminated against.

Many critics of GINA argue that the act does not adequately define the entire scope of genetics, especially since genetics and biotechnology have continued to advance in recent years. Without defining genetics in its entirety, there is bound to be continual confusion in ruling cases regarding genetic discrimination. For example, the definition of a “genetic test” in GINA is “means an analysis of human DNA, RNA, chromosomes,

⁶⁹ CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § SEC. 2000E. (1964).

⁷⁰ GENETIC INFORMATION NONDISCRIMINATION ACT, *supra* note 65.

proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.”⁷¹ It does not include “an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.”⁷² Therefore, the definition does not include some key factors that contribute to genetics and genetic disorders. This definition is quite broad and does not go into detail about any of the complexities of DNA and the information that it possesses. GINA also functions under the assumption that the only way to obtain genetic information is through DNA testing. It does not address the other ways that someone can learn about genetic information. For example, tests such as cholesterol testing, which is done through a simple blood test, are not covered under GINA.⁷³ Testing such as this can indirectly reveal genetic information. For instance, “cholesterol levels. . . can depend on a person’s genetic makeup and thus cannot always be controlled by lifestyle choices.”⁷⁴ Similarly, testing for certain “infectious agents,” such as bacteria and viruses, are not covered under GINA.⁷⁵ HIV, for instance, is a retrovirus therefore not technically part of the human DNA, so “measuring its presence does not constitute a genetic test under the law’s definition.”⁷⁶ Given the controversy surrounding the history of HIV—especially regarding the LGBTQ+ community—it is concerning that HIV testing is not covered under GINA, as it could easily be construed as a source of discrimination in the workplace.

Another issue with GINA is that due to the strict administrative constraints specified under GINA in addition to similar constraints “as in Title VII and ADA cases,”⁷⁷ there are likely to be many cases that “will be dismissed for the same procedural reasons.”⁷⁸ Under GINA, “employees must seek a right-to-sue letter from the agency within 90 days of the alleged discriminatory employment action.”⁷⁹ Many people are unaware of constraints such as these and, in effect, forfeit their rights to sue their employer.⁸⁰ Thus, many viable cases of genetic discrimination never make it the courts because people do not follow the procedures needed to file a suit properly.

⁷¹ *Id.*

⁷² *Id.*

⁷³ JOANNE BARKEN, *JUDGING GINA: DOES THE GENETIC NONDISCRIMINATION ACT OF 2008 OFFER ADEQUATE PROTECTION?*, 75 *BROOK. L. REV.* 545, 574 (2009).

⁷⁴ *Id.*

⁷⁵ *Id.* at 574.

⁷⁶ *Id.* at 574.

⁷⁷ *Id.* at 575.

⁷⁸ *Id.* at 575.

⁷⁹ *Id.* at 575.

⁸⁰ *Id.* at 575.

III. How to Solve Issues Regarding Genetic Discrimination

Overall, given that genetic discrimination is a relatively new issue, the current legislation is not enough to adequately cover all of the ways that genetic information can be used against people in the workplace. There have been no genetic discrimination cases that have gone to the Supreme Court. This means that the federal legislation, like ADA and GINA has been left up to the states and lower federal courts to interpret. However, the current legislation does not clearly address and fully encompass all of the layers of the issue of genetic discrimination in the workplace.

The United States federal government needs to start seeing this issue as a major problem. If new technology continues to develop without any additional, clear legislation, there are bound to be more cases violating someone's right to privacy of their genetic information. One example of new technology that is developing is the accuracy of genetic testing predicting specific diseases.⁸¹ There is currently precise and accurate testing for diseases, such as Huntington's disease,⁸² but there is less accurate testing available for cardiovascular disease (CVD).⁸³ As different kinds of tests are developed to identify predisposition for diseases such as CVD, they may or may not be covered under the current definitions in GINA.⁸⁴ Additionally, there is advancement in fields, such as "cosmetic neurology,"⁸⁵ which involves altering human behaviors, such as learning and memory through altering genes.⁸⁶ This could effectively create a form of genetic discrimination in the hiring process because an employer is likely to favor someone with these artificially improved genes but altering genes to have better performance in certain areas is not covered under GINA.⁸⁷

These examples are just the beginning of the possibilities that exist within advancements within the fields of genetics and biotechnology. With these inevitable advancements, it is imperative that Congress continuously evaluates and reforms current legislation, such as GINA, to expand upon what circumstances are effectively covered

⁸¹ *Id.* at 575.

⁸² *Id.* at 575.

⁸³ *Id.* at 575-576.

⁸⁴ *Id.* at 576.

⁸⁵ *Id.* at 576.

⁸⁶ *Id.* at 576.

⁸⁷ *Id.* at 577.

under the legislation. When GINA was signed into law in 2008, several organizations, “including the Department of Health and Human Services, the Department of Labor, and the Department of Treasury, along with the EEOC,” were given the responsibility of enforcing the act.⁸⁸ “In addition, GINA mandates that a Genetic Nondiscrimination Study Commission be formed by May 2015” with the purpose of evaluating the need to amend GINA given developing technological advancements.⁸⁹ The functioning of this committee is vital to stopping genetic discrimination. Without updates based on new technology, GINA’s scope will soon be too narrow and employers will be able to obtain all sorts of genetic information not covered in GINA as it was written in 2008.

Several other countries are facing the same struggles that the United States is facing due to the fast-paced developments in the field of genetics. For example, Canada passed their own Genetic Non-Discrimination Act in May of 2017,⁹⁰ but it has many of the same issues as GINA. It defines a “genetic test” as “a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis,”⁹¹ which has the same vagueness as the definition in GINA. One difference between this act and GINA is that this act requires an employee to provide a written consent for an employer to “use or disclose the results of a genetic test.”⁹² This extra safeguard of written consent may provide an extra layer of certainty for times when an employer provides genetic information voluntarily, which is one of the exceptions in GINA.⁹³ With this as an example, it is notable that other countries with advanced genetic technology have yet to be able to keep up with science legislatively.

In conclusion, Congress should update and clarify legislation to specify, in effect, that a person holds the right to privacy of their genetic information, and it should not have any bearing on someone’s employment opportunities. Since the civil rights movements of the 1960s, the US has written various pieces of legislation to ensure that all citizens have equal opportunity when competing for jobs. The Civil Rights Act of 1964 was the first legislation of this kind that expressly prevented employers from discriminating based on

⁸⁸ *Id.* at 571.

⁸⁹ *Id.* at 571.

⁹⁰ GENETIC NON-DISCRIMINATION ACT, S.C. 2017, c 3 (CAN.).

⁹¹ *Id.*

⁹² *Id.*

⁹³ GENETIC INFORMATION NONDISCRIMINATION ACT, *supra* note 65.

“race, color, religion, or national origin.”⁹⁴ As the idea of discrimination progressed past race and gender in the following decades, the Americans with Disabilities Act was written to protect those who suffer from various disabilities from discrimination, including in the workplace.⁹⁵ The ethics of discrimination are continuously evolving, and GINA was the first legislative recognition of the rise of genetic discrimination. While race and disability can be seen on the surface, DNA encodes many powerful messages that have countless implications about someone’s life. The information possessed in the genetic code can be used against someone, especially in the workplace, and as biotechnology continues to develop, it is inevitable that the information we can cultivate from a genetic test will expand. It is the duty of the US government to recognize the patterns in history that we have observed regarding discrimination in the workplace. The means to the end of discrimination is legislating against genetic discrimination before the technology gets too far ahead of the current legislation.

⁹⁴ CIVIL RIGHTS ACT OF 1964, *supra* note 69.

⁹⁵ AMERICANS WITH DISABILITIES ACT, *supra* note 42.

Improving Tribal Courts: Balancing American Indian Rights with Tribal Independence

Parker Kelly

“[M]ere access to the Courthouse doors does not by itself assure a proper functioning of the adversary process” – Justice Thurgood Marshall, Opinion in Ake v. Oklahoma, February 26, 1985

Introduction:

American Indian tribes today have a form of modified sovereignty within the territories of the 326 reservations that currently exist.¹ Tribal governments themselves predate European settlement but have adapted over time due to interference by the United States Federal Government, as well as shifting locations from their original lands to reservations and the need to face new sets of challenges of a modern age. One of the most interesting and controversial challenges for tribal governments today is the creation and maintenance of a strong, successful judiciary within the confines of their limited sovereignty.

While tribes have always had some form of court systems, the modern tribal court system arose from the Courts of Indian Offenses created in 1883.² The system was later expanded by the Indian Reorganization Act of 1934,³ which also helped protect the existence

¹ *The Bureau of Indian Affairs Frequently Asked Questions*, THE BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions>.

