THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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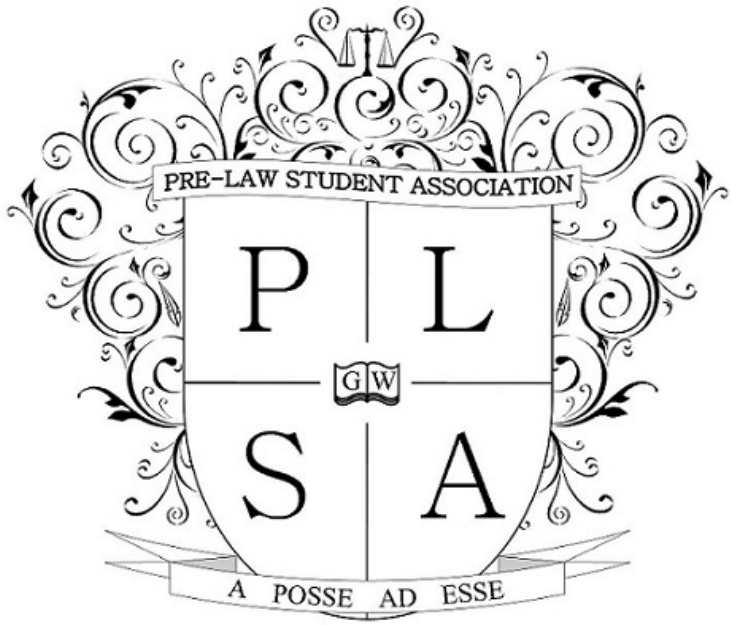

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The articles of the George Washington Undergraduate Law Review would not be published without the hard work of the student editors. Their dedication throughout the yearlong publication effort is evident in the quality of writing in this law review.

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Foreword

As President of The George Washington University Pre-Law Student Association, I am honored to introduce the 2022 Undergraduate Law Review. I would like to give a special thank you to all who work to make the Undergraduate Law Review possible from the student writers, editors, legal mentors, etc.

This year's publication is exciting as it is the first year back in person since the pandemic. The increased coordination and engagement among our membership enabled our publication to be successful despite the challenges of re-integrating students into an in-person environment. Our student writers' extraordinary work contributes valuable insights to the legal academic realm which is crucial to increase dialogue about legal topics and sharpen out students' writing and analytical skills for law school.

The Pre-Law Student Association's mission is to provide undergraduate students with the opportunity to network, inspire professional ethics, promote scholastic excellence, understand and excel in the law school application process, and explore different aspects of the legal profession. Therefore, our Undergraduate Law Review is a key pillar of the Pre-Law Student Association. I am proud to present to everyone the 2022 Edition of the GW Undergraduate Law Review.

Sincerely,

Christiana Pittman

Christiana Pittman
President

Introduction

Dear Reader,

After the most competitive application cycle in the GW ULR's history, 18 writers and eight editors were selected to take part in this year-long publication process. I have had the privilege this year of not only supervising the publication process, but of also watching these writers grow in their pursuit to address the modern-day challenges that the legal system brings. As one of the few undergraduate law reviews in the country, these writers and editors took on an extremely difficult task. However, these students rose to the challenge, and produced exceptional articles that will go on be cataloged by the Library of Congress, the GW Gelman Library, and a consortium loan community.

The publication could not have been produced without this year's editing team. These writers were assisted by myself, three co-Editor-in-Chiefs, eight student editors, two law students who served as technical editors, and 22 professional editors. I am immensely grateful for the commitment made by the editing team who worked relentlessly to ensure that the ULR maintains its tradition of producing articles of high-caliber. I would specifically like to thank my three co-Editor-in-Chiefs – John Bennett, Ale Alexandra D'agostino, and Yasmin Maleki – who went above and beyond to ensure that the publication process went smoothly. Their attention to detail, ability to lead in the face of adversity, and persistence have been invaluable to the culmination of this year's edition of the GW ULR.

For the past four years, the GW ULR has fostered my passion for the law. I have spent countless hours during my time at GW writing, researching, and editing for the GW ULR and from this process, I have not only grown as an academic and a leader, but as an individual as well. I am forever grateful that the Executive Board of the Pre-Law Student Association and the GW ULR's three co-Editor-in-Chiefs granted me the opportunity to lead the publication this year.

With that, I present to you the 12th edition of the George Washington Undergraduate Law Review.

Sincerely,

Courtney Lange

Courtney Lange
Law Review Director

ARTICLES

Intellectual Property Laws in the Fashion Industry: The Legality of Fast Fashion

Samantha Lee

Introduction

In 2017, Chanel, a French luxury fashion house founded in 1910, filed a lawsuit against defendant Hsiao Yin Fu for "counterfeiting, trademark infringement, false designation of origin, trademark dilution, state and common law trademark infringement and unfair competition, and breach of contract."[1] Fu operated a business in Burlingame, California where she sold counterfeit products, including handbags, wallets, clothing, and jewelry, that allegedly infringed on Chanel's trademark and had substantially lower quality compared to Chanel's genuine luxury products.[2] Chanel filed a motion for a default judgment and since Fu failed to oppose the motion, a federal court granted Chanel's motion.[3] After supplemental briefing, Chanel sought a permanent injunction, $35,640 in attorney's fees, $400 for costs, $40,000 for bond release, and the permission to destroy all goods that law enforcement seized on May 4, 2016.[4] In 2017, the court granted Chanel's motion for default judgment.[5] This case represents a successful instance of a luxury fashion house obtaining compensation from a fast fashion business that had blatantly counterfeited a luxury brand's design.

Luxury fashion is characterized by "identified status, exceptional quality, after purchase services, creativity, and more" and is regarded less as a piece of clothing, but as a unique way of expression and in some cases as art.[6] In contrast, fast fashion, represented by

[1] Chanel, Inc. v. Hsiao Yin Fu, No. 16-cv-02259 (N.D. Cal. Feb. 16, 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.* Chanel initially sought $500,000 in statutory damages and requested that the court find Fu in contempt of the court's permanent injunction.

[5] *Id.*

[6] Uché Okonkwo, Luxury Fashion Branding: Trends, Tactics, Techniques 2 (1st ed. Palgrave Macmillan 2007).

brands such as Shein or Fashion Nova, is "an all-encapsulating term used to describe a business model based on copying and replicating high-end fashion designs" and is "mass produced at low cost."[7] Despite the time invested in creative design by luxury brands, fast fashion companies take advantage of these designs by providing them to their consumers at cheaper prices, as exemplified in the litigation between Chanel and Fu.

While the Chanel case shows that luxury fashion companies can successfully use the judicial system to stop those who blatantly plagiarized their designs and seek compensation for the theft of their intellectual property, this is not always the case. Fashion law is a patchwork of laws that is primarily based on the Copyright Act of 1976 and the Lanham Act to attempt to create design protection.[8] However, this combination of laws enable fast fashion companies to take advantage of luxury brands' creativity and innovation because it makes it difficult to decipher what precedents and regulations are or can be applied to fashion design.[9] Not only does the ambiguity in laws protecting a product's unique design allow fast fashion companies to capitalize on luxury brands' work, but it also undermines the concept of luxury, which poses a danger to the luxury fashion house itself. Luxury is considered exclusive, high quality, and creative.[10] By equating fast fashion copies and luxury products, such as when fast fashion companies are not penalized for similar or identical versions of luxury products, the exclusivity that luxury brands rely on to market their products is diminished.[11]

This article considers two alternatives to mitigate the issues posed by the current patchwork of federal laws that allow fast fashion companies to manufacture similar or identical products and proliferate in the industry. The first approach, found in the European Union, is to adopt intellectual property laws based on *sui generis*, a system that "only protects fashion designs and pieces of apparel that are exceptionally original, and does so only against other articles that are substantially identical," but also protects entire garments rather than

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[7] Katherine Saxon, *Fashion Guide: Definitions, Problems, Examples, Solutions*. The Vou (Apr. 7, 2021), https://thevou.com/fashion/fast-fashion/.

[8] Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs,* 48 U. Balt. L. Rev 453, 464 (2019).

[9] Cassandra Elrod, *The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion industry Affect Global Sustainability,* 24 Ind. J. of Global Legal Stud. 575, 580 (2017).

[10] Fabrizio Mosca & Rosalia Gallo, *Global Marketing Strategies for the Promotion of Luxury Goods 244* (2016 Cesare Amatulli, Antonio Mileti, Gianluigi Guido, Vincenzo Speciale).

[11] Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community,* 8 Nw. J. Tech. & Intell. Prop. 147, 160 (2010).

only protecting "separable designs" as seen in the United States.[12] The second approach is to implement labor and environmental sustainability laws that limit the ability of fast fashion brands to take advantage of unfair labor practices that enable them to mass produce cheap clothing.

Part I of this article examines current fashion intellectual property law to provide context on how fast fashion is legal. It will also reference several notable precedents between luxury fashion houses and fast fashion companies to indicate how current intellectual property law is used. Part II shows why the current legal framework inadequately protects luxury fashion houses and encourages the proliferation of fast fashion, and the need to change this system. Part III describes current European Union laws and possible ways to implement a similar policy in the United States. It also identifies current labor and sustainability fashion laws that may limit the ability of fast fashion companies to take advantage of the current system and thus better prevent them from manufacturing identical or highly similar products.

I. Fashion Law: Current Intellectual Property Protection for Apparel Designs

Fashion law is not a clearly defined field of law, and it incorporates a patchwork of laws drawn from copyright law, trademark law, and patent law to create limited protection for fashion designs.

A. Copyright Law

Copyright law can protect unique designs if it is separate from the utilitarian function of the garment.

The Copyright Act of 1976, a federal law that aims to protect against unauthorized copying of work, is used to extend copyright law to fashion design.[13] This protection is drawn particularly from Section 102, which aims to protect "original works of authorship fixed in any tangible medium of expression" for literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[14] While there is no explicit mention of fashion design within this law, creators classify their apparel

[12] Arianne Vanessa Josephine T. Jimenez, *A Sui Generis System of Protection for Exceptionally Original Fashion Designs, 26* Loy. A. Ent. L. Rev. 101, 101 (2016).

[13] *What is Copyright Law and What Works are Protected by It?,* The Fashion Law (2021), https://www.thefashionlaw.com/resource-center/copyright-law/.

[14] 17 U.S.C. § 102.

under the pictorial, graphic, and sculptural works category to qualify for legal protection.[15] Even if designers classify their work under this category, however, the Copyright Act provides limited protection. The Copyright Act does not protect the "mechanical or utilitarian" aspects of products.[16] Since apparel has a "useful" function, this utilitarian doctrine prevents creators from protecting their entire design.[17]

The idea of separating utility from creative freedom was addressed in the landmark Supreme Court case *Star Athletica, LLC v. Varsity Brands, Inc.*[18] Varsity Brands, Inc. (Varsity) manufactured and received copyright protection for two-dimensional designs on its cheerleading uniforms.[19] Star Athletica, LLC (Star) manufactured uniforms that were similar to the designs that Varsity manufactured and copyrighted.[20] Varsity sued Star for violating the Copyright Act because the designs were separable and non-functional and were protected under the Act.[21] Conversely, Star argued that Varsity did not have copyright protection because they were part of the uniform and cannot be separated from the "useful" article.[22] The Supreme Court concluded that a design on a "useful" article, such as apparel, is copyrightable if it can exist separately from the article.[23] In this case, the Court determined that the designs could be separated from their cheerleading uniforms because they had their own pictorial, graphical, or sculptural qualities and were copyrightable despite having the outline of the cheerleading uniform, otherwise considered the useful object.[24]

Star Athletica v. Varsity Brands established that separability could exist in fashion design and gave designers the ability to seek broader protection under the Copyright Act. If a designer can prove its separate identification and independent existence from a physical

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[15] Linna T. Loangkote, Note: *Fashioning a New Look in Intellectual Property: Sui Generis Protection for the Innovative Designer,* 63 Hastings L.J. 297, 303 (2011).

[16] 17 U.S.C. § 101 (defining pictorial, graphic, and sculptural works to include designs but not their "mechanical or utilitarian aspects" and stating that "the design of a useful article. . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article").

[17] *See* Loangkote, *supra* note 15.

[18] Star Athletica, L.L.C. v. Varsity Brands, Inc.*,* 137 S. Ct. 1002 (2017).

[19] *Id.*

[20] *Id.*

[21] *Id.* at 10, 15.

[22] *Id.* at 3.

[23] *Id.* at 1.

[24] *Id.* at 3.

garment, luxury fashion houses are better able to defend their work in court from fast fashion brands that often produce similar or exact replicas of their work.[25]

In addition to the separability principle, the Copyright Act has expanded to include textiles. In the 1950s, the United States Copyright Office expanded the scope of copyright law when it determined that painting was not completely different from dyeing fabric and since then "textile prints and lace patterns have been copyrighted."[26] While some basic designs reside within the public domain, designers can now create their own textile prints and receive protection.[27]

In 2021*,* the court applied the concept of separability and expanded textile protection under the Copyright Act in a case between Versace, an Italian luxury fashion house, and Fashion Nova, a popular California-based fast fashion brand.[28] Versace argued that Fashion Nova was "selling 'deliberate copies and imitations of [its] most famous and recognizable designs, marks, symbols, and other protected elements'" and this is "causing significant damage to Versace's widely valuable intellectual property rights."[29] Fashion Nova defended its actions by citing that "certain designs at issue in this suit…should be invalidated because Versace's 'copyrighted [prints]…lack originality, are standard geometric figures and patterns, are in the public domain, and are widely used in the fashion and apparel industry.'"[30] Further, Fashion Nova claimed that "the marks at issue are functional…and are not actually protected since trademark law only extends to a product's decorative, non-functional features."[31] Four days before the trial was set to begin, both parties agreed to settle the case and to "finalize the outstanding matters before the pretrial conference."[32] While this case did not go to trial, Versace's arguments to protect and defend its textile and design indicated how luxury fashion houses use the *Star Athletica* separability principle and expanded copyright law.

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[25] *Id.* at *7*.

[26] Jenna Sauers, *How Forever 21 Keeps Getting Away with Designer Knockoffs,* Jezebel (July 20, 2011, 4:20 PM), https://jezebel.com/how-forever-21-keeps-getting-away-with-designer-knockof-5822762.

[27] *Id.*

[28] *See* Gianni Versace S.R.L. v. Fashion Nova*,* No. 19-cv-10074, 2021 U.S. Dist. C.D. Cal. Nov. 25, 2019).

[29] The Fashion Law, *Versace is Suing Fashion Nova for "Brazenly" Copying its Designs, Infringing its Trademarks,* The Fashion Law (Nov. 26, 2019), https://www.thefashionlaw.com/versace-is-suing-fashion-nova-for-brazenly-copying-its-designs/.

[30] The Fashion Law, *Versace, Fashion Nova Settle Case Days Before the Start of Trial Over Copycat Wares,* The Fashion Law (July 19, 2021), https://www.thefashionlaw.com/versace-fashion-nova-settle-case-days-before-the-start-of-trial-over-copycat-wares/.

[31] *Id.*

[32] *Id.*

B. Trademark Law

Luxury fashion companies often use the Lanham Act or the Trademark Act of 1946, a federal act that provides a system for trademark registration and protects the trademark owner, to safeguard their designs.[33] Trademark law can be used to protect apparel if the design uses the luxury fashion house's trademark or if their product is "inherently distinctive or has achieved secondary meaning and qualifies for trade dress protection."[34]

The Lanham Act defines a trademark as, "any word, name, symbol, or design…to identify and distinguish the goods of one brand from those of another."[35] Trademark law protects the product if an identical trademark is used with another good in a way that would "cause confusion, or…deceive" the consumer from the original good.[36] Furthermore, this law aims to "prevent fraud and deception in…commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks."[37] While trademark law specifically strives to prevent unauthorized replication of designs, trademark law is even less protective than copyright law because it primarily applies to fashion designs that indicate the source of the design.[38] If a designer incorporates the trademark into their design, however, the design can essentially obtain "a permanent, practically no-strings-attached rights to the design."[39] For example, Gucci, a luxury Italian fashion house, trademarked its classic logo of interlocking G's. Under trademark law, a handbag, for example, would be more likely to be protected if it displayed Gucci's logo than if the handbag did not because the logo indicates that the handbag was produced by Gucci.[40]

While trademark law only applies when a designer incorporates their trademark, there are several cases in which luxury fashion brands successfully defended their work against fast fashion brands. For example, Tory Burch, a luxury American fashion brand, sued 41 defendants who sold counterfeit luxury merchandise bearing Tory Burch's trademarks.[41] Although the defendants were individuals and business entities who resided in foreign

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[33] Trademark Act of 1946 §1, 15 U.S.C. § 1051 (2013).
[34] *Id.* at §1052(f).
[35] Trademark Act of 1946 § 45, 15 U.S.C. § 1127 (2013).
[36] Trademark Act of 1946 § 1, 15 U.S.C. §1051 (2013).
[37] Trademark Act of 1946 §45, 15 U.S.C. § 1127 (2013).
[38] Loangkote, *supra* note 15 at 305.
[39] Farella Braun & Martel LLP, *The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment*, 127 Harv. L. Rev. 995, 1001 (2014).
[40] *Id.* at 1002.
[41] Tory Burch LLC et al. v. Yong Sheng Int'l trade Co., LTD et al., No. 1:10-CV-09336 (S.D.N.Y. May 13, 2011).

jurisdictions, the court determined that the defendants sold counterfeit products bearing the Tory Burch trademark to buyers in the United States and went "to great lengths to conceal themselves and their ill-gotten proceeds from Tory Burch's and the court's detection."[42] After the defendants failed to appear, the court entered a default judgment and awarded Tory Burch $4 million in statutory damages against each defendant.[43] The court also ruled that the money held in PayPal accounts by the defendants would be released to Tory Burch as partial payment.[44] Furthermore, the court provided Tory Burch with "ongoing authority to serve its permanent injunction on the domain registrars" by any of the 41 defendants.[45] Through this ruling, Tory Burch shut down hundreds of counterfeit websites selling copies of the companies' signature apparel bearing its trademark.[46] Given that the defendants are not based in the United States, it is unlikely that Tory Burch will fully collect its compensation, but the assets in the defendants' PayPal accounts were reportedly "one of the largest sums ever awarded for counterfeiting fashion products."[47]

Other than a trademark, designers could pursue trade dress protection, which is also defined under the Lanham Act. While trade dress originally only protected the "packaging of a product," it has recently encompassed the design of the product and protects the "total image and overall appearance" of a product, including "features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."[48] Trade dress protection cannot be applied to a functional good to ensure that "protection for utilitarian features [are] . . . sought through a limited-duration utility patent and not through the potentially unlimited protection of a trademark registration" and the product must be distinctive.[49] If the proposed trade dress mark is not inherently distinctive, designers can still pursue trade dress protection if there is "proof of acquired distinctiveness or secondary meaning."[50] Secondary meaning is proof that consumers or potential consumers identify the

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[42] Default Judgment and Permanent Injunction Order, Tory Burch LLC v. Yong Sheng Int'l Trade Co., No. 10-cv-9336, 2011 U.S. Dist. LEXIS 158882, at *4 (S.D.N.Y. May 13, 2011).; *see also* Natasha Reed, *From Runway to Replica: Intellectual Property Strategies for Protecting Fashion Designs,* Foley Hoag LLP (Feb. 8, 2016), https://casetext.com/analysis/from-runway-to-replica-intellectual-property-strategies-for-protecting-fashion-designs?sort=relevance&resultsNav=false&q=.

[43] Default Judgment and Permanent Injunction Order, *Tory Burch LLC v. Yong Sheng Int'l Trade Co.,* No. 10-cv-9336, 2011 U.S. Dist. LEXIS 158882, at *3 (S.D.N.Y. May 13, 2011).

[44] *Id.* at 6.

[45] *Id.* at 7.

[46] Reed, *supra* note 42.

[47] *Id.*

[48] Farella Braun & Martel LLP, *supra* note 39, at 1002.

[49] 15 U.S.C. § 1202.02(a)(ii); 15 U.S.C. 1202.02

[50] 15 U.S.C. §1052(f)

trademark as a distinctive marker when applied to apparel.[51] To illustrate, Hermès', a luxury French fashion house, Birkin bag is so infamous that its appearance alone indicates its designer.[52]

Trade dress protection can be observed in a lawsuit in which Coach sued We Care Trading (We Care) for trademark infringement of two registered trademarks, trade dress infringement, contributory infringement of two trademarks and its trade dress, and dilution of both trademarks.[53] Coach has a trade dress in its handbags that are made of "glove-tanned leather, bound edges, heavy brass or nickel-plated brass hardware, and a hand tag with a beaded chain," which are well-known aspects of Coach's classic collection.[54] During the trial, Coach successfully showed that its handbag design had gained secondary meaning and the jury found We Care liable for all charges.[55] While the jury awarded no damages, the court signed a permanent injunction against We Care.[56]

Trade dress protection can also be acquired through common law rights that are acquired through commerce in a specific geographical area.[57] While there are no fees associated with attaining protection through common law, enforcing trade dress protection through common law is difficult and does not give a fashion designer the right to prevent other similar or the same trademarks outside of the region.[58] The only way to protect a design long term is trade dress protection through federal registration.[59]

C. Design Patent Law

The Patent Act of 1842, a federal act that "protected inventor's designs for manufactured articles through design patents," created design patent law that can be applied to fashion design.[60] Although a design patent is limited to ornamentation, "a design may embody functionable features and still be patentable," but only if the design has "an unobvious appearance distinct from that dictated solely by functional considerations."[61] In

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[51] *Id.*

[52] The Fashion Law, *Intellectual Property 101: A Primer,* The Fashion Law (Apr. 26, 2020), https://www.thefashionlaw.com/intellectual-property-rights-a-primer/.

[53] Coach, Inc. v. We Care Trading, No. 99-cv-11672 (S.D.N.Y. July 28, 2001).

[54] *Id.*

[55] Beltrametti, *supra* note 11, at 154.

[56] *Id.*

[57] *What Is Trade Dress and How Is It Different from a Trademark?,* The Fashion Law (2022), https://www.thefashionlaw.com/resource-center/trade-dress-law/.

[58] *Id.*

[59] *Id.*

[60] *Design Patent,* Legal Information Institute (2021), https://www.law.cornell.edu/wex/design_patent.

[61] *Id.*

addition to ornamentation, design patents must meet "a non-obvious and novelty requirement to qualify for a design patent."[62] The design could be a "portion of the design, the entire design, or ornamentation applied to a design," which could be beneficial for luxury designers as entire garments could be protected.[63] Design patents are registered with the United States Patent and Trademark Office (USPTO) and if a design is approved, it can receive protection for 14 years.[64] In the United States, inventions can be patented up to 12 months after they have been publicly disclosed, however, the United States also operates under a first-to-file system that awards the patent to the first inventor who files their application.[65] This makes it advantageous to file a patent as soon as possible.

Unlike trade dress protection, a design patent does not need to prove that the apparel has acquired secondary meaning.[66] Further, it is unlikely for a design patent to be rejected based on the design's functionality.[67] Often, designers apply for a design patent to protect their garment and to build consumer recognition.[68] Subsequently, a design patent can help develop secondary meaning to obtain trade dress protection at a later time.[69] Luxury designers, such as Christian Dior Couture (Dior), have taken advantage of this law as Dior has patented several items, including the ornamental design for its classic tuxedo style dress coat for 14 years.[70]

II. The Problem with Current Intellectual Property law for the Fashion Industry

A. The Lack of Legal Protection

The primary issue with intellectual property as it applies to fashion is that there is no 'fashion law,' but it is a limited combination of protections through using copyright law, trademark law, and patent law.[71] In copyright law, fashion designs need to be viewed as a whole because it gives an overall impression that is essential to appreciating the artistry and

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[62] Loangkote, *supra* note 15, at 306.

[63] Dayoung Chung, *Law, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation,* 17 J. Marshall Rev. Intell. Prop. 492, 542 (2018).

[64] Manon Burns and Lisa Holubar, *Is it Functional or Is It Functional? Trade Dress vs. Design Patent "Functionality,"* American Bar Association (Feb. 8, 2021), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/january-february/is-it-functional-trade-dress-vs-design-patent-functionality/#5.

[65] 35 U.S.C. 102.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] U.S. Patent No. D709, 267S (issued July 22, 2014).

[71] Martin, *supra* note 8, at 459.

the creativity of the design.[72] However, the issue of separability, as indicated in *Star Athletica,* means that only specific designs can be protected and the designs must be able to exist independently from the apparel.[73] Yet, few aspects of apparel are purely aesthetic and can be definitively separated from the product's functionality.[74] If a designer is unable to indicate the separability between the design and the function of the apparel, the issue of functionality would prove to be especially problematic for luxury fashion houses.[75] Fast fashion companies can take advantage of this and produce similar or identical products with little to no consequence as luxury brands cannot have legal copyright protection for their garments.

Those that oppose the lacking legal protection in the fashion industry have referenced similarities between architectural design and apparel design. Similar to designing a blouse, there are finite possibilities on ways to design high-rise buildings because of construction limitations.[76] While architectural works are protected under the Copyright Act, fashion designs are either completely unprotected or need to meet certain criteria to qualify for legal protection.[77] This not only indicates hypocrisy between categories entitled to copyright protection, but also the apparent lack of fashion design protection.

Despite the Lanham Act, the lack of legal protection for apparel is also notable in trademark law. Because current trademark law is primarily concerned with the indication of the source of the design that distinguishes one brand's goods from another, this law does little to protect creative or innovative fashion designs unless it incorporates the designer's trademark.[78] Therefore, fast fashion brands have been able to extensively counterfeit luxury designs. Counterfeiting is "the use of a spurious trademark on non-original merchandise, which is identical with or substantially indistinguishable from a registered trademark, in connection with the trafficking of counterfeit merchandise."[79] Although Congress acknowledged this problem when it passed the Counterfeiting Act in 1984, fast fashion brands continue to mass manufacture similar or identical luxury garments.[80]

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[72] Loangkote, *supra* note 15, at 304.
[73] *Id.* at 303.
[74] *Id.* at 304.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 305.
[79] Beltrametti, *supra* note 11, at 149.
[80] *Id.* at 147.