² 25 C.F.R. § 11.200

³ Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2018).

of tribal governments on reservations today⁴ and has since been regulated under several other federal laws.⁵ The current situation has created a system of courts that is not respected, underfunded,⁶ and does not protect defendant rights as well as American courts.⁷ Additionally, there is a long history of U.S. federal courts — including the district, appeals and Supreme Court levels — imposing rulings on tribal courts without those courts actually being a part of the broader U.S. Court system.⁸ This combination of problems has led to a weak judicial system and weak rights protections for citizens, both from external officers⁹ and from the Bill of Rights not being fully applied to the tribal courts.¹⁰

The solution to this problem is integrating tribal courts into the broader U.S. court system. This would entail treating tribal courts in a similar fashion as state courts with certain procedural rights incorporated into them, such as the currently nonexistent right to counsel and the ability to appeal judgments to the Supreme Court.¹¹ This would also include expanding tribal court jurisdiction to include non-members in criminal trials. Currently people who commit crimes on reservations, but are not members of a tribe, cannot be tried on reservations.¹² This proposal would lead to greater rights protections for American Indians on reservations and increased federal funding for tribal courts. While this does expand the oversight of the U.S. Federal Government over tribal courts, it should actually strengthen the sovereignty of tribal courts and their governments. In this paper, I will defend this proposal by first discussing the current status of tribal courts, then explaining modern tribal sovereignty and the challenges faced by tribal governments, followed finally by a consideration of how the rights of American Indians are best protected.

I. The Status of Modern Tribal Courts

⁴ The Indian Reorganization Act – 75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination, 112th Cong. 3 (2011).

⁵ The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (2018); The Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601 (2018).

⁶ *Recently Passed “Indian Tribal Justice Technical and Legal Assistance Act” Expected to Strengthen and Improve Tribal Justice Systems*, 26 No. 1 NARF L. REV. 1, 1 (2001).

⁷ Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1752 (2016).

⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. U.S.* 450 U.S. 544 (1981); *Nevada v. Hicks* 533 U.S. 353 (2001).

⁹ *Dollar General v. Mississippi Band of Choctaw Indians*, 579 U.S. ___ (2016).

¹⁰ The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (2018).

¹¹ Cutler, *supra* note 7, at 1756.

¹² *Montana v. U.S.* 450 U.S. 544 (1981).

American Indian tribes have a long history of facing oppression, stretching back to the first European settlers.¹³ Ancestors of modern white Americans killed millions of American Indians through war and disease, while stripping the rights and uprooting the lives of millions more.¹⁴ The history of the violent conquest of the land we now call the United States is well-known and documented, as is the trend of signing and then ignoring treaties with Native tribes.¹⁵ The treaty history is a prime example of how the U.S. federal and state governments have mistreated tribal governments since the country was founded. While the U.S. claims that it respects tribes as independent governments, it treats them and their preferences as unimportant, making many of the benefits of the U.S. that other Americans receive inaccessible to the Indian community.

Many non-native Americans hold misconceptions about the role of tribal sovereignty today and the status of tribal governments. The term “sovereignty” is part of the problem, as the term can be associated with completely independent status or, at the very least, total control over some domains, like states have. Instead, while tribes have some legal powers that are distinct to only them, both federal and surrounding state laws apply as a result of the Assimilative Crimes Act.¹⁶ The Assimilative Crimes Act specifically allows for state laws to apply on federal land within the state where there is no relevant federal law, such as speeding laws within national parks as well as native reservations.¹⁷ For that reason, when discussing tribal sovereignty, the federal government labels tribal governments as “domestic dependent nations,” emphasizing their status as governments but also their dependency on the U.S.¹⁸ However, the misconceptions of tribal sovereignty go far beyond the word itself. Contrary to any understanding of independence, all American Indians are U.S. citizens and have been since at least the passage of the Indian Citizenship Act in 1924.¹⁹ Modern American Indians who live on reservations pay taxes, vote in federal elections, serve

¹³ Ron Rosenbaum, *The Shocking Savagery of America's Early History*, SMITHSONIAN MAGAZINE (March 2013), <https://www.smithsonianmag.com/history/the-shocking-savagery-of-americas-early-history-22739301/>.

¹⁴ Jeffrey Ostler, *Genocide and American Indian History*, OXFORD RESEARCH ENCYCLOPEDIAS (March 2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-3>.

¹⁵ Hansi Lo Wang, *Broken Promises On Display At Native American Treaties Exhibit*, NPR CODE SWITCH, (January 18, 2015, 4:57 PM).

¹⁶ The Assimilative Crimes Act of 1948, 18 U.S.C. § 13.

¹⁷ *Id.*

¹⁸ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁹ The Indian Citizenship Act of 1924, 8 U.S.C. § 1401b.

in the military²⁰, and travel freely throughout the U.S. like any other citizen.²¹ To some extent, tribal reservations are best understood as an approximation of states, having some limited power and jurisdiction, but lacking the ability to interact with other states, print currency, or go to war. However, limitations of tribal governments, and in particular tribal courts, reach beyond restrictions faced by state governments.

The federal court system, despite having no criminal jurisdiction over most citizens and despite the fact that cases from tribal courts have no route to federal appeals, controls tribal courts. The Supreme Court has routinely ruled that tribal courts only have the ability to try their own members and not other U.S. citizens,²² although they do have civil jurisdiction over non-members.²³ Congress has expanded the jurisdiction before when creating the “Duro Fix” in 1991,²⁴ editing the Indian Civil Rights Act of 1968 to ensure that tribal courts have criminal jurisdiction over Indians from different American Indian tribes.²⁵ This jurisdictional expansion was upheld by the Supreme Court in *United States v. Lara*²⁶ in 2004. In the decision, Justice Stephen Breyer argued that, “the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive,’ meaning that Congress has the ability to both legislate Indian affairs and to modify that legislation after the initial legislation is passed.”²⁷ The opinion in *U.S. v. Lara* provides a template for the proposal I mentioned in the Introduction, as expanding the jurisdiction of tribal courts is neither novel nor unconstitutional. *U.S. v. Lara* also provides further evidence of the tension at the heart of tribal sovereignty, as Congress using their power to expand tribal court jurisdiction expands sovereignty but also emphasizes the tribal government’s role as a dependent nation. Justice Breyer seemed to recognize this, stating that, “we are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status,” including “interference with the power or authority of any State.”²⁸

²⁰ *The Bureau of Indian Affairs Frequently Asked Questions*, *supra* note 1.

²¹ 8 U.S.C. § 1401b.

²² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana* 450 U.S. at 544.

²³ *Montana* 450 U.S. at 544.

²⁴ 25 U.S.C. § 1301.

²⁵ *Id.*

²⁶ *U.S. v. Lara*, 541 U.S. 193 (2004).

²⁷ *Id.*

²⁸ *Lara*, 541 U.S. at 193.

Tribal courts' lack of jurisdiction over non-Indians has led to a familiar series of events to resolve legal issues that originate on reservations: simply get an injunction from a nearby federal district court (or appeals court or the Supreme Court as necessary) and tribal courts can't do anything. This was the origin of the distinction of tribal court jurisdiction over nonmembers in *Oliphant v. Suquamish Indian Tribe*²⁹ and *Montana v. U.S.*³⁰. The precedence established has been used repeatedly since, with successes for some³¹ and failures for others.³² One of the more interesting and relevant recent examples is *Nevada v. Hicks*,³³ a case in which a tribal court asserted jurisdiction over a state officer executing a search warrant on a reservation, jurisdiction that the Supreme Court later decided that the tribal court did not have. *Nevada v. Hicks*³⁴ both reaffirmed the belief held by many state governments that they are superior to tribal governments and fully defined tribal courts as not having general jurisdiction over federal matters.³⁵

The complete control of tribal courts and tribal governments more broadly by Congress also has interesting implications for the rights of American Indians who live on reservations. Because Congress technically defines Indian Reservations as “domestic dependent nations,”³⁶ the Bill of Rights does not actually apply naturally on reservation land,³⁷ a tension that was even more complicated in the days before the Indian Citizenship Act of 1924,³⁸ which granted all American Indians citizenship.³⁹ Today, the rights most Americans have protected through the Bill of Rights are protected through the Indian Civil Rights Act of 1968,⁴⁰ although it does not include all of the same rights. Most notably, while the Indian Civil Rights Act contains the right to hire an attorney,⁴¹ it does not include the right to an attorney in all cases that exist in the U.S. more broadly.⁴² That lack that became

²⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³⁰ *Montana* 450 U.S. at 544.