Moreover, even if designers do incorporate their trademark, luxury fashion houses need to continuously defend their brand and their trademark from fast fashion brands. Burberry Limited (Burberry) is known for filing lawsuits against unauthorized companies using their infamous Burberry Check trademark.[81] For example, Burberry sued Target Corporation (Target) for allegedly copying its trademarked check print.[82] Burberry demanded that Target immediately stop selling its knock-off products and sought $2 million for each infringed trademark as well as attorney fees.[83] Burberry maintained that Target's previous collaborations with luxury brands, such as Hunter, a brand that sells luxury Wellington boots, and famous figures like Victoria Beckham, "heightens the risk of consumer confusion."[84] In response, Target "issued a blanket denial of Burberry's allegations."[85] After the Southern District of New York heard the case, both parties agreed to dismiss the case, but the terms of the dismissal are unclear.[86]

Burberry has also sued J.C. Penney for unauthorized use of its trademarked Burberry Check. Burberry alleged that J.C. Penney and its supplier "intentionally and willfully used, reproduced, and copied the Burberry Check" and "although J.C. Penney's allegedly infringed products were of inferior quality, they superficially appeared similar to genuine Burberry products, which would deceive and mislead consumers."[87] J.C. Penney argued that its supplier was responsible for any infringement actions.[88] Burberry subsequently "filed a notice of voluntary dismissal with prejudice" and J.C. Penney removed any "alleged infringing products from its website."[89] Similar to Burberry's more recent case with Target, the terms of the J.C. Penney settlement are unknown.[90]

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[81] Mary Hanbury, *Target is Being Sued by Burberry, and it Reveals One of the Biggest Problems Facing the Clothing Industry,* Business Insider (May 9, 2018, 12:39 PM), https://www.businessinsider.com/target-sued-by-burberry-reveals-big-problem-fashion-2018-5.

[82] Burberry Limited et al v. Target Corporation et al*,* No. 1:18-CV-03946 (S.D.N.Y. May 2, 2018).

[83] *Id.*

[84] *Id.*

[85] Eric Chadwick & Kyle Peterson, *Burberry vs. Target: Drawing the Line Between Inspiration and Infringement,* Star Tribune (Aug. 20, 2018, 7:57 AM), https://www.startribune.com/burberry-vs-target-drawing-the-line-between-inspiration-and-infringement/491157851/.

[86] Robyn Turk, *Target and Burberry Settle Dispute Over Check Pattern,* Fashion United (Oct. 25, 2018), https://fashionunited.com/news/fashion/target-and-burberry-settle-dispute-over-check-pattern/2018102524212.

[87] Anthony V. Lupo, Michelle Mancino Marsh and & Janice Phaik Lin Goh, *JC Penney Quickly Settles Suit with Burberry Over Alleged Counterfeit Check Pattern,* Arent Fox LLP (Apr. 4, 2016), https://www.lexology.com/library/detail.aspx?g=eee02176-f21d-4728-a1ce-644dd20671bb.

[88] *Id.*

[89] *Id.*

[90] *Id.*

In addition, while trade dress trademark protection seems to be beneficial for luxury fashion houses, the legal standard to qualify for this protection has traditionally been extremely difficult to meet.[91] Trade dress trademark protection allows fashion houses to protect an entire garment, but it must meet the functionality matter and distinctive product design clause in trade dress protection that requires a secondary meaning to qualify.[92] This results in many designers forgoing this process as attaining a secondary meaning is challenging.[93] Thus, this provides another avenue of protection luxury fashion brands cannot access, further enabling fast fashion brands to proliferate.

Patents can encompass an entire design.[94] Design patents, however, have a lengthy application process because patents are issued through the USPTO and are extremely expensive.[95] On average, patents take two years to receive a decision from the USPTO and can cost up to several thousand dollars to apply for each design patent.[96] The USPTO also rejects approximately half of patent applications.[97] Thus, since the process is too uncertain and inconvenient, most luxury fashion houses do not have design patents.[98] The fashion industry is also constantly evolving.[99] This makes the expensive and lengthy processes extremely disadvantageous since the designs a luxury brand wants to patent may not be in season by the time a patent is issued.[100]

The difficulty in prosecuting individuals or brands producing fast fashion is exemplified by a 2016 case brought by Louis Vuitton against My Other Bag for "alleged trademark dilution, trademark infringement, and copyright infringement."[101] Louis Vuitton claimed that My Other Bag's canvas tote bags similar to Louis Vuitton's "iconic handbags by evoking 'the classic 'my other car…' novelty bumper sticks" infringed on Louis Vuitton's registered trademarks and diluted the quality of its trademark by using them on its own

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[91] Farella Braun & Martel LLP, *supra* note 39, at 1002.
[92] *Id.*
[93] *Id.*
[94] Design Patent, *supra* note 60.
[95] Loangkote, *supra* note 15, at 304.
[96] Beltrametti, *supra* note 11, at 155.
[97] *Id.*
[98] *Id.* at 156.
[99] *Id.*
[100] Loangkote, *supra* note 15, at 307.
[101] Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., No. 14-CV-2419 (JMF) (S.D.N.Y. Jan. 8, 2018).

"inexpensive canvas tote bags."[102] The District Court and the Second Circuit ruled in favor of My Other Bag given "the obvious differences in [My Other Bag's] mimicking of the [Louis Vuitton] mark, the lack of market proximity between the products at issue, . . . minimal, unconvincing evidence of consumer confusion," My Other Bag's clear use for parody purposes, and that My Other Bag's parody purposes "produced a new expression and message that constituted transformative use."[103] Despite Louis Vuitton's trademark on goods and similarities, other factors involved in this case resulted in My Other Bag's freedom to continue manufacturing its designs.

B. Cutting into Profits of the Luxury Brand

One way this legal framework has impacted luxury brands is through decreased economic profits from copied or closely replicated original designs. A luxury brand's profits are impacted in two ways: through tangible revenue lost because of counterfeiting and through spending money combating counterfeiting. In 2019, the total trade in fake merchandise was "estimated at around $4.5 trillion, and fake luxury merchandise accounted for 60 to 70 percent of that amount . . . and represented perhaps a quarter of the estimated $1.2 trillion total trade in luxury goods."[104] Furthermore, luxury brands allocate a large amount of money to prevent others from copying or closely replicating their designs. For instance, LVMH Moët Hennessy Louis Vuitton employs at least 60 lawyers and "spends a reported $17 million annually on anti-counterfeiting legal action."[105] As the sale of replicas proliferates online, a 2018 government Accountability Office report indicated that 40 percent of the luxury goods sold on third-party vendors were fake.[106] This percentage is only estimated to increase as e-commerce platforms rise in popularity and result in the growing potential for revenue losses.[107] While the lost profits may not be the primary driver of luxury fashion houses pursuing legal action given other more important repercussions, they are still a factor to consider.

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[102] *Id.*; The Fashion Law, *Louis Vuitton Wins the Last Round in Fight Over My Other Bag,* The Fashion Law (Mar. 18, 2019), https://www.thefashionlaw.com/louis-vuitton-wins-the-last-round-in-fight-over-my-other-bag/.

[103] Louis Vuitton Malletier, S.A. v. My Other Bag, Inc. No. 18-293-cv (2d Cir. Mar. 15, 2019).

[104] Roberto Fontana, Stéphane J.G. Girod & Martin Králik, *How Luxury Brands Can Beat Counterfeiters,* Harv. Bus. Rev. (May 24, 2019), https://hbr.org/2019/05/how-luxury-brands-can-beat-counterfeiters.

[105] The Fashion Law, *The Counterfeit Report: The Big Business of Fakes,* The Fashion Law (Dec. 11, 2019), https://www.thefashionlaw.com/the-counterfeit-report-the-impact-on-the-fashion-industry/.

[106] Jacob Pramuk & Christina Wilkie, *Trump Puts Amazon, Alibaba on Notice for Sale of Counterfeit Goods,* CNBC (Apr. 3, 2019), https://www.cnbc.com/2019/04/03/trump-to-sign-measure-to-crack-down-on-fake-goods-sold-online.html.

[107] *Id.*

C. Fast Fashion Business Strategy

Because copying designs is in and of itself not illegal, fast fashion brands have incorporated intellectual property lawsuits into part of its business strategy. The best example of this fast fashion business strategy is Forever 21. Forever 21 is infamous for creating similar or blatant copies of luxury fashion designs.[108] Current intellectual property law only covers aspects of fashion design, which means there are no United States intellectual property laws that cover entire designs.[109] After 27 years of business, Forever 21 has settled lawsuits more than 50 times that "typically include a non-admission of guilt, financial compensation to the designer whose work was copied, and a confidentiality agreement."[110] Despite being sued numerous times by all designers, including luxury fashion houses (most infamously Gucci who sued Forever 21 over using Gucci's iconic green-red-green stripes and blue-red-blue), Forever 21 continues to manufacture similar if not identical designs.[111] While it initially perplexed Professor Scafidi, the first professor to offer a formal course on fashion law at a United States law school, she later realized, "this is just part of their business strategy. [Forever 21 goes] ahead and they take what they want, and when they get caught, they pay up. It's probably cheaper than licensing it in the first place."[112] This suggests the issue for all fashion designers, not only luxury fashion houses, whose designs will continue to be copied if greater intellectual property protections are not enacted. Without it, fast fashion brands, such as Forever 21, will continue to relentlessly replicate designs for profit.

D. Stunting Creative Liberty

Not only is there a lack of sufficient intellectual property protection in the fashion industry, but the current legal framework, particularly trademark law, impedes the creativity of designers.[113] As discussed earlier, trademark protections do little to protect designs unless it incorporates the luxury fashion house's symbol or logo.[114] For this reason, Professor Scafidi observed that designers "are likely to feature their logos as prominently as possible and incorporate them into their designs to the greatest degree that consumers are willing to

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[108] Sauers, *supra* note 26.

[109] *Id.*

[110] *Id.*

[111] *Id.*; Sarah Shannon, *Gucci Escalates Legal Battle with Forever 21,* Business of Fashion (Aug. 8, 2017), https://www.businessoffashion.com/articles/news-analysis/gucci-escalates-legal-battle-with-forever-21/.

[112] Sauers, *supra* note 26.

[113] Elrod, *supra* note 9, at 583.

[114] *Id.*

accept."[115] While this provides the most consistent additional protection for luxury houses who seek to protect their designs, it will also likely hinder creativity because of the use of the brand's trademark.[116] This is demonstrated with any luxury fashion house that features its trademark prominently in its designs, such as Louis Vuitton's monogram canvas that is prominently displayed across the French fashion house's website.[117] While Louis Vuitton's monogram canvas has become iconic, many blatantly displayed trademarks receive slight push-back from consumers and also offer no incentives "for new, creative output of new, expressive . . . designs."[118] This is problematic for luxury designers who want to create new pieces for consumers without feeling compelled to use a trademark and also simultaneously risk widespread counterfeiting.

E. Discounting Efforts by Designers

Current fashion intellectual property law also discounts the effort made by luxury fashion house designers by enabling fast fashion counterfeiting. Luxury fashion houses spend an inconceivable amount of effort into inventing, designing, creating, and then launching their products.[119] In a 2019 short video published by Vogue, Dior's creative director Maria Grazia Chiuri discussed the process from her first inspiration to showcasing the dress on the runway.[120] Seamstresses at Dior's atelier spend three to four weeks to hand embroider flowers and other designs onto the gown.[121] Moreover, instead of using tulle, the traditional fabric that is used when designers want to embroider, to construct the dress, Chiuri chose fishnet, which is much more difficult to work with, because it better represented her inspiration for the show.[122] Current intellectual property law allows fast fashion brands to see the weeks of work and deliberate choices that luxury fashion designers put into concepts and quickly produce counterfeit versions.

F. Threat to the Concept of Luxury

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[115] Susan Scafidi, *Intellectual Property and Fashion Design*, 1 Intell. Prop. & Info. Wealth 115, 121 (Peter K. Yu ed., 2006).; Amy L. Landers, *The Anti-Economy of Fashion; An Openwork Approach to Intellectual Property Protection,* 24 Fordham Intell. Prop. Media & Ent. L.J. 427, 464-65 (2015).

[116] Elrod, *supra* note 9, at 583.

[117] *Louis Vuitton Monogram,* Louis Vuitton (2021), https://us.louisvuitton.com/eng-us/recommendations/louis-vuitton-monogram.

[118] Landers, *supra* note 115*, at* 465.

[119] Vogue, *How A Dior Dress Is Made, From Sketches to the Runway*, YouTube (September 27, 2019), https://www.youtube.com/watch?v=QFdi95YTDys&ab_channel=Vogue.