³¹ *Nevada v. Hicks* 533 U.S. 353 (2001).

³² *Dollar General*, 579 U.S.

³³ *Nevada*, 533 U.S. at 353

³⁴ *Id.*

³⁵ WILLIAM C. SCOTT, UNITED STATES SUPREME COURT HOLDS TRIBAL COURTS ARE NOT COURTS OF GENERAL JURISDICTION (2001).

³⁶ *Worcester v. Georgia*, 31 U.S. 515 (1832)

³⁷ JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE 1 (2003).

³⁸ 8 U.S.C. § 1401b.

³⁹ Kalt & Singer, *supra* note 37 at 22.

⁴⁰ 25 U.S.C. § 1301.

⁴¹ *Id.*

⁴² Cutler, *supra* note 7 at 1756.

an issue in the *U.S. v. Bryant* when a tribal court ruling was used as a predicate offense.⁴³ This instance of American Indians receiving fewer rights because they live on reservations and not in a state is another example of the selective enforcement of rights only when enforcement actually helps the U.S.'s goals. I will argue this is fixed by increasing these courts' jurisdiction and connections to the federal system.

American Indian defendants on reservations receive neither beneficial precedent from the federal court system nor a right to appeal cases from tribal to federal appeals courts. As a result, American Indians cannot fight for good court decisions that benefit other tribes and other American citizens and are not benefitted in the rare instances in which a different American Indian wins in an off-reservation trial. This also means that when tribal courts do fit the stereotype of being dysfunctional and bad arbiters of justice, American Indians who are U.S. citizens pay the price, with no guarantee of reform.⁴⁴ Overall, modern tribal courts lack jurisdiction, respect, and the ability to successfully protect the rights of U.S. citizens while maintaining functionality and fairness. This combination of expectations and deficiencies has left tribes in an untenable situation and in need of dramatic reforms.

II. Challenges to Tribal Sovereignty

The Non-Member Jurisdiction Problem

A fundamental concern of all sovereign governments is the ability to actually govern the territory they control, requiring both nominal and functional power. Modern tribal governments suffer from a lack of both. While tribal courts have never been held in high regard by the U.S. Government, the disdain for their ability to adequately function expanded greatly with the decision in *Oliphant v. Suquamish Indian Tribe* in 1978. *Oliphant v. Suquamish Indian Tribe* considered whether David Oliphant, a non-Indian living on the Suquamish Tribe's reservation, could be held criminally accountable in a tribal court.⁴⁵ Justice William Rehnquist delivered the opinion of the court, finding that Oliphant could not be tried in a tribal court because those courts lacked "inherent criminal jurisdiction to try and punish non-Indians" and Congress has not explicitly granted that jurisdiction.⁴⁶ Interestingly, the

⁴³ *U.S. v. Bryant*, 579 U.S. ___ (2016).

⁴⁴ Kalt & Singer, *supra* note 37 at 29.

⁴⁵ *Oliphant*, 435 U.S. at 191.

⁴⁶ *Id.*

Court gave a remarkable amount of deference to treaties signed by both the Suquamish Tribe and other tribes in the past, despite those treaties not containing any specific reference to this issue. Rehnquist cited the phrases “acknowledge their dependence on the government of the United States”⁴⁷ and “[The Tribe] agree[s] not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial,”⁴⁸ which were both found in the Treaty of Point Elliott signed by the Suquamish Tribe, as proof that the Suquamish agreed that they had no jurisdiction over non-members.⁴⁹ Rehnquist acknowledged that, without other evidence, “these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction.”⁵⁰ He resolves this concern by referring to past precedent with the Choctaw Tribe,⁵¹ specifically the phrase “express a *wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations” (emphasis from *Oliphant*),⁵² arguing that this clause is more relevant than “the jurisdiction and government of all the persons and property that may be within their limits,” a phrase also included in the treaty they reference.⁵³ The treaty from which those phrases are pulled is the Treaty of Dancing Rabbit Creek, the treaty that the Choctaw signed giving away their land and leading to the Trail of Tears. This is one of many examples of the Supreme Court evaluating precedent independent of considerations of its racial history, a problem that manifests itself in Indian cases as a criticism of the quality of tribal courts. However, this criticism is misguided, as tribal courts have increasingly become “targets for major infusions of funding and expertise”⁵⁴ and internal reforms resulting from increased sovereignty have made many tribal courts “fully competitive with counterparts among non-Indian governments.”⁵⁵

Justice Thurgood Marshall’s dissent, joined by Chief Justice Burger in *Oliphant* is only one paragraph long:

I agree with the court below that the ‘power to preserve order on the reservation . . . is a *sine qua non* of the sovereignty that the Suquamish

⁴⁷ Treaty of Point Elliott, Suquamish Tribe-U.S., Apr. 11, 1855.

⁴⁸ *Id.*

⁴⁹ *Oliphant*, 435 U.S. at 191.

⁵⁰ *Id.*

⁵¹ Treaty of Dancing Rabbit Creek, Choctaw American Indian Tribe-U.S., Sept. 1830.

⁵² *Oliphant*, 435 U.S. at 191.

⁵³ Treaty of Dancing Rabbit Creek, *supra* note 51.

⁵⁴ Kalt & Singer, *supra* note 37 at 32.

⁵⁵ *Id.*

originally possessed.’ *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy, as a necessary aspect of their retained sovereignty, the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.⁵⁶

Clearly, Justice Marshall and Chief Justice Burger thought that the ability to enforce laws is crucial to true sovereignty, a concern the majority did not share. However, that distinction is not the fundamental difference between their views, as it is possible that Justice Rehnquist believed that enforcement is a core part of sovereignty, a concern he showed some sympathy for when he wrote, “we are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians.”⁵⁷ Instead, the fundamental difference is whether the absence of congressional action indicates deference to tribal governments’ ability to govern effectively or if the Court should consider the claims a tribe makes to extra powers beyond those explicitly dictated by Congress invalid in all cases. Debating which philosophy is correct requires a deeper look into broad judicial philosophy and what it means to be an activist court than I will engage with in this paper. However, it is notable that since *Oliphant*, even liberal justices have consistently refused to side with tribal government expansion in the absence of an explicit congressional mandate.

Prior to 2013, Congress had been silent on the issue of tribal jurisdiction over non-members except for implementing the Duro Fix mentioned above, allowing tribal courts to try American Indians from other tribes but not non-Indians who commit crimes on reservations.⁵⁸ Throughout that time, Congress showed interest in improving tribal courts and governance through the passage of several bills such as The Indian Tribal Justice Act of 1993⁵⁹ and The Indian Tribal Justice Technical and Legal Assistance Act (2000).⁶⁰ Though, as of 2001, no money has been appropriated for the former. Then, in 2013, the passage of the Violence Against Women Act Reauthorization⁶¹ included the first meaningful expansion of tribal jurisdiction to non-members. The bill included a section creating “special domestic violence jurisdiction’ over non-Indians accused of intimate partner violence or violating the

⁵⁶ *Oliphant*, 435 U.S. at 191.

⁵⁷ *Id.*

⁵⁸ 25 U.S.C. § 1301.

⁵⁹ The Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601 (2018).

⁶⁰ The Indian Tribal Justice Technical and Legal Assistance Act, 25 U.S.C. § 3651 (2018).

⁶¹ The Violence Against Women Reauthorization Act, 34 C.F.R. 668.46(b) (2018).

protective order,”⁶² allowing tribal courts to try and convict individuals who are not members of any native tribe for domestic violence violations. Despite the progress, even this step to expand tribal court jurisdiction was limited. Nevertheless, these acts demonstrate that Congress has both some willingness to make meaningful change and the capability to pass legislation enacting positive policies for tribal court reform and advancement. The Supreme Court has definitively and repeatedly stated that they do not plan to remedy tribal sovereignty concerns by themselves, so congressional policy is likely the only remedy available for tribal governments attempting to expand their jurisdiction. A willing and capable Congress indicates a positive future for advocates of expanded tribal court jurisdiction.