[120] *Id.*

[121] *Id.*

[122] *Id.*

Replicas of luxury fashion house designs dilute the original design. Not only do exact or similar replications of an original design cut into profits and simultaneously discount the effort and innovation creators put into their products, but it also decreases the design's "aspirational value."[123] A design's "aspirational value" is correlated with the uniqueness associated with a product.[124] When cheaper and poorer quality imitations are mass manufactured, this causes the design to become widespread and thus associated with a less exclusive and prestigious image.[125] Although some critics may argue that counterfeit luxury items serve as an advertising tool and thus benefit the creator, counterfeit versions of the original design made by fast fashion individuals and businesses ultimately dilute the original luxury design and harm the luxury fashion house that created it.[126]

The dilution of original designs is inherently problematic because it poses a threat to the idea of luxury fashion houses. While luxury fashion is known for its high-quality and creativity, Uché Okonkwo, a luxury business analyst, states, "characteristics that consumers seek in luxury brands today include high perceived prestige . . . and their association with fashion and an affluent lifestyle."[127] Luxury fashion houses are not only selling their designs, but an image to which people aspire. In addition, a luxury brand can be defined as the "sum of the feelings and perceptions people have" coming into contact with a specific brand, meaning how successful a luxury brand directly depends on how it is perceived.[128] This makes fast fashion brands that exactly or closely replicate luxury designs even more problematic because copying dilutes the exclusivity and prestige of the design by decreasing the perceived scarcity of the product.[129] The idea of selling a lifestyle is typified by Christian Louboutin, whose red sole shoes have become synonymous with luxury, celebrities, and a level of wealth to aim for.[130] References to Louboutin's iconic "red bottoms" and the wealth it represents are pervasive in pop culture, such as in Cardi B's single Bodak Yellow.[131]

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[123] Beltrametti, *supra* note 11, at 160.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] The Fashion Law, *What Brands are Really Selling,* The Fashion Law (Apr. 10, 2020), https://www.thefashionlaw.com/what-are-brands-really-selling/.

[128] Gallo, *supra* note 10, at 245.

[129] Beltrametti, *supra* note 11, at 160.

[130] Business of Fashion, *Christian Louboutin,* Business of Fashion (2021), https://www.businessoffashion.com/community/people/christian-louboutin#:~:text=Christian%20Louboutin%20is%20one%20of,boutiques%20in%20over%2035%20countries.

[131] Cardi B, *Bodak Yellow,* on *Invasion of Privacy* (Atlantic Records 2018).

More broadly speaking, dilution of the original design poses a threat to the culture luxury fashion houses wish to promote. In addition to selling high-quality designs and an elite lifestyle, luxury fashion houses are turning toward "curating platforms to function as tastemakers to extend their own brand halo into the wider cultural world."[132] By establishing this culture surrounding a brand, luxury fashion houses are building a "unique philosophy beyond a single aesthetic, which in turn will convert more people to loyal customers."[133] This new value proposition of luxury fashion can be seen with Stella McCartney. In London, the brand opened a flagship store to create a space titled #StellaCommunity friends that hosted "different local businesses each week, featuring beauty, art, music, food, live-streamed talks with special guests, and skincare treatments."[134] With this upcoming method of retaining customer loyalty, luxury brands aim to create a culture where "customers feel they can lean on brands and their taste."[135] This new culture-based marketing means that the dilution of original designs would not only impact the prestige of the brand itself but the world that the designers are creating for their consumers. This is an issue because luxury brands already need to have a "curated assortment" when extending their brand to avoid being seen as analogous with mass commercial websites, such as Alibaba or Amazon.[136] With poorly made replicated designs, the image that luxury fashion houses now wish to project may be threatened.

G. The Primary Point of Contention: The Piracy Paradox

One of the primary concerns of luxury fashion houses with current fashion intellectual property law is the relationship between creative freedom and innovation and copying. Professor Kal Raustiala and Professor Christopher Sprigman are two critics against greater intellectual property protection within the fashion industry.[137] In 2006, they introduced a new framework named the 'piracy paradox' that aimed to "explain how copying functions as an important element of, and perhaps even a necessary predicate to - the apparel

[132] Kati Chitrakorn, *Luxury is Culture Now. Here's How,* Vogue Business (July 16, 2021), https://www.voguebusiness.com/companies/how-luxury-brands-become-cultural-curators-gucci-saint-laurent-vetements.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Kal Raustiala & Christopher Sprigman, *Piracy Paradox: Innovation and Intellectual Property in Fashion Design,* 92.8 Va. L. Rev. 1687 (2006).

industry's . . . [innovation cycle]" and that the ability to legally copy enhances the industry.[138] This is because "as a design is more widely copied, its cachet typically falls," which drives the innovation cycle in the fashion industry.[139] The professors argue that through 'induced obsolescence' (the idea that "by stimulating consumer demand for new designs, [the freedom to copy] . . . spurs innovation in design") and 'anchoring' (the idea that copying creates trends allowing consumers to understand what is in and out of fashion), paradoxically, the lack of intellectual property in the fashion industry benefits designers and the industry.[140] If greater intellectual property rights were passed, apparel "would not lose its status as quickly, consumer demand would decrease, and designers would ultimately lose incentive to innovate."[141]

There are several issues with applying this theory to the relationship between luxury fashion houses and fast fashion brands or individuals, primarily with the difference between copying and imitation. While there is no doubt that fashion is cyclical and luxury fashion houses have produced similar designs, there is a difference between interpretational copying that follows or draws inspiration from popular trends versus an exact or close replication of original designs.[142] Interpretational copying may help to propel the innovation cycle, as the piracy paradox suggests, but exact or close replication only serves to disincentivize designers for creating new designs because "there is no economic benefit for the creator."[143] Further, if exact or close replication does spur innovation because of the need to create the next trend, the creative process becomes overtaken by the need to create new designs and minimize copying.[144] This leads to frustration and increased burnout among designers, which would be counterintuitive to design innovation within the industry.[145] In both circumstances, the lack of distinction between interpretational copying and exact copying is an issue with the piracy paradox's argument against greater intellectual property protection.

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[138] *Id.* at 1691; Kal Raustiala and Christopher Jon Sprigman, *Faster Fashion: The Piracy Paradox and Its Perils,* 39.2 Cardozo Arts & Ent. L.J. 535, 536 (2021).

[139] Jon Sprigman, *supra* note 138, at 541.

[140] *Id.* at 536, 540; Sprigman, *supra* note 137, at 1733.

[141] Elrod, *supra* note 9, at 593.

[142] Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma,* 11 Chi. Kent J. Intell. Prop. 172, 173 (2012).

[143] *Id.*

[144] *Id.* at 182.

[145] *Id.*

Furthermore, the piracy paradox does not take into account the current technological advances. Luxury fashion is designed by a creator who has put extensive thought and care into their product and is made with attention and aesthetic sensibility.[146] Once these designs debut on a runway, however, fast fashion pirates can "copy designs from photographs of catwalks [online] and produce copies even before the real items are introduced into the market."[147] Fast fashion copyists can also wait until luxury garments appear in stores to see which designs are popular and quickly replicate those designs.[148] Both of these scenarios pose problems to luxury fashion houses because it, as aforementioned, not only undermines the work and creativity that went into the process of designing luxury apparel, but it also decreases luxury houses' profits and allows fast fashion brands or individuals to profit off the designer without any effort.[149] One critique of this argument against the piracy paradox is that fast-fashion items are often imperfect substitutes for luxury apparel and thus cheap replications through fast fashion do not impact luxury fashion houses.[150] Yet, it is difficult to determine "the fraction of consumers who bought a pirated item, but would have been willing to pay the higher price of the original."[151]

H. Lengthy Legal Process

Another argument against greater comprehensive fashion intellectual property is that many luxury fashion houses aim to settle cases with fast fashion individuals and brands rather than moving to trial.[152] Not only is there limited case law to guide court decisions and arguments by the plaintiffs on fashion intellectual property, but it also takes a notoriously long time for courts to decide these disputes.[153] As a result, the legal fees associated with moving an intellectual property case to trial are considered counterproductive and many brands "tolerate the competition from lower priced look-alikes and seek to educate their customers about the value of owning the authorized version of a particular design."[154]

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146 Vogue, *supra* note 119.
147 Beltrametti, *supra* note 11, at 158.
148 Cohen, *supra* note 142, at 181.
149 *Id.*
150 Beltrametti, *supra* note 11, at 159.
151 *Id.*
152 Kelly Grochala, *Intellectual Property Law: Failing the Fashion Industry and Why the "Innovative Design Protection Act" Should be Passed*, Law School Student Scholarship 133, 10 (2014).
153 *Id.*
154 *Id.*

Therefore, some say that if luxury fashion houses move to settle, there is no need for greater intellectual property protection in the fashion industry.[155]

Despite the difficult legal process, luxury fashion houses have proven that if their designs are substantially threatened, they will move forward to prosecute the defendant. In a 2009 case, Gucci sued Guess for creating products that were similar to Gucci products.[156] In 2011, after discovery and unsuccessful settlement negotiations, Guess sought summary judgment.[157] The court concluded that, under the Lanham Act, Gucci proved Guess infringed on its trademarks and proved its dilution claims.[158] The court denied Gucci's counterfeit claim, however, because "courts have uniformly restricted trademark counterfeiting claims to those situations where entire products have been copied stitch-for-stitch."[159] Although the court originally awarded Gucci $4.7 million for Guess' trademark infringement, this amount was later decreased to $456,183.[160] The presiding judge commented that "over the past three years, the parties have put in countless hours and spent untold sums of money."[161] This indicates that when a luxury fashion house's intellectual property, such as its trademark, is threatened, luxury brands will take action.[162] Therefore, while many cases do end up in a settlement, this does not equate to a luxury fashion house's unwillingness to pursue litigation and should not be used as justification against greater fashion law.

III. The Solution

A. The European Approach

One potential way to mitigate the concerns fast fashion poses to luxury fashion houses is by incorporating European Union fashion law, specifically sui generis protection, into the United States.

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[155] Sprigman, *supra* note 137, at 1737, 1741.

[156] Gucci Am., Inc. v. Guess?, Inc., 09 Civ. 4373 (SAS) (S.D.N.Y. May. 21, 2012).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] Sarah Karmali, *Gucci Loses Legal Battle Against Guess,* Vogue (May 7, 2013), https://www.vogue.co.uk/article/gucci-loses-guess-lawsuit-logo-copyright-case.

[161] Gucci Am., Inc. v. Guess?, Inc., 09 Civ. 4373 (SAS) (S.D.N.Y. May. 21, 2012).

[162] *Id.*

On March 6, 2006, the European Community Design Protection Regulation applied to all Member States.[163] This design protection system established a two-tiered approach: the first is the Unregistered Community Design (UCD) protection that begins from a design's first public introduction and the second is the Registered Community Design (RCD) protection after registering with the Office for Harmonization in the Internal Market in Alicante.[164] A design that has a registered right can prevent its unauthorized use that does not produce a "different overall impression, a power akin to monopoly," while a design with an unregistered right only applies to unauthorized exact copies.[165] Within this system, a designer can delay their request for RCD protection for 12 months, which means that if a designer is uncertain if their design will be successful, the designer can test the market while enjoying UCD protection.[166]

Furthermore, this regulation gives sui generis protection for designers. Sui generis regulation protects the ornamental appearance and the utilitarian function of a design.[167] This system defines design as "the appearance of the whole or part of the product resulting from its features and, in particular, the lines, contours, colors, shape, textures and/or materials of the product itself and/or its ornamentation."[168] To qualify for sui generis protection, the design must be different and show more than minimal creativity.[169]

The sui generis and the two-tiered protection approach would benefit United States intellectual property law. This system would help mitigate several issues fast fashion poses to luxury fashion houses, such as the lack of protection and stunting creative liberty. Using the European definition of design would ensure that non-creative designs, such as a basic check or polka dot design, stay in the public domain while protecting original designs that would need to meet the two-part definition of a design.[170] Further, imposing a sui generis system would allow entire designs to have the potential to be protected under UCD and RCD, which would limit the ability of fast fashion creators to blatantly plagiarize luxury designs. By limiting this ability, luxury fashion houses would decrease their need to heavily rely on trademark protection to ensure that legal action can be taken against fast fashion

[163] Beltrametti, *supra* note 11, at 167.
[164] *Id.* 167-168.
[165] Loangkote, *supra* note 15, at 307.
[166] Beltrametti, *supra* note 11, at 169.
[167] Loangkote, *supra* note 15, at 307.
[168] Beltrametti, *supra* note 11, at 170.
[169] Loangkote, *supra* note 15, at 307.
[170] *Id.* at 318.

brands. The two-tiered protection approach would also allow designers to decide how much protection they would like to receive while ensuring that those who create exact replicas of work are penalized.[171]

Critics argue that although there is greater legal protection in the European Union, there is little litigation involving fashion designs and there is also the same widespread fashion design copying in Europe as in the United States.[172] Furthermore, despite greater regulation, few designers choose to use the two-tiered approach to register their designs, which allegedly indicates how underutilized the greater legal protection is.[173] If greater regulation was more beneficial, critics contend that innovation in the United States industry would stagnate.[174] Critics also argue that greater "substantial legal risk may induce designers to avoid the 'referencing' that they engage in so freely now," which may empower "larger players to use cease and desist letters to squash the competition."[175]

These arguments oversimplify regulation in the fashion industry.[176] The low number of registered designs and case law related to fashion intellectual property does not necessarily equate to a designer's disregard for enforcing their rights.[177] Many cases in Europe reach confidential settlements that are rarely made public, such as Jimmy Choo, a British luxury fashion house, who received over 80,000 euros in settlement from NewLook, a British fashion retailer, who was forced to retract thousands of shoes from the market.[178] This settlement indicates that luxury fashion brands can and will seek monetary damages and injunctive relief.[179]

Furthermore, given stricter fashion intellectual property laws in the European Union, fast fashion retailers who hope to market in the European Union, such as Zara and H&M, need to create derivatives of trends before manufacturing them.[180] Because of globalization, the United States and European Union markets are not as distinguishable as they previously were, which "forces de facto design diversity in the United States."[181] Despite

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[171] *Id.* at 319.
[172] Sprigman, *supra* note 137, at 1737.
[173] I*d.* at 1743.
[174] Loangkote, *supra* note 15, at 308.
[175] Sprigman, *supra* note 137, at 1744, 1745.
[176] Loangkote, *supra* note 15, at 308.
[177] *Id.*
[178] Beltrametti, *supra* note 11, at 170.
[179] Loangkote, *supra* note 15, at 309.
[180] *Id.*
[181] *Id.*

the European Union's more stringent protection system, many of the most iconic fashion designers are based in Europe.[182] Fashion and innovation continue to thrive where these regulations are in place, which should assuage concerns that designers may avoid referencing designs or that larger players would unjustly target their competition.[183]

One way to implement a greater regulatory system could be through legislation, but domestic challenges from Congress prevent any policy with elements of the European Union sui generis system and two-tiered approach from enactment. From 1914 to 2008, Congress considered at least 70 bills that would have adopted greater intellectual property protection for fashion design, but a lack of momentum among members and the lack of coordination within the fashion community prevented this from happening.[184]

The lack of momentum among Congress members and the lack of coordination within the fashion industry are exemplified through the 2007 Design Piracy Prohibition Act (DPPA). The bill proposed to extend copyright protection to three years and would allow "recovery of increased damages awarded for infringement of original designs."[185] This bill caused sharp divides among the fashion industry about the potential benefits. The California Fashion Association argued that the bill would stifle inspiration and many retailers would be subjected to 'frivolous lawsuits' while the Council of Fashion Design America and the New York Council of Fashion Design supported the bill.[186] To obtain greater fashion intellectual property protection, representatives from the fashion community need to unite in supporting the imitative and lobby Congress to pass the bill.

Another way would be by expanding current legislation at the discretion of the judicial system. In cases such as *Star Athletica*, the issue of separability defined in the Copyright Law was expanded to apply to fashion design. In other cases, however, courts have closely followed precedent and statutory text. As previously mentioned, in 2009, Gucci sued Guess for manufacturing similar products.[187] While Gucci successfully argued that Gucci had infringed on its trademarks and proved its dilution claims, Gucci's counterfeit claims were denied because the entire products were not "copied stich-for-stich."[188] This

[182] *Id.* at 307.
[183] *Id* at 312.
[184] Beltrametti, *supra* note 11, at 148.
[185] Martin, *supra* note 8, at 467, 468.
[186] Beltrametti, *supra* note 11, at 157.
[187] Gucci Am., Inc. v. Guess?, Inc., 09 Civ. 4373 (SAS) (S.D.N.Y. May. 21, 2012).
[188] *Id.*

case indicates that especially in fashion intellectual property law, it is difficult to determine if the court would be willing to expand interpretations of the law or stick closely to statutory text. For an American version of the European Union's sui generis system to be put in place without enacting legislation, courts would need to expand their definition and perspective of fashion intellectual property.

B. Sustainable Fashion

An alternative way to mitigate the concerns that fast fashion poses is by encouraging more sustainable fashion, which decreases the potency and viability of fast fashion companies. While there is no fashion industry standard for "sustainable fashion," sustainable fashion "encompasses a variety of terms such as organic, green, fair trade . . . and so forth, each attempting to highlight or correct a variety of perceived wrongs in the fashion industry including animal cruelty, environmental damage, and worker exploitation."[189]

One way to encourage sustainable fashion is through stricter labor laws that aim to prevent worker exploitation within a fashion company's supply chain. Fast fashion brands are able to set low prices directly because of wage theft.[190] While it may be easy to assume that most worker exploitation within a fast fashion brand's supply chain happens overseas, a New York Times exposé on Fashion Nova indicated that worker exploitation in the fashion industry happens just as often in the United States.[191] In 2019, the article reported that American factories sewing for Fashion Nova owed over $3.8 million in wages to hundreds of workers who are paid as little as $2.77 an hour.[192] While the United States has enacted the Fair Labor Standards Act, a federal law that dictates that an employee of a garment factory must be paid at least the federal minimum wage ($7.25 per hour) regardless of whether the employee is paid hourly or at piece rate, there are clearly cases where fast fashion brands do not comply and have evaded regulation for years.[193]

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[189] Louise Lundblad & Iain A. Davies, *The Values and Motivations Behind Sustainable Fashion Consumption*, 44 J. of Consumer Behav. 309, 310 (2015).

[190] Emily Farra, *California Just Passed a Landmark Bill to Protect Garment Workers - Here's What It Means for the Entire Fashion Industry,* Vogue (Sept. 30, 2021), https://www.vogue.com/article/california-sb-62-garment-worker-protection-act.

[191] Natalie Kitroeff, *Fashion Nova's Secret: Underpaid Workers in Los Angeles Factories,* The N.Y. Times (Dec. 16, 2019), https://www.nytimes.com/2019/12/16/business/fashion-nova-underpaid-workers.html?curator=FashionREDEF.

[192] *Id.*

[193] *Minimum Wage,* U.S. Department of Labor (2021), https://www.dol.gov/general/topic/wages/minimumwage.; *Wages and Fair Labor Standards Act,* U.S. Department of Labor (2009), https://www.dol.gov/agencies/whd/flsa.

Fortunately, the United States is already moving toward more sustainable practices as states propose and implement stricter labor laws. For example, in 2021, California passed the Garment Worker Protection Act, a landmark bill that requires hourly wages for garment workers and prohibits piecework, a pervasive system in the fashion industry in which workers are paid per garment (often equating to less than $3 per hour).[194] The new law will also "penalize both manufacturers and brands for wage theft and pay practices."[195] Furthermore, in 2012, California passed the Transparency in Supply Chains Act, which required fashion companies to publish their actions to safeguard their supply chains from slavery and human trafficking.[196] One caveat to this is that although the law requires fashion companies to disclose their efforts, there is no standard or expectation for fashion companies to have a sustainable supply chain.[197] These types of laws, if adopted by other states or through federal legislation, would be pivotal in restraining fast fashion brands from benefiting from worker exploitation and producing exact or similar replicas of luxury items.[198] Rising worker wages could increase the price of counterfeit goods, potentially making them less lucrative to consumers, and could prevent fast fashion brands from producing counterfeits as easily or quickly.[199]

The United States can also encourage sustainable fashion through stricter environmental sustainability laws. In 2018, a McKinsey research report indicated that the international fashion industry emitted 2.1 billion metric tons of greenhouse gas, approximately the same quantity of emissions as the entire economies of France, Germany, and the United Kingdom combined.[200] Further, since "consumers will likely throw the cheap and 'out of style' garment away, one truckload of clothes are either sent to landfills or burned every second."[201] The United States has implemented the Clean Water Act, a federal mandate

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[194] Farra, *supra* note 190.

[195] *Id.*

[196] Tim O'Callaghan, *The Law of Ethical Fashion,* Druces, https://www.druces.com/the-law-of-ethical-fashion/.

[197] *Id.*

[198] Farra, *supra* note 190.

[199] Maya Cheav, *Fast Fashion and Outsourcing*, Chapman University (Feb. 26, 2020), https://blogs.chapman.edu/sustainability/2020/02/26/fast-fashion-and-outsourcing/.

[200] McKinsey & Company, *The Future of Fashion: Sustainable Brands and 'Circular' Business Models,* McKinsey & Company (2021), https://www.mckinsey.com/featured-insights/the-next-normal/fashion.

[201] The Business Research Company, *Sustainable Fashion Market Analysis Shows The Market Progress In Attempt to Decrease Pollution in the Global Ethical Fashion Market,* GlobeNewswire (Oct. 28, 2020), https://www.globenewswire.com/news-release/2020/10/28/2116073/0/en/Sustainable-Fashion-Market-Analysis-Shows-The-Market-Progress-In-Attempt-To-Decrease-Pollution-In-The-Global-Ethicalfashion-Market-2020.html.; Elrod, *supra* note 9, at 588.

that "establishes the basic structure for regulating discharges of pollutants into the waters of the [United States] and regulating quality standards for surface waters."[202] According to this mandate, the Environmental Protection Agency categorized many textile manufacturing plants as "hazardous waste generators because the byproducts of the polyester production process [emits] hazardous, volatile monomers and organic compounds," which contaminate surrounding water sources.[203] By implementing greater environmental sustainability laws and imposing greater costs for violating these laws, fast fashion brands may be deterred from using environmentally damaging methods and resources, and in turn this action would limit their ability to produce counterfeit products.

One issue with enacting stricter labor and environmental laws is that the United States cannot do anything to mitigate worker exploitation happening by fast fashion brands in other countries.[204] Globalization has resulted in a more diversified supply chain as "the majority of fake goods picked up in [United States] customs checks originate in mainland China and Hong Kong."[205] United States laws are limited to where it has sovereignty, and thus stricter United States labor laws would do nothing to prevent worker exploitation in China and Hong Kong that allow fast fashion brands to proliferate.[206] This limitation should not deter the United States from enacting its own laws that would constrain fast fashion from conducting these practices in the United States and set an example of sustainable laws other countries should implement to also move toward a more sustainable workforce.[207]

The United States could also implement a general certification system that can indicate if a company is using ethical and sustainable manufacturing. There is currently no all-encompassing label and no federal mandate to certify ethical and sustainable products.[208] Without a certification system, it is easy for companies to market themselves as sustainable based on one part of their supply chain, but still employ unethical and unsustainable practices in another part. For example, a clothing company can publicize that they use ethical and

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[202] Clean Water Act, 33 U.S.C. §1251 et seq.

[203] Elrod, *supra* note 9 at 586, 587.

[204] Callaghan, *supra* note 196.

[205] OECD, *Trade in Fake Goods is Now 3.3% of World Trade and Rising,* OECD (Mar. 18, 2019), https://www.oecd.org/newsroom/trade-in-fake-goods-is-now-33-of-world-trade-and-rising.htm.

[206] *Id.*

[207] Exec. Order No. 14008, 86 C.F.R. 7619 (2021).

[208] EcoCult Staff, *Is There a Sustainable Certification for Clothing? [Your Guide to Eco-Friendly and Ethical Labels]*, EcoCult (Jul. 1, 2019), https://ecocult.com/eco-friendly-ethical-sustainable-labels-certifications-clothing-fashion/.

sustainable cotton, but the company dyes the cotton with toxic dye, or it is sewn in a factory that employs forced labor.[209] With a government verified ethical and sustainability label, companies could be held more accountable, and fast fashion brands may not be as prone to proliferate.

Yet, like implementing the European Union's sui generis system and two-tiered protection approach, there are congressional challenges to implementing labor and environmental standards and certifications. Stricter environmental and labor laws have been passed at the state level rather than the federal level. This is exemplified by California's 2021 Garment Worker Protection Act and its 2012 Transparency in Supply Chain Act.[210] Recently, there has been federal legislation that advocates for a more sustainable supply chain and greater environmental laws. For example, the 2021 Build Back Better Act would include "$555 billion for renewable energy and clean transportation incentives over a decade" and would include "new 'civil penalties'" or fines on employers for unfair labor practices.[211] In December 2021, however, Democratic Senator Joe Manchin of West Virginia announced that he would not vote for the bill because of its climate provisions and the plan's cost.[212] Given that all 50 Democratic senators would need to vote for the bill for it to pass using the budget reconciliation process, Senator Manchin effectively killed the bill.[213] In March 2022, he stated that he would be potentially open to specific provisions, including ones that address climate policy, but there is no explicit agreement yet.[214] The bill's inability to pass Congress indicates the difficulty of creating a more sustainable federal labor and environmental standard.[215] It is difficult to say how these domestic congressional challenges could be overcome.

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[209] *Id.*

[210] Farra, *supra* note 190.; Callaghan, *supra* note 196.

[211] Jackson Lewis, *Build Back Better Act Update: Committee Releases Labor Provisions for Inclusion in Senate Vote,* Nat'l L. Rev. (Dec. 13, 2021), https://www.natlawreview.com/article/build-back-better-act-update-committee-releases-labor-provisions-inclusion-senate.; Lauren Sommer, *What Losing Build Back Better Means for Climate Change,* NPR (Dec. 20, 2021), https://www.npr.org/2021/12/20/1065695953/build-back-better-climate-change.; Build Back Better Act, H.R.5376, 117th Cong. (2021).

[212] Arnie Seipel & Joe Hernandez, *Joe Manchin Says He Won't Support President Biden's Build Back Better Plan,* NPR (Dec. 19, 2021), https://www.npr.org/2021/12/19/1065636709/joe-manchin-says-he-cannot-support-bidens-build-back-better-plan.

[213] Li Zhou, *What Happened to Build Back Better?* Vox (Mar 16, 2022), https://www.vox.com/2022/3/16/22955410/build-back-better-scenarios.

[214] *Id.*

[215] Ella Nilsen, *'I'm Kind of Speechless': Democrats Scramble to Salvage Climate Provisions After Manchin Sinks Build Back Better,* CNN (Dec. 20, 2021), https://www.cnn.com/2021/12/20/politics/democrats-manchin-climate-build-back-better/index.html.