The State Government Relations Problem

While it seems like the description of tribal governments as “domestic dependent nations” from *Worcester v. Georgia*⁶³ might be an apt way to describe a state’s relationship with the federal government, their powers are in fundamentally different tiers. Because of the Assimilative Crimes Act,⁶⁴ states can try American Indians for crimes committed in that state’s land, unlike tribal governments, and states are given sovereignty over significantly more domains by the federal government than tribal governments are. As a result, state governments often mistreat native reservations or attempt to assert their dominance over them whenever possible. This problem has a long history in the Supreme Court, best demonstrated by the 2001 decision in *Nevada v. Hicks*.⁶⁵ *Nevada v. Hicks* considered whether state officials from Nevada who executed a search warrant on the Fallon Paiute-Shoshone Tribe’s land could be tried by a tribal court for their actions while on that tribe’s reservation. Floyd Hicks intended to sue on the grounds of trespassing and several constitutional rights violations; but, those concerns were not addressed by the tribal appeals court or any U.S. federal courts after the state of Nevada challenged the tribal court’s ruling in a U.S. district court.⁶⁶ While the U.S. district court and 9th Circuit Court of Appeals held that the tribal

⁶² Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction over Domestic Violence on Their Own Land*, AMERICAN BAR ASSOCIATION JOURNAL (Apr. 2015), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own.

⁶³ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁶⁴ The Assimilative Crimes Act of 1948.

⁶⁵ *Nevada*, 533 U.S. at 353.

⁶⁶ *Id.*

court had jurisdiction, the Supreme Court reversed the decision. Justice Scalia wrote the opinion of the court, stating that:

Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties.⁶⁷

This decision undermines tribal governments ability to assert any true authority over its own territory. State and federal officials' relationships with tribal officials and residents of reservations reflect a colonial attitude rather than co-equal standing, which underlies a lot of the problems tribal governments and their courts continue to have. Even before the decision, states had repeatedly shown a broad disdain for tribal governments' claims, an ideology that Steve Newcomb described in the context of *Nevada v. Hicks*:

The 18 states that jointly filed an amicus brief in the case, said the attorneys for Hicks, were arguing that Nevada game wardens are immune from "tribal courts" on the basis of "the colonial era doctrine of discovery or by related attempts to characterize tribes as inherently inferior sovereigns."⁶⁸

This problematic interpretation of the status of tribal governments limits any realistic claims to sovereignty and underscores the inability for tribal governments to function at any meaningful level.

Scalia's opinion in *Nevada v. Hicks* also argues that because the guaranteed right of federal-question removal from section 1983 civil right legislation, the ability for a defendant to move their trial from a state (or in this case tribal) court into the federal court system does not apply to tribal courts, as Scalia claimed that tribal courts cannot be trusted as arbiters of civil rights suits.⁶⁹ Rather than remedy the issue, the Court's solution is simply to remove power to avoid the "serious anomalies" that granting tribal courts more control would apply.⁷⁰ This is reflective of a broader trend of responding to faults in tribal courts or

⁶⁷ *Id.*

⁶⁸ Steven Newcomb, *On Attorneys, Indian Advocacy and Nevada v. Hicks*, INDIAN COUNTRY TODAY (April 28, 2004), <https://indiancountrymedianetwork.com/news/on-attorneys-indian-advocacy-and-nevada-v-hicks/>.

⁶⁹ *Nevada*, 533 U.S. at 353

⁷⁰ *Id.*

congressional policy by removing power from tribes rather than creating actual remedies. Scalia's opinion is also a great representation of the legal interpretation disagreement between Justice Thurgood Marshall and Justice Rehnquist, with Scalia siding with Rehnquist's position that the Court should not grant any implied rights to tribal governments and instead only evaluate explicit congressional authorizations.

The precedent set by *Nevada v. Hicks* is dangerous for tribal governments ability to claim power to regulate any non-member in any situation. As professors Joseph P. Kalt, Ph.D., and Joseph W. Singer, J.D., from Harvard explained,

If interpreted broadly, the Hicks ruling would prevent tribes from asserting any regulatory powers whatsoever over nonmembers even if they trespass on tribal lands and commits torts or other harms to tribal members at home on their own land unless those nonmembers had expressly contracted to voluntarily submit themselves to tribes' jurisdiction.⁷¹

Given the increasingly restrictive trend in Supreme Court decisions, passing reforms in Congress is even more imperative than it had been before *Oliphant*, *Montana v. U.S.*⁷², and the cases since them that led to *Nevada v. Hicks*.

Part III: Protecting American Indian Rights

Tribal courts today are improving rapidly; and, as I have argued, are deserving of increased jurisdiction to empower tribal governments and protect tribal sovereignty.⁷³ However, they are far from perfect and can fail to protect defendant rights protection. Additionally, even tribal courts that function perfectly suffer from a crisis of perceived legitimacy across the legal community and the American public more broadly. Allowing for incorporation of defendant rights protected in other American courts while allowing for the right to appeal cases from tribal courts of appeals to the Supreme Court should help to assuage both of these issues. I will examine how each will function in the next two sections.

The Bill of Rights and Indian Defendant Rights Protections

⁷¹ Kalt & Singer, *supra* note 37 at 17.

⁷² *Montana*, 450 U.S. at 544.

⁷³ Kalt & Singer, *supra* note 37 at 31.

The Bill of Rights of the U.S. Constitution does not directly apply to tribal governments.⁷⁴ Instead, they are regulated by the Indian Civil Rights Act of 1968,⁷⁵ a federal law that includes an incomplete version of the Bill of Rights and, according to the 1978 decision in *Santa Clara Pueblo v. Martinez*,⁷⁶ has no federal enforcement mechanism.⁷⁶ *Santa Clara Pueblo* is one of the only decisions in the last several decades to increase tribal government sovereignty, as the decision declared tribal governments immune from lawsuits for their failure to follow the Indian Civil Rights Act of 1968. While I argued for expanded sovereignty earlier in this paper, expanding sovereignty only in their ability to ignore their citizens' requests for rights protections is an outcome that only worsens conditions for American Indians today.

Even if the Indian Civil Rights Act of 1968 was a successful check on tribal government overreach, the gaps in guaranteed rights remain incredibly problematic. Tribal courts are not required to provide a lawyer for defendants who cannot provide one for themselves,⁷⁷ a flaw that is ignored in federal courts based on the ruling in *U.S. v. Bryant*.⁷⁸ The failure to protect one of the most basic rights of a defendant, as Lindsay Cutler put it, "no liberal sovereign can be absolved of the imperative to protect the rights of the accused in its criminal proceedings."⁷⁹ Integration of tribal courts into the broader American court system would require the incorporation of the parts of the Bill of Rights that apply in a courtroom, better protecting defendants on all reservations.

While the effect may be somewhat limited, allowing for appeals to the Supreme Court could also create meaningful precedent across the entire United States. Right now, any cases decided in a tribal appeals court are only relevant on that reservation. With the ability to set binding precedent for the entire country, cases originating from tribal courts can become landmark civil rights cases, something they can uniquely contribute to, given the general economic and social conditions of most American Indians, especially on reservations.

Perceptions of Court Legitimacy

⁷⁴ *Id.*

⁷⁵ 25 U.S.C. § 1301.

⁷⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁷⁷ Cutler, *supra* note 7 at 1756.

⁷⁸ *Bryant*, 579 U.S.

⁷⁹ Cutler, *supra* note 7 at 1752.

The American public and the Supreme Court have doubted the ability of tribal courts to function fairly and successfully since the beginning of the United States' existence, and many still criticize them based on assumptions that were more appropriate a century ago.⁸⁰ Professors Kalt and Singer describe in detail some of these complaints, including “that tribes are not directly subject to the Bill of Rights,” the lack of “a right to remove a tribal court case to federal court,” and the lack of “a right of review, by certiorari or otherwise, in the United States Supreme Court as there is in the case of state supreme court decisions that adjudicate federal questions”⁸¹ Additionally, according to Garrett Epps of *The Atlantic*, “The Supreme Court has fallen victim to negative stereotypes about tribal courts,’ ... ‘It does not ‘trust’ them to be competent and fair. That is most unfortunate and quite inaccurate.”⁸² Importantly, each concern stems from a fundamental lack of trust in the capacity for fairness of tribal courts.

Professor Pommersheim’s perspective is one that is increasingly common amongst American legal experts who come into contact with the tribal court system. Judge Robert Hunter, a former member of the North Carolina House of Representatives and the North Carolina Court of Appeals who joined the Supreme Court of the Eastern Band of Cherokee in 2015,⁸³ agreed to speak with me about his perspective on tribal justice today and how his perspective has changed since joining the court. While he has only overseen cases on one reservation, he has nothing but praise for the quality of the judges and courts on reservations today. Despite the courts’ reputation, Judge Hunter has found that defendants receive great rights protections, provided by a tribal government that is truly invested in creating a good justice system and following the Indian Civil Rights Act of 1968.⁸⁴ The Eastern Band of Cherokee’s court system is an interesting one, arising from an initiative in 2000 led by Leon Jones, the Chief of the Eastern Band of Cherokee, and former North Carolina Supreme Court Justice Harry Martin and replacing the previous system that was more directly overseen by the Bureau of Indian Affairs.⁸⁵ As a result, the Eastern Band of Cherokee Indian’s court

⁸⁰ Kalt & Singer, *supra* note 37 at 29.

⁸¹ *Id.*

⁸² Garrett Epps, *Who Can Tribal Courts Try?*, THE ATLANTIC (Dec. 7, 2015), <https://www.theatlantic.com/politics/archive/2015/12/who-can-tribal-courts-try/419037/>.

⁸³ Mike Conley, *Bob Hunter Takes on New Legal Role*, MCDOWELL NEWS (Apr. 10, 2015), http://www.mcdowellnews.com/news/bob-hunter-takes-on-new-legal-role/article_7ab37338-def7-11e4-ba1b-8fcb4a12ed47.html.

⁸⁴ 25 U.S.C. § 1301.

⁸⁵ Harry Corpening Martin, ASHEVILLE CITIZEN-TIMES (2015), <https://www.legacy.com/obituaries/citizen-times/obituary.aspx?pid=174787588>.

system is modeled very closely on the North Carolina state court system and many of the judges who have sat on their Supreme Court came from the North Carolina state courts. The combination of judges who are members of the tribe and outside legal expertise has created a well-functioning court system that, in Judge Hunter's assessment, is ready for the responsibility of expanded jurisdiction.

Despite the defenses offered by legal professionals who actually work within various tribal court systems every day, the perception that these courts lack true legitimacy persists in the general public and amongst many powerful people in the U.S. federal government. Creating direct Supreme Court oversight of cases that go through the appeals process in the tribal court system should help to assuage these fears. The most obvious fear this solves is the direct complaint of a lack of legitimacy through no right of review, as Professors Kalt and Singer identify.⁸⁶ However, the benefits do not stop with just that concern. Supreme Court oversight would grant a massive amount of legitimacy based on the Supreme Courts power over federal courts. For proof of this, one can examine states that rank very low in the U.S. Chamber of Commerce's Institute for Legal Reform Lawsuit Climate Survey.⁸⁷ Despite consistently ranking as one of the least impartial justice systems in the country, there is no call for Louisiana's state courts to be barred from trying Texans for crimes committed in Louisiana. Kalt and Singer also identify that many tribal courts are already rivaling the states they reside in, giving tribes in Montana as a specific example of high quality, impartial tribal courts.⁸⁸ The most important differences between Montana state courts and those of the Confederated Salish and Kootenai Tribes are the lack of federal oversight and the lack of a few defendant rights protections, both of which this proposal solves.⁸⁹

The main counterargument to the benefits of Supreme Court oversight is that it seems to just be another form of American colonialism and a reduction in tribal sovereignty. While this criticism is intuitive, it is misguided and relies on the assumption that strong tribal sovereignty exists today. While the Supreme Court does not have the ability to review cases that occur in tribal courts today, they end up reviewing many complaints from non-Indians for matters that occur on tribal lands. This is because, in many cases, non-Indians challenge tribal court rulings in federal district court on jurisdiction grounds, a trend reaching back to

⁸⁶ Kalt & Singer, *supra* note 37 at 19.

⁸⁷ 2017 U.S. Lawsuit Climate Survey: A Survey of Fairness and Reasonableness of State Liability Systems 1 (2017).

⁸⁸ Kalt & Singer, *supra* note 37 at 32.

⁸⁹ *Id.*

at least *Oliphant v. Suquamish Indian Tribe*⁹⁰ and continuing to cases decided as recently as *Dollar General v. Mississippi Band of Choctaw Indians* in 2016.⁹¹ Additionally, the violations of sovereignty stemming from this change will primarily help protect the rights of tribe members while sovereignty is expanded, through increasing the jurisdiction tribal courts have over non-members. Overall, while expanding United States federal government power over tribal governments should make anyone attempting to improve tribal governance and increase the rights protections for American Indians uneasy, this proposal should not create any quasi-colonialist issues.

Conclusion: Testing Supreme Court Oversight and Expanded Jurisdiction

Integrating tribal courts into the broader United States court system should create a much better legal system for tribes and help to expand tribal jurisdiction to solidify their ability to successfully rule their territory. This new system for tribal courts would include some level of discretion in the way courts are set up, just as states have today, with an appeals court and the ability to appeal to the United States Supreme Court from the top court of appeals for each reservation or for each intertribal appeals court. Each tribal government would be required to follow the portions of the Bill of Rights that directly apply to criminal and civil procedure, creating better rights protections for American Indians who live on reservations today. Additionally, the Supreme Court would no longer be able to override the jurisdictional claims made by non-Indian defendants like they routinely have since *Oliphant v. Suquamish Indian Tribe*.⁹²

To test the solution, it is worth considering the cases of *Oliphant v. Suquamish Indian Tribe*⁹³ and *Nevada v. Hicks*.⁹⁴ If *Oliphant* were tried in this new system, it would not move past the initial tribal court. *Oliphant*'s claim was that non-Indians could not be tried in tribal courts, a jurisdictional claim that this policy directly fixes. If *Nevada v. Hicks* were tried again in the new system, even though states maintain more power than tribal governments, the Fallon Paiute-Shoshone Tribe would be able to try a state officer for trespassing and other violations. Additionally, the ideology of dominance over tribal governments that many state

⁹⁰ *Oliphant*, 435 U.S. at 191.

⁹¹ *Dollar General*, 579 U.S. ___

⁹² Kalt & Singer, *supra* note 37 at 16.

⁹³ *Oliphant*, 435 U.S. at 191.

⁹⁴ *Nevada*, 533 U.S. at 353.

governments, including Nevada's, would be weakened as tribal governments are granted more powers and perceived as more legitimate. Thus, integrating tribal courts would successfully shift the decisions of two of the most important tribal sovereignty cases of the last 50 years while securing better rights for American Indians and everyone else who lives on reservations today.

THINK PIECE

You Have the Right to Remain Silent: The Case for a Federal Law Granting Reporter's Privilege

Felicia Kalkman

Introduction

A reporter sits at a witness stand faced with an ethical dilemma. She received information from a source that chose to go on background, meaning his name would not be published. The information she gained from that source was pertinent to a crime that was committed, and she published that information in a story for the newspaper for which she writes. As a result of that story and other evidence gathered by the police, a criminal trial is now occurring, and she has been called by the state to testify. She must make a choice: she can name the source, abandoning her journalistic integrity and possibly losing her job, or she may refuse, being held in contempt of court and facing jail time.

Reporters must face this ethical dilemma in the United States. In 1972, William Farr was jailed for 46 days for refusing to give up his sources; in 2001, Vanessa Leggett served 168 days for the same offense; Jim Taricani was sentenced to six months in 2004. Judith Miller served 12 weeks in 2005 for refusing to give up her sources.

Reporters are forced to give up their sources if questioned because there is no federal reporter's privilege. Reporter's privilege is defined as a measure that "prevents reporters and journalists from being forced to disclose confidential information and name

sources.”¹ Currently in the United States, no federal law of this sort exists. The lack of a protective law forces reporters to choose between their journalistic integrity and their freedom. This article attempts to explain the history of reporters in the courts, the historical precedent for reporter’s privilege, common controversies surrounding the issue, and the need for a federal reporter’s privilege. Based on the longstanding respect freedom of the press enshrined within the First Amendment, the United States should pass a federal law granting reporter’s privilege.

I. Background

Before talking about the necessity of a federal reporter’s privilege, it is important to understand the role of journalists in history and in present society. To do this, there must be comprehensive understand of what a journalist is, the history of reporters in the courts, and the most important court cases that have defined reporter’s privilege in modern history.

A. *What is a Journalist?*

Before analyzing what rights a journalist should be granted, it is important to discuss what a journalist is. This is difficult because it varies drastically depending on who creates the definition. Some definitions prefer to keep the definition open to encompass the variety of journalists in the United States. Most people who produce journalism stories are not full-time writers for a nationally-recognized newspaper. With the evolution of online and citizen journalism, journalists “work (sometimes as freelancers, sometimes without pay) as reporters, videographers, and commentators on Weblogs...cable outlets, and ‘zines [magazines], locally, nationally and internationally.”² However, some, like journalism expert Alan Knight, advocate that journalists should be identified through how they present themselves, rather than the platform they use, as “journalists need to be trusted and should have credibility, in the public interest.”³ Throughout this article, the definition of the term “journalist” will be more comprehensively addressed in part two, as well as the issues with the vagueness of the term.