One potential way to overcome these challenges is by encouraging a cultural change toward sustainability. This cultural change is already occurring as 67 percent of consumers consider sustainable materials as an important factor on whether to purchase a product.[216] Between 2016 and 2019, online searches for sustainable fashion increased as sustainability was concluded to become one of the main attributes that would build brand loyalty and rapport among consumers.[217] As this culture continues, consumers may turn away from fast fashion brands, decreasing the brands' prominence and thus decreasing the proliferation of exact or similar versions of luxury designs.[218]

Conclusion

The current fashion intellectual property laws can be separated into three categories: copyright law, trademark law, and patent law. Because 'fashion law' is not a clearly defined field, it incorporates a patchwork of laws to create limited protection for fashion designs that result in rampant counterfeiting of luxury fashion house designs.[219] While luxury fashion houses want to protect their unique designs, the lack of adequate intellectual property protection hurts profitability, stunts creative liberty, promotes counterfeiting as a fast fashion business strategy, discounts luxury designers' efforts, and threatens the concept of luxury itself.[220] Opponents of greater legal protection cite the piracy paradox, arguing that counterfeiting enables the fashion industry to flourish.[221] This theory, however, does not consider the differences between copying or counterfeiting and imitation or the current technological advances that make fast fashion possible.[222] Opponents also cite the relatively few cases that advance to trial, but the tendency of luxury fashion houses to settle cases reflects the cost and risk of prolonged litigation, not the lack of need for strong intellectual property protections.[223]

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[216] Anna Granskog, Libbi Lee, Karl-Hendrik Magnus, and Corinne Sawers, *Survey: Consumer Sentiment on Sustainability in Fashion,* McKinsey & Company (July 17, 2020), https://www.mckinsey.com/industries/retail/our-insights/survey-consumer-sentiment-on-sustainability-in-fashion.

[217] McKinsey & Company, *The Future of Sustainable Fashion,* McKinsey & Company (Dec. 14, 2020), https://www.mckinsey.com/industries/retail/our-insights/the-future-of-sustainable-fashion#.

[218] *Id.*

[219] Martin, *supra* note 8.

[220] *Id.*; Elrod, *supra* note 9 at 583; Sauers, *supra* note 26; Vogue, *supra* note at 119; Beltrametti, *supra* note 11 at 160.

[221] Sprigman, *supra* note 137.

[222] Cohen, *supra* note 142; Beltrametti, *supra* note 11 at 158.

[223] Loangkote, *supra* note 15, at 308.

There are two ways to obtain greater legal protection. The first option is to implement the European Union's sui generis system and two-tiered protection approach.[224] This could be achieved through federal legislation or through expanding judicial interpretation of current law, but each has its own practical challenges. A second option is to adopt greater sustainability laws, particularly labor and environmental laws.[225] Again, political challenges may prevent this from being realized at the federal level, but progressive states may make advancements in their own policies.[226]

Oscar Wilde famously stated, "imitation is the sincerest form of flattery that mediocrity can pay to greatness."[227]As fast fashion brands often use lower quality and cheaper materials to make the same luxury designs, similar imitations or exact copies may not be as sincere as in the past. As counterfeits pose a credible danger to luxury fashion houses, greater fashion intellectual property protection is needed to resolve this challenge.

[224] Beltrametti, *supra* note 11, at 167.
[225] Davies, *supra* note 185.
[226] Hernandez, *supra* note 20.
[227] Maggie Cramer, *What Does Imitation Is the Sincerest Form of Flattery Mean?*, The Word Counter (Jan. 15, 2021), https://thewordcounter.com/what-does-imitation-is-the-sincerest-form-of-flattery-mean/.

Private-Sector Whistleblowers to the Media: Erasing Ambiguity Under the Dodd-Frank Act of 2010

Kevin Zhang

Introduction to Whistleblowing

The modern Federal Government of the United States has an expansive and byzantine bureaucracy.[1] Despite its humble origins, the Federal Government now employs over "2 million federal civilian workers" across "350 different occupations" to manage programs ranging from national security to agriculture.[2] From time to time, members of the Federal Government, purposefully or otherwise, engage in illegal or legally ambiguous behavior to the detriment of its mission and the nation at large. While enforcement and oversight mechanisms exist to scrutinize potential abuses of power and responsibility, they are greatly hampered by the convoluted nature of the governmental apparatus, as well as conflicts of interests of its inspectors.[3] Consequently, the existence and role of individuals who identify and expose illicit activities, also known as whistleblowers, are integral to the oversight of governmental agencies and the remediation of unlawful and wasteful actions.

Whistleblowers often provide information, at great professional risk, vital to the public's interest. While the term varies in meaning under different contexts and legislation, the term 'whistleblower' generally represents an individual who informs on perceived illegality and wrongdoing to other organizations, persons, or the public. While no two whistleblowers are the same, all whistleblowers are integral in their attempts to reveal and rectify perceived wrongs unbeknownst to or actively concealed by the target of their whistleblowing.

[1] Steven Still, *A Public Concern: Protecting Whistleblower Under the First Amendment*, 88 Fordham L. Rev. 1543, 1544 (2019).

[2] Dennis Vilorio, *Working for the Federal Government*, United States Bureau of Labor Statistics (Sept., 2014), https://www.bls.gov/careeroutlook/2014/article/federal-work-part-1.htm.

[3] Still, *supra* note 1, at 1544.

Since its inception, the United States has seen a wide array of whistleblowers.[4] Benjamin Franklin, a Founding Father and one of the earliest whistleblowers in American history, received letters directed to then-Governor of Massachusetts, Thomas Hutchinson.[5] Franklin would go on to circulate these letters, which advocated for an increased British military presence to quell the American revolutionaries among his compatriots, such as John Adams.[6] These letters were then released to the Boston Gazette in 1773 by Adams against Franklin's will.[7] During the American Civil War, Congress passed the False Claims Act to counter immense profiteering through fraudulent claims to allow private individuals to sue perpetrators for fraud "in the name of the government" in *qui tam* cases, meaning cases filed by private persons on behalf of the government.[8] The plaintiff, if successful, would then receive a portion of the government's recovery, thus allowing the government to combat false claims through the efforts of whistleblowers.[9] In recent years, whistleblowers such as Edward Snowden have released governmental documents to publicize potential illegality and violations of constitutional rights.[10] In Snowden's case, the former National Security Agency (NSA) contractor, through the disclosure of top-secret NSA documents, galvanized debate over the United States' pervasive spying capabilities across the globe and among its citizens.[11] While opinions differ regarding the legality of and national security implications pertaining to governmental whistleblowers, they are nonetheless instrumental in exposing potential violations of rights and law under the government's conventionally secretive and byzantine cover.

While many prominent whistleblowers, such as Edward Snowden, released information related to governmental functions and actions, whistleblowers of private entities are also integral to the enforcement and execution of state and federal laws. In executing its mission, the Securities and Exchange Commission (SEC), established and empowered by Section 4

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[4] Smithsonian National Postal Museum, *The Hutchinson Letters*, Smithsonian National Postal Museum (last visited Jan. 3, 2022), https://postalmuseum.si.edu/exhibition/out-of-the-mails-the-franking-privilege/the-hutchinson-letters.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *The False Claims Act*, 31 U.S.C. §§ 3729 (1863).

[9] *Id.*

[10] Ed Pilkington, *'Panic made us vulnerable': how 9/11 made the US surveillance state – and the Americans who fought back*, The Guardian (Sept. 4, 2021, 2:00 AM), https://www.theguardian.com/world/2021/sep/04/surveillance-state-september-11-panic-made-us-vulnerable.

[11] *Id.*

of the Securities Exchange Act of 1934, relies heavily on whistleblower information to exercise its function of oversight and enforcement of security laws.[12] Since issuing its first monetary award in 2012, the SEC has issued over "$1.2 billion to 233 individuals," ranging from "10 percent to 30 percent of the money collected [from monetary sanctions over $1 million]."[13] More recently, Frances Haugen's exposure of internal Facebook documents and mechanisms has sparked a nationwide debate over the role and responsibilities of social media companies, leading to an ongoing Congressional inquiry over Facebook's actions.[14] Thus, the regulation and oversight of private entities depend heavily on the information and efforts of whistleblowers.

There is not a single standard of whistleblowers. Yet, from private-sector employees to federal workers seeking internal or public discourse and remediation, whistleblowers all serve to reveal illegality and malpractice while increasing public awareness and remediation of perceived wrongdoing. Consequently, Congress has expanded, albeit gradually, whistleblowers protections to ensure oversight and remediation of misconduct within the government and private companies.

This article will examine the evolving rights and protections of whistleblowers in the United States and the balance between facilitating whistleblowing efforts and protecting national security and trade secrets. It will then examine the Dodd-Frank Act of 2010, passed after the Great Recession, which extended protections to private employees for whistleblowing to the SEC. Though whistleblower protections have steadily expanded for private-sector employees in recent years, they, generally, may only share information to entities such as Congress and the SEC, and face significant restrictions over their eligibility for protections, such as issues over confidentiality, propriety, and non-disclosure agreements. Furthermore, while public employees have certain protections under the Constitution for whistleblowing to the media, private sector whistleblowers to the press are largely unprotected and subject to potential suit as well as financial and legal repercussions. As such, due to the increasing role of private entities in American daily and civil life, such as

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[12] Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1934).

[13] *SEC Issues Whistleblower Awards Totaling Approximately $10.4 Million*, United States Securities and Exchange Commission, https://www.sec.gov/news/press-release/2021-243 (last visited Jan. 3, 2021).

[14] *Protecting Kids Online: Testimony from a Facebook Whistleblower*, *Before the Subcomm. on Consumer Protection, Product Safety, and Data Security*, 117th Cong. (2021) (statement of Frances Haugen, Facebook whistleblower).

social media companies in political discourse, and the inadequacy of current protections of private sector whistleblowers to the media, this article will set to establish potential frameworks and solutions for increased protection and facilitation of media whistleblowing by private-sector employees.

A. Importance of Whistleblowers

Whistleblowers play a crucial role in identifying problems, illegality, and also performing oversight. Whistleblowers who go through private channels of their government, employers, or law enforcement agencies, for example, have led to critical reform and identification of illegality and abuse.[15] In the United Kingdom, a nurse "blew the whistle on the mistreatment of people with learning difficulties, which led to an undercover [investigation, exposure,] and, ultimately, the imprisonment of six abusive care workers."[16] Many of these whistleblowers choose to, and remain, anonymous, but serve as important catalysts to discussion and change regarding malpractice within organizations, companies, and governments. These may include attitudinal changes and increased awareness, as was the case in the United Kingdom with the six abusive care workers, and may lead to legal and procedural changes within public and private entities.[17]

Through media disclosures and the release of internal documents, private-sector whistleblowers have also had a significant role in identifying and rectifying illegality. The Panama Papers, a giant leak of "11.5 million financial and legal records," exposed a system of "crime, corruption, and wrongdoing… by secretive offshore companies."[18] These papers revealed a clandestine network of politicians, celebrities, drug dealers, alleged arms dealers, other questionable agents acting in tandem through "hard-to-trace companies and tax havens" through the secretive "industry of offshore finance."[19] Public whistleblowers have served as essential catalysts for reform, and have revealed and changed the "most serious

[15] Open Society Foundations, *Why We Need Whistleblower Protections*, Open Society Foundations (last updated Dec. 2019), https://www.opensocietyfoundations.org/explainers/why-we-need-whistleblower-protections.

[16] *Id.*

[17] *Id.*

[18] Will Fitzgibbon, *Panama Papers FAQ: All You Need to Know About The 2016 Investigation*, International Consortium of Investigative Journalists (Aug. 21, 2019), https://www.icij.org/investigations/panama-papers/panama-papers-faq-all-you-need-to-know-about-the-2016-investigation/.

[19] *Id.*

corruption" and highlighted "accountability failures" where governments have been unable, or unwilling, to address issues.[20]

Private sector whistleblowers, too, are crucial to American society. Private sector organizations and companies often play important roles in American life, covering a wide variety of areas ranging from health to finance to the spread and regulation of information. In 2010, Andrew Maguire, a British commodities trader, presented information to American regulators alleging fraud and international manipulation of the gold and silver market, leading a federal probe into his employer and corporate giant J.P. Morgan.[21] Similar acts have occurred across various fields, professions, and nations, leading to the exposure of fraud, illegality, and actions harmful to the public interest. While Andrew Maguire's actions did not lead to any legal and regulatory action, the acts of private whistleblowers serve as an important check on private entities, particularly those with secretive processes that are poorly regulated by governmental bodies.

Whistleblowers thus serve as essential agents in ensuring transparency and legality, particularly in secretive entities with tools to mask their actions, such as offshore financial companies, intelligence agencies, and the government. They serve as important checks against institutional power, and individuals and organizations have increasingly recognized the value of whistleblowers in ensuring integrity and providing information in the public's interest.

B. Risks Faced by Whistleblowers

Despite their integral role in exposing illegality, whistleblowers often face significant barriers. While Congress and various agencies, such as the Securities and Exchange Commission, have implemented numerous acts and measures designed to protect whistleblowers, they nonetheless encounter significant social, financial, and political risks for their actions. The Parliament of the United Kingdom reprimanded Benjamin Franklin following the Hutchinson Letters and stripped him of his responsibilities as the Postmaster General of the Parliamentary Post.[22] The United States court-martialed and sentenced Chelsea Manning, a whistleblower who released top-secret documents, to 35 years of

[20] Open Society Foundations, *supra* note 15.