B. *Reporters and The Courts*

¹ Luann Dallojacono, “*My Lips Are Sealed, Unless...*” *Examining the Reporter’s Privilege in New York and Why It Should Be Applied Federally*, 33 *TOURO L. REV.* 933, 935 (2017).

² JAY BLACK, *JOURNALISM ETHICS: A PHILOSOPHICAL APPROACH* 103 (Christopher Meyers) (2010).

³ Alan Knight, *Who is a Journalist?* 9 *JOURNALISM STUDIES* 117, 117 (2008).

The First Amendment imposes restrictions on the United States of America government, protecting certain inalienable rights including “religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴ The meaning of freedom of the press and other First Amendment issues remain highly controversial. “For decades, scholars, attorneys, jurists, writers, editors, and publishers wrestled with a complex query related to the First Amendment and the issue of harm.”⁵ Journalists in particular are changing and adapting based on first amendment rulings.

Since the establishment of freedom of the press in the United States, there have been numerous decisions by the courts to define how journalists function in the United States legal system. In the 1931 case *Near v. Minnesota*, the court established the concept of prior restraint as part of freedom of the press.⁶ Following *Near*, it was generally accepted that the government could not preemptively censor the press before a story was published, and laws that allowed for the preemptive censoring of possibly defamatory materials were made unconstitutional. In 1971, *New York Times Co. v. United States* created a standard of actual malice in libel cases, specifically against public officials.⁷ This means that when a public official sues for libel (publishing false statements that damage one’s character), the official must prove that the false statements were made with actual malice. In *Chandler v. Florida*, it was ruled that cameras should be allowed in the courtroom.⁸ In *Time, Inc. v. Hill*, the Supreme Court found that journalists were protected when publishing information that casts people in a false light, meaning that it casts a person in misleading or untrue way that harms their reputation. This added protection to journalists’ stands, as long as the information was not published maliciously or with a reckless disregard for the truth.⁹

These examples show that the press has historically been protected in the United States. However, this is not true when it comes to reporter’s privilege. Despite the fact that some cases have given journalist’s protection, cases like *Branzburg v. Hayes* and *Cohen v. Cowles Media* have harmed journalist’s ability to protect their sources.

⁴ U.S. CONST. amend. I.

⁵ Albert N. Greco, *The first amendment, freedom of the press, and the issue of “harm”: A conundrum for publishers*, 93 (11th ed. 1995)

⁶ *Near v. Minnesota*, 283 U.S. 283, 285 (1931).

⁷ *New York Times Co. v. U.S.*, 403 U.S. 713, 700 (1971).

⁸ *Chandler v. Florida*, 449 U.S. 560 (1981).

⁹ *Time, Inc v. Hill*, 385 U.S. 374, 385 (1967).

C. Reporter's Privilege: *Branzburg v. Hayes*

While many First Amendment issues pertain to journalists, one issue remains at the forefront of debates about reporters' rights: reporter's privilege. Simply defined, reporter's privilege is a privilege provided by law that protects a reporter from being compelled to testify about confidential information or sources. This would make it so that reporters do not have to give up their sources to which they promised confidentiality.

This concept was first debated in the historic 1972 Supreme Court case *Branzburg v. Hayes*. *Branzburg* is unique according to author and journalism professor Paul Marcus because, "three separate actions were consolidated for consideration by the Supreme Court."¹⁰ This means that while three separate cases were tried, the Supreme Court created one ruling that applied to all three cases. *Branzburg v. Hayes* pertained to two stories by *Louisville Courier-Journal* reporter Paul Branzburg.¹¹ The case revolved around two articles in which Branzburg wrote about drug deals and drug production. After the articles were published, Branzburg was subpoenaed to testify in court about who the drug leaders were, despite the fact that Branzburg promised his sources that their identities would not be revealed. After the Kentucky Court of Appeals found that he must testify before a grand jury, he appealed to the Supreme Court who chose to write a decision that applied to this case and two other listed below.¹²

In *United States v. Caldwell*, reporter Earl Caldwell from *The New York Times* interviewed members of the Black Panther Party and wrote multiple articles about them. These articles, according to journalism expert Craig A. Newman, "included statements by Black Panther leaders threatening to kill President Nixon, and other statements advocating the forceful overthrow of the government."¹³ A federal grand jury ordered Caldwell to hand over his notes and tape recordings. Caldwell refused to testify because he promised his sources confidentiality. The Ninth Circuit Court of Appeals ruled that he did not have to testify before a grand jury unless the government demonstrates a compelling need for his presence.¹⁴

¹⁰ Paul Marcus, *Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 868 (1984).

¹¹ Craig A. Newman, *Qualified Privilege for Journalists Branzburg v. Hayes: A Decade Later*, 61 U. DET. J. URB. L. 463, 488 (1984).

¹² *Id.*

¹³ *Id.*

¹⁴ U.S. V. Caldwell, 989 F. Supp. 1056 (9th Cir. 1993).

In *In re Pappas*, reporter Paul Pappas visited Black Panther headquarters in New Bedford, Massachusetts to report on a story. He was supposed to watch the police raid the headquarters, but the raid never occurred. Instead, he was admitted into the headquarters for three hours and did not write a story about the experience. Regardless, he was subpoenaed to appear before a grand jury. It was ruled that Pappas had to testify about who his source was; and, when he appealed to the Supreme Judicial Court of Massachusetts, the Court agreed saying, “that newsmen must respond to grand jury subpoenas and answer ‘relevant and reasonable inquiries.’”¹⁵ This began a chilling effect on reporters, as they knew a promise of confidentiality to their sources would no longer sustain in court.

In all three cases, reporters argued that the newsgathering process often requires an arrangement to keep sources anonymous or to only partially publish information revealed by the source; and that if reporters had to reveal their sources to a grand jury, it would deter future sources from providing information, “to the detriment of the freedom of communication protected by the First Amendment.”¹⁶ However, despite this claim, the court upheld all three subpoenas in a 5-4 decision.¹⁷ Justice White wrote in the majority opinion that “[t]he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries.”¹⁸

Despite this, some have analyzed that that the court’s ruling should not be broadly applied to all future cases involving journalists and their sources. This in part comes after the dissenting opinion in the case, notably by Justice Douglas who found, “effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and reexamination.”¹⁹ This calls into question the judgment as a whole, especially in such a narrow decision.

D. Promise of Confidentiality: Coben v. Cowles Media

Though the decision in *Branzburg* was made in 1972, the court’s stance on journalist’s privilege became more complicated in 1991 after *Coben v. Cowles Media*. In the fall of 1983, it

¹⁵ *Id.*

¹⁶ *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972).

¹⁷ *Id.* at 665.

¹⁸ *Id.* at 674.

¹⁹ *Id.* at 715.

was election season in Minnesota.²⁰ Dan Cohen, who was active in politics for the Republican Party, “had dirt on Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor of Minnesota.”²¹ He then contacted four reporters, Lori Sturdevant of the *Minneapolis Star Tribune*, Bill Salisbury of the *St. Paul Pioneer Press Dispatch*, Gerry Nelson of the Associated Press, and David Nimmer of WCCO Television,²² saying that he had information about the upcoming election as he “discovered that Marlene Johnson had been arrested for unlawful assembly in 1969, and in 1970 for petty theft.”²³ Cohen met separately with Sturdevant and Salisbury and said he would give them documents alleging misconduct by Johnson in exchange for a promise of confidentiality.²⁴ Both agreed they would not reveal Cohen’s identity.

Armed with the information they had gained from their reporters, the *Star Tribune* and *St. Paul Pioneer Press Dispatch* set to create a story about Johnson’s misconduct. Despite their promise of confidentiality, the two papers published the name of their source.²⁵ Cohen’s desire to not be named seemed justified as, after publication, his employment was terminated.²⁶

Because of this, Cohen sued for “intentional misrepresentation and breach of contract.”²⁷ The case went from the Hennepin County District Court to the Minnesota Court of Appeals and, finally, to the Supreme Court.²⁸ The Supreme Court sided with Cohen, saying that this decision debates whether “the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper’s breach of a promise of confidentiality given to the plaintiff in exchange for information.”²⁹ The court found that the verbal contract a media organization makes with a source not to reveal their identity is legally enforceable under the principles of promissory estoppel. Promissory estoppel is defined as “the doctrine allowing recovery on a promise made without

²⁰ Jerome A. Barron, *Cohen v. Cowles Media and Its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419, 466 (1994).

²¹ Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1128 (2001).

²² Barron, *supra* note 20, at 466.

²³ *Id.*

²⁴ Daniel A. Levin; Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources After Cohen v. Cowles Media Company: A Survey of Newspaper Editors*, 24 GOLDEN GATE U. L. REV. 423, 494 (1994).

²⁵ Garfield, *supra* note 21, at 1128.

²⁶ Barron, *supra* note 20, at 466.

²⁷ Garfield, *supra* note 21, at 1128.

²⁸ *Id.*

²⁹ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 664 (1991).

consideration when the reliance on the promise was reasonable, and the promise relied to his or her detriment.”³⁰

This decision cemented the principle that news organizations must keep their sources secret, even if subpoenaed to say otherwise. This is extremely difficult as the *Branzburg* decision forces reporters to give up sources or face jail time.

E. *Shield Laws and Circuit Court Rulings*

Because of the lack of federal legislation to protect journalists, states created legislation, called shield laws, to protect reporters from having to reveal their sources. Shield laws are, “statutes in some states that make communications between news reporters and informants confidential and privileged, freeing journalists of the obligation to testify about them in court.”³¹ Roughly 30 states have passed shield laws that allow journalists to refuse to testify about their sources.³² However, approximately 49 states and the District of Columbia have recognized some sort of qualified privilege for journalists either through shield laws or case law, with the exception of Wyoming.³³

Shield laws work differently in different states. For example, an Alabama shield law was “originally enacted in 1935...[and] provides an absolute privilege to persons engaged in a news gathering capacity on behalf of a newspaper, radio station, or a television station.”³⁴ However, in some states like Montana, the law has changed. Since its original development in 1943, Montana’s shield law has been adapted four times. It is now considered a qualified privilege, and states that:

Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or

³⁰ *Promissory estoppel*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/promissory_estoppel/p.

³¹ *Shield Laws*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/shield_laws.

³² Jonathan Peters, *Shield laws and journalist’s privilege: The basics every reporter should know*, COLUMBIA JOURNALISM REVIEW (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php.

³³ *Ruling demonstrates need for U.S. reporters’ shield law*, INTERNATIONAL PRESS INSTITUTE, <https://ipi.media/ruling-demonstrates-need-for-u-s-reporters-shield-law/>.

³⁴ Lucy A. Dalglish, *Reporter’s Privilege: Alabama*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2010), <https://www.rcfp.org/rcfp/orders/docs/privilege/AL.pdf>.

prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.³⁵

Disparity exists between the vast number of laws spanning different jurisdictions. This is problematic because if a reporter is working on a large, national story across many states, he could be given very different treatment for refusing to testify depending on where the case is tried. This gives the government a compelling advantage, and thus harms reporters even further. The disparity also creates a sense of inconsistency and sloppiness in the United States legal system.

Circuit courts have also provided a level of protection of reporters not to give up their sources. While the First Circuit Court recognizes a qualified reporter's privilege,³⁶ the Second Circuit's interpretation of the qualified privilege is relatively broad.³⁷ Some, like the Fourth Circuit, have "been less aggressive than many of its counterparts in enunciating a reporter's privilege"³⁸ while others limit the use of reporter's privilege to only instances where confidentiality was guaranteed to a source beforehand.³⁹ Finally, the Eighth Circuit has not definitively established a reporter's privilege.⁴⁰

The disparity among various states and district courts presents a need for a consistent federal law protecting reporters from revealing their sources.

II. Ongoing Issues with Reporter's Privilege

A. *Who is Considered a Journalist?*

Despite the important need for a federal reporter's privilege, there are still key issues that must be resolved. One of the most important issues is a rather complex question: who is a journalist? This is hard to answer as, "The language will be hard to craft and could easily leave ambiguities as to exactly when the statute applies and who is covered. (One strong argument against such a law is that it gives the government the power to define who is and is not a journalist.)"⁴¹ While many people could describe a stereotypical *New York Times*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ David Gordon, *Need for confidential sources likely to increase*, 58 GRASSROOTS EDITOR 17, 17 (2017).

reporter, a blogger may be a journalist to some but not to others. Citizen journalism is also an increasing concern. If the federal government could decide who is and is not a journalist, not only would that give increasing power to the government, but it could also result in a very small, exclusive group as the very idea of a journalist continues to change.

B. *Previous Federal Legislations*

State shield laws are not the only attempt to create a broad reporter's privilege. Congress has introduced legislation multiple times to try and create a national reporter's privilege but has failed each time. The Free Flow of Information Act was first co-sponsored by then-Representative Mike Pence in 2005.⁴² The goal of the bill was "to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media."⁴³ The bill was meant to serve as a federal shield law that would protect reporters from having to disclose their sources.⁴⁴ The bill failed to pass Congress in 2005, 2007, 2009, 2011, and 2013.⁴⁵ While the Pence-led bill passed the House in 2007 and 2009, it died in the Senate despite support from Democrats and Republicans.⁴⁶ In 2013, the Obama administration announced limited support for the bill. In 2015, the lower chamber passed another reporter shield measure as an appropriations amendment. However, it failed to become law.⁴⁷

C. *Chilling Effect*

For journalists, one of the most compelling reasons for reporter's privilege is to protect their sources is because of the possible chilling effect on future sources. Journalists fear that, instead of coming forward, sources may remain in the shadows and stay silent. This would effectively limit freedom of speech because sources are dissuaded from speaking freely to reporters. This would also keep the citizenry from being informed and limit the media's power in the United States, for "the lack of a defined reporter's privilege opens reporters to the potential of government harassment and keeps them from being able to guarantee sources' confidentiality. This is undesirable...because the pressure alone might

⁴² Free Flow of Information Act of 2011, H.R. 2932, 112th Cong. (2011).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Brian N. Biglin, *The Reporter's Privilege and Its Uncertain Boundaries in the National Security Context*, NEW JERSEY LAWYER (June 2017), https://www.duanemorris.com/articles/static/biglin_njlaw_0717.pdf.

⁴⁶ *Id.*

⁴⁷ *Id.*

discourage aggressive reporting about the government.”⁴⁸ In *Branzburg*, “the Court did not explicitly recognize the existence of a chilling effect resulting from the forced disclosure of confidential sources.”⁴⁹ This is why many have disagreed with the Court’s opinion in *Branzburg*. They believe the chilling effect is very real and would suppress speech. This would violate the First Amendment, as the chilling effect “is as inimical to the principles of the First Amendment as direct censorship by the state.”⁵⁰ Without protection, important information that the people deserve to know will be suppressed.

Additionally, the press is considered the fourth branch of government, serving as “a government watchdog, monitoring those in power for abuses of their positions and informing the public on matters of local and national significance.”⁵¹ If journalists must fear for their safety and freedom when they get information, their ability to serve as a watchdog is compromised and they cannot “ensure that the press continues to fulfill that role and does not become an investigative arm of the government.”⁵²

D. *WikiLeaks and National Security Risks*

Without a federal reporter’s privilege, many fear the drastic ramifications beyond just a chilling effect for reporters. Reporters are bound by ethics and journalistic practices and can be held responsible by the United States criminal justice system. Without protection by shield laws, journalists become a less appealing way for potential sources to reveal information. Instead, their information will be spread through unchecked, unaccountable, and illegal means. The most common example of this is through WikiLeaks, which provides more certainty of confidentiality. WikiLeaks advertises their website as “an innovative, secure and anonymous way for sources to leak information.”⁵³

This provides a compelling alternative to the traditional journalists’ sources and gives sources a choice in whom to confide. If it makes more sense for sources to confide in WikiLeaks, they will. This presents a huge problem to the United States government.

⁴⁸ Ryan C. Stevens, *Keeping the News Domestic: Why a Toxic Environment for the American Press and Ready Access to Foreign Media Organizations Like WikiLeaks Compel the Rapid Adoption of a Federal Reporters’ Privilege*, 66 HASTING LAW JOURNAL 1464, 1469 (2015).

⁴⁹ John E. Osborn, *The Reporter’s Confidentiality Privilege: Updating the Empirical Evidence after a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 67 (1985).

⁵⁰ RonNell Andersen Jones, *Rethinking Reporter’s Privilege*, 11 MICH. L. REV. 1222, 1247 (2013).

⁵¹ Kurt Wimmer & Stephen Kiehl, *Who Owns the Journalist’s Privilege – the Journalist or the Source?*, COMMUNICATIONS LAWYER, 1 (2011).

⁵² *Id.*

⁵³ Stevens, *supra* note 48, at 1469.