[21] Michael Gray, *Feds probing JP Morgan trades in silver pit*, The New York Post (May 9, 2010, 4:00 AM), https://nypost.com/2010/05/09/feds-probing-jpmorgan-trades-in-silver-pit/.

[22] Smithsonian National Postal Museum, *supra* note 4.

confinement.[23] Similarly, Edward Snowden faces charges of espionage under the Espionage Act of 1917, among others for his release of top-secret National Security Agency (NSA) documents.[24] Consequently, whistleblowers face significant risks of retribution and financial, political, and personal costs for their actions.

Private whistleblowers, too, are often at the risk of ostracization and reduction or termination of pay and work. A recent example is Facebook whistleblower Frances Haugen, who faces a potential suit from her former employer for violations of Non-Disclosure Agreements (NDA) and unauthorized release of trade secrets.[25] Consequently, whistleblower protections are integral in facilitating private whistleblowers, as they too face significant risks in their efforts.

I. Whistleblowers and the Law

A. Whistleblower Protections and Legislation

Governmental employees often encounter significant barriers and opposition to any whistleblowing attempt. In 1902, President Theodore Roosevelt issued Executive Order 163, barring all federal employees from disclosing information to Congress in any way save through their heads of the Departments, to solicit wage increases or to advocate for legislation.[26] Roosevelt further expanded restrictions against federal whistleblowers in 1906 when he allowed "department heads to dismiss employees without notice [and] reasons in writing."[27] President William Howard Taft, Roosevelt's successor, continued the trend when he "forbade postal and federal employees for answering congressional [inquiries regarding their work and pay] unless authorized…by their department heads."[28] These orders, collectively known as "gag orders," greatly restricted the ability of federal employees to communicate and disclose potential illegality to Congress.[29]

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[23] Rachel Weiner, *Chelsea Manning is released from ja*il, The Washington Post (Mar. 12, 2020), https://www.washingtonpost.com/local/public-safety/chelsea-manning-ordered-released-from-jail/2020/03/12/0ee56efc-6478-11ea-845d-e35b0234b136_story.html.

[24] Peter Finn & Sari Horwitz, *U.S. charges Snowden with espionage*, The Washington Post (Jun. 21, 2013), https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html.

[25] Tali Arbel, *EXPLAINER: Could Facebook Sue whistleblower Frances Haugen?*, AP News (Oct. 9, 2021), https://apnews.com/article/facebook-whistleblower-frances-haugen-legal-retaliation-0f74fc76973a4e83ec457c35c04f8767.

[26] *The Reign of Terror*, National Association of Letter Carriers, https://www.nalc.org/about/facts-and-history/body/1902-1912.pdf, (last visited Jan. 4, 2022).

[27] *Id.*

[28] *Id.*

[29] *Id.*

In response, Congress introduced the Lloyd-La Follette Act of 1912, enshrining "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress" and "to furnish information to either House of Congress [and its members]."[30] Congress further expanded the rights and protections of federal whistleblowers in the Civil Service Reform Act of 1978, which protected government employees against retaliation for whistleblowing, while protecting the identity of whistleblowers except for cases where the "disclosure of [their] identity is necessary to carry out the investigation."[31] Acts such as the Whistleblower Protection Act of 1989 and the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 further cemented these protections,[32] which protected federal employees who disclosed "government illegality, waste, and corruption" and punished unlawful retaliatory actions against federal whistleblowers by their supervisors, respectively.[33] Combined, these acts have gradually yet definitively established the legality and rights of federal whistleblowers to voice concerns through Congressional and governmental oversight channels and have served as the cornerstone of employee oversight of the federal government.

Private whistleblowers, like their federal counterparts, are also protected under certain Congressional statutes. The Securities Exchange Act of 1934 established the United States Security and Exchange Commission, which, as previously mentioned, permits and protects private employees in their effort to disclose information regarding possible violations of securities laws.[34] The Whistleblower Protection Act of 1989 marked a major expansion of private-sector whistleblower protections when it extended many protections given to federal employees in the Civil Service Reform Act to private-sector employees.[35] More recently, the Dodd-Frank Act of 2010 implemented rules that "enabled the SEC to take legal action against employers who have retaliated against whistleblowers," and expanded protections on discharges, demotions, suspensions, harassment, and discriminations against employees who report misconduct to the SEC upon a reasonable belief of employer violation of federal

[30] Lloyd-La Follette Act of 1912, 5 U.S.C. § 7211 (1912).
[31] Civil Service Reform Act, S.2640, 95th Cong. (1978).
[32] The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 5 U.S.C. ch.23 § 2301 et seq. (2002).
[33] Whistleblower Protection Act of 1989, 15 U.S.C. § 2087 (1989).
[34] Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1934).
[35] Whistleblower Protection Act of 1989, 15 U.S.C. § 2087 (1989).

securities laws.[36] Dodd-Frank thus serves as a major and the most recent expansion of private-sector whistleblower protections.

B. Existing Judicial Precedent

Due to the potential sensitivity of the activities of federal agencies, Congress and the Supreme Court of the United States have generally sought to balance whistleblower protections for public disclosures of federal employees under the First Amendment and protections of official secrets alongside ensuring the proper functions of the government. Early battles over whistleblowing and employee disclosures often involved discussions regarding the First Amendment, as the Courts grappled between the principle of free speech and the potential ability of employers to restrict said rights. In 1892, the Supreme Court of Massachusetts ruled in *McAuliffe v. Mayor of New Bedford* for a limited view of an employee's First Amendment Rights and, with it, a restriction in whistleblowing actions.[37] In cases related to the government, early courts noted that while the government, as sovereign, could not freely restrict First Amendment rights, it was not, in cases when it acts as the employer, subject to the same restrictions.[38] Consequently, the Courts granted employers significant leeway in restricting First Amendment rights in cases pursuant to their employees' free speech claims, thus restricting the ability of federal and private whistleblowers to bring forth whistleblowing and general complaints.[39]

This interpretation would persist until the 1960s when the Supreme Court's interpretation shifted in favor of employee claims of free speech in *Pickering v. Board of Education*.[40] The Supreme Court ruled that the "right [of employees] to speak on issues of public importance may not furnish the basis of…dismissal from public employment,"[41] determining that public sector employees could make certain statements if the interests "outweigh the legitimate interest of…employers in maintaining operational efficiency."[42] While further rulings, such as *Connick v. Myers* and *Garcetti v. Ceballos*, would establish tests and standards, including the need for employees to touch upon a matter of "public concern"

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[36] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.4173, 111th Cong. (2010).

[37] John R. Vile, *McAuliffe v. Mayor of New Bedford (Mass.) (1892)*, The First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/598/mcauliffe-v-mayor-of-new-bedford-mass (last visited Jan. 2, 2022).

[38] Still, *supra* note 1, at 1551.

[39] *Id.*

[40] *Id.*

[41] Pickering v. Board of Education, 391 U.S. 563 (1968).

[42] Still, *supra* note 1, at 1547.

and speak "as citizens for First Amendment purposes" respectively,[43] the shift towards public interest in *Pickering* has nevertheless established the importance and precedence in facilitating federal whistleblowing under First Amendment protections.[44]

II. The Dodd-Frank Act of 2010, Current Framework, and its Problems

A. Whistleblower Provisions of the Dodd-Frank Act of 2010 and Judicial Interpretation

In the aftermath of the Great Recession of 2008, Congress passed the Dodd-Frank Act of 2010 to overhaul financial regulation in the United States. Following the passage of the Dodd-Frank Act, the SEC "implemented rules that enabled [it] to take actions against employers who have retaliated against whistleblowers."[45] Under Section 922 of the Dodd-Frank Act, employers, in general, may not "discharge, suspend, threaten, harass, directly or indirectly, or [otherwise] discriminate against, a whistleblower [for their role in providing the commission with information in accordance with the act and assisting in investigations or actions of the Commission related to such information]."[46] The SEC and its employees are also, in general, barred from disclosing information that "could reasonably be expected to reveal the identity of a whistleblower" to protect the rights and privacy of whistleblowers to the SEC.[47] Private whistleblowers to the SEC subject to retaliation may "file a retaliation complaint in federal court" for "double back pay (with interest), reinstatement, reasonable attorney fees, and reimbursement for certain costs in connection with the litigation."[48] Commission Rule 21F-17(a) of the SEC further prohibits "action[s] to impede [individuals] from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement…with respect to such communications."[49]

However, in *Digital Reality Trust, Inc. v. Somers*, the Supreme Court unanimously held that anti-retaliation provisions of the Dodd-Frank Act extended only to whistleblowers of

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[43] *Id.*

[44] Garcetti v. Ceballos, 547 U.S. 410, 440–41 (2006).

[45] United States Securities and Exchange Commission, *Whistleblower Protections*, United States Securities and Exchange Commission (last modified Jul. 21, 2021), https://www.sec.gov/whistleblower/retaliation.

[46] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.4173, 111th Cong. (2010).

[47] *Id.*

[48] United States Securities and Exchange Commission, *supra* note 45.

[49] 17 CFR § 240.21F-2 (2020).

possible securities law violations to the SEC.[50] The Court noted that the intention of the Dodd-Frank Act's whistleblower program was to encourage individuals to report possible securities violations to the SEC, and notes that to qualify for anti-retaliation provisions under the Dodd-Frank Act, "a person must first 'provid[e]…information relating to a violation of securities laws to the Commission."[51] Thus, the Court concluded that the anti-retaliation provisions of the Dodd-Frank Act of 2010 do not extend to individuals "who ha[ve] not reported a violation to the SEC and therefore [fall] outside of the Act's definition of 'whistleblower,' [defined as an individual who provides pertinent information to the SEC]."[52]

The Court's decision in *Somers* thus restricts the scope of anti-retaliation provisions of the Dodd-Frank Act of 2010 to disclosures by individuals to the Securities Exchange Commission. The Supreme Court decided that Dodd-Frank's language does not protect disclosures to other sources, such as internal communications as in *Somers* or contact with news outlets, due to its unambiguous definition of a "whistleblower."[53] The Court's decision thus encourages private employees and whistleblowers to go to the SEC with complaints. While the Court in *Somers* noted that whistleblowers who do not go through the Securities Exchange Commission may still be protected under previous acts, such as the Sarbanes-Oxley Act of 2002, it is important to recognize that many protections are limited to specific categories and instances.[54] In the case of Sarbanes-Oxley, the act only protects six categories of protected conduct, namely disclosures regarding securities fraud, shareholder fraud, bank fraud, mail fraud, wire fraud, and violations of any SEC rule or regulation.[55] Furthermore, Section 806 of the Sarbanes-Oxley Act limits disclosures to Federal regulatory agencies, Members and Committees of Congress, or individuals with supervisory authority over the employee, as well as filing, testifying, participating, or otherwise assist with court procedures related to possible violations of SEC rules and regulations, as well as other acts and Federal law pertaining to shareholder fraud.[56]

Thus, the most recent expansion of private whistleblower protections applies to a limited category of individuals who provide information to the SEC. Under the current model, it

[50] Digital Trust, Inc. v. Somers, 583 U.S. 16-127d6 (2018).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Sarbanes-Oxley Act of 2002, H.R.3763, 107th Cong. (2002).
[56] *Id.*

does not extend any protection to other individuals, including those who have reported to the SEC and who would otherwise be protected under existing statutes had they not contacted the media.

B. Private Whistleblowers and Current Situation

While whistleblowing protections regarding security law violations are necessary, many recent cases are not related to such violations. In 2021, Frances Haugen filed "at least eight complaints with the SEC" alleging that Facebook was "hiding research about its shortcomings from investors and the public."[57] Haugen further released internal Facebook documents to the *Wall Street Journal*, which demonstrated Facebook's awareness regarding the problems of its applications and the "negative effects of misinformation and the harm caused, especially to young girls, by Instagram."[58] Haugen's disclosure to the SEC, Congress, and news outlets such as the *Wall Street Journal* comes as media companies in the United States face increased scrutiny for their perceived role in facilitating or tolerating misinformation and violent sentiments. As such, Haugen's actions were not so much related to SEC regulations and possible violations of securities laws but aimed to bring public attention to the alleged impact of private, social media corporations on American civil discourse and their purported role in online misinformation and harm toward its users, primarily young adolescents and adults.

Frances Haugen's whistleblowing of Facebook practices and internal documents exemplifies the evolving climate and role of private whistleblowers. Many whistleblowers at private entities are not so much interested in the breaches of securities laws, as was the case in the late 2000s and early 2010s following the Great Depression and increased scrutiny of financial institutions across the United States, but rather bring attention to perceived violations of private corporations and harm toward the public interest. For private employees in these cases, whistleblowing to governmental agencies, regulators, or the SEC may not be sufficient or appropriate. Instead, whistleblowers such as Frances Haugen may find media or news outlets to be preferable to Congress or the SEC, as their efforts may

[57] Rishi Iyengar, *What we know about the Facebook whistleblower*, CNN Business (Oct. 5, 2021), https://www.cnn.com/2021/10/04/tech/facebook-whistleblower-frances-haugen-what-we-know/index.html.
[58] *Id.*

stem from a desire to increase public awareness of the negative and supposed impact of private companies towards the American public.