The availability of foreign media organizations like WikiLeaks allows leakers and sources to send their information to news outlets that will not be subject to the laws of the United States. Future leakers and sources who desire to release such information to the public will attempt to avoid harassment, and therefore, be pushed away from reputable reporters... and turn to news outlets that are outside the reach of the DOJ. Technological advances in data storage and communication over the Internet enable leakers to easily send information to organizations like WikiLeaks, which generally operate outside the United States. The history of cooperation between the U.S. government and American press shows why this trend of outsourcing to foreign organizations is a problem that increases the need for a clear and uniform reporters' privilege.⁵⁴

Without the ability of journalists to report information, that duty falls into worse, more corrupt hands.

E. *What is the meaning of the First Amendment?*

The First Amendment provides critical protection to journalists so that they can check government power, as "advocates of a privilege for reporters contend that this protection should be extended to ensure the confidentiality of a reporter's information and sources. Since fear of exposure deters sources from revealing their information to reporters, it is argued, the failure to recognize a reporter's privilege significantly impairs the ability of the press to keep the public informed."⁵⁵ This means that without a reporter's privilege the freedom of the press is compromised.

Newsgathering is critical for journalists to get accurate information. Thus, newsgathering should be protected. The necessity of newsgathering has been subsequently ruled on in the D.C. Circuit which "succinctly put it in *Zerilli*, 'news gathering is essential to a free press.'⁵⁶ Without a federal reporter's privilege, journalists do not have the right to gather news freely and fairly because they could have to reveal their sources, and thus, their right to give anonymity to their sources is gone. This eliminates traditional newsgathering techniques, compromises journalists, and stops quality reporting for fear of imprisonment.

⁵⁴ Stevens, *supra* note 48, at 146.

⁵⁵ Angela M. DeMeo, *Reporter's Privilege and the First Amendment*, 23 THE CATHOLIC LAWYER 41, 43 (2017).

⁵⁶ Committee on Communications & Media Law, *The Federal Common Law of Journalist' Privilege: A Position Paper*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 217 (2004).

III. The Need for a Reporter's Privilege

It is clear that there should be a federal reporter's privilege; however, it remains unclear how exactly the United States government should go about this. There are a few possible solutions, but a federal law created by Congress would likely be most effective.

A. Overturning *Branzburg v. Hayes*

The first solution that is often presented when trying to secure a federal reporter's privilege is overturning the *Branzburg* decision that denied a federal reporter's privilege in the first place. After the decision, "the courts and the press have remained locked in a bitter battle over the right of newsmen to protect their confidential source relationship."⁵⁷ The narrow 5-4 decision in *Branzburg* is currently the court's last definitive ruling on whether the First Amendment's press clause guarantees reporters the constitutional right to protect their sources from grand juries.⁵⁸

Because of the narrow decision and recent cases of journalists being forced to give up their sources or imprisoned, there is more uncertainty around the decision in the case. Other courts have criticized the decision including "a strongly worded United States Court of Appeals decision in 2003 criticizing thirty years of federal appellate precedent that provided limited protection to journalists and sources."⁵⁹

Others have interpreted the majority opinion in *Branzburg* as the Court laying the foundation for the acknowledgement of a qualified First Amendment shield; "although it held that privilege did not apply in the four cases before it, the Court did not define the precise parameters of whatever protection the first amendment affords confidential newsman-source relationships."⁶⁰ Because so much was left unanswered by the original case, the Supreme Court could take up another reporter's privilege case and establish clear guidelines as to when a reporter is protected, thus effectively overturning the *Branzburg* case.

This option, however, is unlikely. The Supreme Court does not like to overturn previous decisions unless something has changed drastically. While one could argue that the advent and potential proliferation of alternative, source-protecting venues like WikiLeaks *has*

⁵⁷ Mark Neubauer, *The Newsmen's Privilege after Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160 (1976).

⁵⁸ Anthony L. Fargo, *What They Meant to Say: The Courts Try to Explain Branzburg v. Hayes*, 12 JOURNALISM & MASS COMMUNICATION MONOGRAPHS, 65 (2010).

⁵⁹ *Id.* at 65

⁶⁰ Neubauer, *supra* note 57.

changed things, the aforementioned change is probably not enough to convince the Supreme Court to reexamine *Branzburg* because traditional news sources are still so prevalent. Thus, overturning *Branzburg* is not the best way to create a federal reporter's privilege.

B. *Rule 501 of Federal Rules of Evidence*

There is a second way to implement a reporter's privilege without overturning the *Branzburg* decision. Instead, the Supreme Court could create a new privilege using Rule 501 of the Federal Rules of Evidence. This rule "allows federal courts to define new privileges by interpreting common law principle ... in the light of reason and experience."⁶¹ In fact, it has been asserted that the "history of this rule—which was enacted three years after the *Branzburg* decision—indicates that Congress expected this rule to be used to create a reporter's privilege."⁶² This is because the *Branzburg* case indicated that the "public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege."⁶³ Thus, the courts have a right to create a new privilege for reporters under Rule 501.

Despite the appeal of this option, it is unlikely to happen. Rule 501 was last amended on April 26, 2011 and, despite scholars writing that this would be the perfect opportunity to create a federal reporter's privilege, there has been no new action taken.⁶⁴ Additionally, the Supreme Court would have to go against the previous court's decision in *Branzburg*, which it had the option to do in when reporter's privilege was challenged in the case *Sterling v. United States* when former CIA agent Jeffrey A. Sterling allegedly gave reporter James Risen information for his book.⁶⁵ Despite pressure, the Supreme Court did not take the case, thus confirming that it did not want to overturn *Branzburg*. This makes it unlikely the Supreme Court would intervene to create a privilege under Rule 501.

C. *Mandatory State Shield Laws: An Individualized Approach*

⁶¹ Stevens, *supra* note 48, at 1469.

⁶² *Legal Sources for Protection of Journalists' Sources*, MLRC INSTITUTE, http://www.gsspa.org/conferences/fall/10052009_1%20-%20Legal%20Sources%20for%20Reporter_s%20Privilege.PDF .

⁶³ *Branzburg v. Hayes*, *supra* note 16, at 688.

⁶⁴ Fed. R. Ed. 501.

⁶⁵ Sarai Horwitz, Robert Barnes, *Supreme Court refuses to take reporter's case on revealing confidential source*, WASH. POST, (June 2, 2014), https://www.washingtonpost.com/politics/supreme-court-refuses-to-take-reporters-case-on-revealing-confidential-source/2014/06/02/d704de58-ca54-11e3-9f5c-9075d5508f0a_story.html?utm_term=.c2acf1da3e10.

Some have disagreed with doing anything at a federal level, advocating instead to leave reporter's privilege to be carried out at the state level. However, this has a variety of problems. First, there would still be not protection for reporters being forced to give up sources in federal cases. Additionally, the lack of consistent state laws could discourage reporting in some states over others, thus degrading the quality of reporting in those states. And, finally, this would create inconsistent messaging about the way reporters are treated in the United States, which not only makes the United States look inconsistent, but also as though the United States considers reporters rights too inconsequential to be protected by a new federal law.

D. Federal Law: Ultimately, the Best Option

Ultimately, the best way to protect reporters throughout the United States is for Congress to enact a clear reporter's privilege. This could be in the form of a newly revitalized Free Flow of Information Act, with support from its former co-sponsor Vice President Mike Pence.⁶⁶ In the current congress (115th Congress), the Free Flow of Information Act of 2017 was introduced by Rep. Raskin, Jamie [D-MD-8].⁶⁷ This is the newest edition of the Act that aims, "to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media."⁶⁸ This newly formed bill is still at the introduction phase, but should be passed without hesitation. However, because this bill has been repeatedly introduced and continuously dies in committee, it is unlikely that will happen.

Conclusion

Reporters have a lengthy and strained history with the United States legal system. For many in the United States government, a federal reporter's privilege is another mechanism for reporters to act as obstacles to justice in the legal system. After the *Branzburg* decision, journalists felt that their work as a government watchdog was being put in jeopardy, as they must choose between giving up their sources or facing jail time. This was especially solidified after the *Cohen v. Cowles Media* decision, which found that a reporter could also be sued for breaking a promise to keep a source unnamed.

⁶⁶ Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. (2017).

⁶⁷ *Id.*

⁶⁸ *Id.*

Even with the introduction of state shield laws to protect reporters, legislation is needed to truly protect reporters. Without it, there will be a chilling effect allows for government tyranny. Further, this lack of protection encourages sources to go to unreliable platforms like WikiLeaks, which reduces the quality of American journalism as a whole.

Though there are several options to solve this problem, a federal reporter's privilege recognized by Congress as federal law would be an undeniably robust solution to protect journalists and their dissemination of authentic information. Congress should hold legislative hearings on the issue and enact legislation to create a federal reporter's privilege to protect the future of journalism.