C. Whistleblower Protections for Disclosures to the Media and News Outlets

Far fewer protections exist for whistleblowers in disclosures to the media. In *Tides v. the Boeing Co.*, the ninth circuit ruled that the Sarbanes-Oxley Act does not protect whistleblowers to the media.[59] Employers may also sue whistleblowers under the Defend Trade Secrets Act of 2016 (DTSA) for the misappropriation of trade secrets in disclosures that are not made in confidence to governmental agencies and officials for reporting or investigating legal violations or legal proceedings filed under seal.[60] As trade secrets are defined broadly under the Defend Trade Secrets Act as "all forms and types of financial, business, scientific, technical, economic, or engineering information" that are not generally known, provide economic value, and have been reasonably protected by owners to keep such information secret, private whistleblowers fall under the crevices of such definition as any information may be included under the definition above.[61]

Though the Defend Trade Secrets Act includes whistleblower immunity provisions that encourage individuals to disclose information that "may be a trade secret and evidence of a violation of law by the company," whistleblowers may still face legal repercussions for breaching confidentiality and non-disclosure agreements (NDA) with their employers.[62] Non-disclosure agreements, often between an employer (such as Facebook) and an employee (such as Frances Haugen), are legal agreements that prohibit the sharing of confidential information.[63] Though rule 21F-17 of the Dodd-Frank Act prohibits "action[s] to impede an individual from communicating with [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement…with respect to such communications," this rule only protects only SEC communications, rather than media disclosures.[64] Thus, whistleblower disclosures to media and news outlets, such as Frances Haugen's transfer of internal Facebook documents to the *Wall Street Journal*, may still be grounds for legal action due to possible violations of confidentiality and NDAs.

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[59] Tides v. The Boeing Co., 644 F.3d 809 (9th Cir. 2011).

[60] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153 (2016).

[61] *Id.*

[62] Rachel Popa & Chandler Ford, *Trade Secrets Implications of Facebook's Frances Haugen's Testimony: Do NDAs Protect Trade Secrets Against Whistleblowers?*, 11 Nat. L. Rev. (2021).

[63] *Non-Disclosure Agreements and Whistleblowers*, National Whistleblower Center (last visited Jan. 4, 2022), https://www.whistleblowers.org/non-disclosure-agreements-and-whistleblowers/.

[64] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.4173, 111th Cong. (2010).

While federal employees may take advantage of the First Amendment's free speech protections to safeguard against employer retribution for whistleblowing, the First amendment does not cover and protect private sector employees.[65] The Bill of Rights applies to government action, and thus, "restrains a public employer's ability to discipline employees for their expression."[66] Limits apply to First Amendment protection, as the Court ruled in *Pickering v. Board of Educati*on that the "interests in allowing public sector employees to make certain statements [must] outweigh the legitimate interests of their employers in maintaining operational efficiency."[67] Furthermore, *Connick v. Myers* and *Garcetti v. Ceballos* necessitates individuals to speak on "a matter of public concern" and speak "as a citizen [and thus not pursuant to their] professional duties," respectively.[68] Despite these requirements, free speech protections under the First Amendment remain potent shields for federal workers against whistleblower retaliation.[69] Employees in the private sector, however, are not entitled to the same First Amendment protections as their federal counterparts and, thus, are not protected by free speech protections for their whistleblowing against their private employers.[70] Therefore, private sector whistleblowers do not share the same protections as government employees, especially regarding whistleblower protections to the media and news sources.

As such, private employees face greater risks and balancing acts when it comes to releasing information and whistleblowing to the media. Private employers must ultimately balance their desire to "whistleblow" on perceived illegality with potential threats to their financial and employment, while operating under limited and shifting protections for private whistleblowers and carefully navigating confidentiality and proprietary agreements to ensure protection against legal action.[71]

D. Limitations of Current Protections

As mentioned, whistleblowing has long served an integral part in uncovering and rectifying criminal acts by individuals or entities. From government illegality to the tobacco

[65] Still, *supra* note 1, at 1546.
[66] *Id.*
[67] *Id.* at 1547.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

industry's deception of regulators, the impact of whistleblowers has touched every corner of American life and history.[72] As such, from the early False Claims Act during the American Civil War to the recent Dodd-Frank Act, acts have all sought to facilitate whistleblowing to ensure transparency. In addition, Acts have also sought to protect legitimate national and private interests, such as that of national security and private trade secrets. With these considerations and benefits, whistleblowing is not only beneficial but necessary, fundamental, and irreplaceable for its role in maintaining oversight across the United States' many industries and areas of life.

In recent years, numerous developments have necessitated a revision of whistleblower protections and their scopes of coverage. Following the expansion of the world wide web in the late 20th century, the Internet has become a significant facet of American life, ranging from financial transactions to networks and communications. As the world shrinks through the expansion of the Internet, the influence of corporations has expanded across the nation and the globe. Modern-day corporations, such as Facebook and Amazon, have consolidated previously disparate fields ranging from communications to news and networking, under their singular corporation and control.[73] With it, the purposes of private sector whistleblowing have also evolved as private corporations, particularly social media companies, play an increasing and dominant role in American life. Thus, as the role of private entities evolves and expands during recent years, the necessary protection for private-sector employees has also changed and necessitate new legislation or an extension of existing acts to ensure the success and facilitation of whistleblowing.

The current framework of private-sector whistleblower protection is largely insufficient to the expanding role of private whistleblowers in contemporary society. While protections against employer retaliation against employee communication with the SEC are necessary, they ultimately do not address the intent of whistleblower protection in recent years. Large companies, such as Facebook and Amazon, are often relatively unscathed by SEC fines and oversight. Further, concerns regarding corporation malpractice, particularly by companies such as Facebook, often relate to the public interest rather than securities law violations. In Facebook's case, public discussion and oversight may better address Frances Haugen's report of Facebook's tolerance and cover-up of the negative impact of its online platforms

[72] Still, *supra* note 1, at 1545.
[73] Arbel, *supra* note 25.

in facilitating misinformation and its reported harm to its users.[74] As Congress seeks to examine further the practices of expanding corporate power and scope, particularly of large technology companies such as Facebook, whistleblower complaints to the media should be protected to ensure the facilitation of oversight and transparency, which are the fundamental role and purpose of whistleblowers.

III. Extending Protections to Private Sector Whistleblowers to the Media

A. Proposed Solution

In *Digital Reality Trust, Inc. v. Somers*, the Supreme Court noted that the Dodd-Frank Act defined those eligible for the act's anti-retaliation provision as "'whistleblowers' who provide pertinent information 'to the [Security Exchange] Commission.'"[75] Those outside the protected category of 'whistleblowers' are "ineligible to seek redress under the statute, regardless of the conduct in which that individual engages."[76] The issue of extending protections of the Dodd-Frank Act to private sector whistleblowers to the media, therefore, lies within expanding the act's definition of whistleblowers. While Congress initially passed the Act in the aftermath of the Great Depression and was targeted toward financial regulation and identifying possible security risks and violations, Congress should now expand it to protect private whistleblowers to the media to adapt to the modern climate of whistleblowing. Whistleblowers, instead of being defined as merely those who report to the SEC regarding possible security violations, should include those who provide information pertinent to the SEC while sharing the same information with other sources in line with existing espionage and secret protections. An extension, or a new act similar to Dodd-Frank's anti-retaliation provisions for whistleblowers, should define whistleblowers as not merely those who provide information to the SEC but include individuals who provide pertinent information to news that demonstrates or was reasonably thought by the individual to demonstrate illegality.

Different whistleblower protection acts use different definitions of 'whistleblowers' to ensure protection for their desired, and only their desired, group. Broad and ambiguous

[74] *Id.*
[75] Digital Trust, Inc. v. Somers, 583 U.S. 16-127d6 (2018).
[76] *Id.*

terms leave room for individuals and Courts to navigate, which may complicate the enforcement of protections and go against the intention of the legislation. The Whistleblower Protection Act, for example, applies to "[f]ederal employees who make disclosures… [and] serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures."[77] By expanding Dodd-Frank's definition of whistleblowers, the provisions of the act would grow to include and defend individuals who, having presented information to the Commission or Congress, also provide said information to other sources, such as the media and news outlets.

It is, however, important to spell out the exact terms of news outlets and media. Without concrete definitions, individuals may maliciously transfer information to other agencies and individuals for non-whistleblowing purposes and use the expanded definition of whistleblowers to protect their activities. While spelling out the specific terms of media may be arduous and necessitate constant legislation to include evolving technologies, adding necessitation for the benefits for public interest to outweigh that of the consequences may be sufficient, such as that of *Connick*.[78] As such, malicious leaks under the guise of "whistleblowing" are excluded from this expansion of definition, which is integral to protecting legitimate whistleblowing while countering illicit activities.

It is also necessary to note that this expanded definition continues to require individuals to report to the SEC or Congress of possible violations and security law violations. The current language in Dodd-Frank does not articulate whether the act covers individuals who disclose to the media despite following the act's provisions by reporting to the SEC or Congress, leaving it to lawmakers to amend or the courts to judge. Yet, *Digital Reality Trust, Inc. v. Somers* suggests that the Court looks strictly upon the language of the act, which does not touch upon disclosures to the media.[79] The Court may similarly decide that, as the act does not directly mention disclosures to the media and news outlets, it protects whistleblowers who disclose information to the SEC alongside other sources for their reports to the SEC, and not their actions to other outlets, such as the media.[80] This expanded approach of specifying the reporting of information to the SEC and Congress as a requirement and not the sole limitation of whistleblowers thus counters the possibility of the

[77] Whistleblower Protection Act of 1989, 15 U.S.C. § 2087 (1989).
[78] Connick v. Myers, 461 U.S. 138 (1983).
[79] Digital Trust, Inc. v. Somers, 583 U.S. 16-1276 (2018).
[80] *Id.*

act protecting whistleblowers for their actions, only to indict them for the same action due to reporting to agencies other than the SEC.

Expanding the definition of whistleblowers would address problems presented by recent whistleblowing cases. In her whistleblowing against Facebook, Frances Haugen transferred documents to the SEC and news outlets, such as the *Wall Street Journal*.[81] By altering the language to require whistleblowers to report to the SEC, rather than defining whistleblowers as strictly those who report to the SEC or Congress, legislators would be able to expand the act's anti-retaliatory protections to include those who report to the media. Dodd-Frank would thus be able to ensure protection for a wide array of private sector whistleblowers, who may not feel that the SEC or Congress are best to remedy the purported malpractice or may feel the need for public awareness and discussion, as in the case of Frances Haugen.[82]

Through this, the Dodd-Frank Act's protections will extend to private-sector whistleblowing to news outlets and media sources. Doing so upholds the critical role and spirit of whistleblowers in revealing illegality while maintaining the existing structure and government oversight to prevent the other extreme of allowing individuals to disclose whatever they wish, whenever they want, to whomever they like.

B. Addressing Potential Criticism and Concerns

A chief concern may be that this approach still gives individuals too much power over individuals, as they gain significant leeway in divulging information to the media that may be sensitive and compromise trade secrets. Yet, it is vital to consider the other acts in place, especially the Defend Trade Secrets Act of 2016 and the Whistleblower Protection Act of 1989. While protecting legitimate corporate whistleblowers, the Defend Trade Secrets Act allows owners of trade secrets to pursue legal action when their trade secrets are misappropriated.[83] The act further enables the Court to issue "an order [to protect] the seized property from disclosure by prohibiting access by the applicant or the person against whom the order is directed, and prohibiting any copies… to prevent undue damage to the party against whom the order has issued or others" and to law enforcement to execute seizures, if necessary.[84] Furthermore, the Whistleblower Protection Act requires whistleblowers to

[81] Iyengar, *supra* note 57.
[82] *Id.*
[83] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153 (2016).
[84] *Id.*

present information to support their claims and subject lying individuals to criminal charges.[85] Combined, the Defend Trade Secrets Act and provisions within the Whistleblower Protection Act protect against malicious disclosures of information, which, combined with the requirement of whistleblowers to provide information to the SEC or Congress, allows the government to scrutinize, and if necessary, charge, individuals who seek to abuse whistleblower protections under this approach.[86]

Similarly, in issues related to national security, the Espionage Act of 1917 can, and has, provided reasons for the Court to rule and issue penalties to information obtained that may threaten national security. For example, both Edward Snowden and Chelsea Manning were charged under the Espionage Act of 1917.[87] While private-sector employees often work in areas unrelated to governmental duties and national security, the Espionage Act nevertheless counters the possibility that this expanded protection to divulsions to the media, which may include foreign personnel, would cause damage to the interests and security of the United States. The Espionage Act of 1917 criminalizes individuals who, "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation," deliver or aid in delivering such information to a foreign entity or domestic agent.[88] Penalties under the Espionage Act include significant personal repercussions such as imprisonment and fines, which significantly increase the costs and deter the possibility of malicious individuals seeking to transmit information under whistleblowing to the detriment of the United States. Thus, the Espionage Act protects against the overuse of the increased coverage of Dodd-Frank by maintaining a check against the use of whistleblowing to conduct illegal activities.

These statutes are integral as malicious disclosures of national secrets and trade secrets under these acts. Consequently, these acts provide a potent protection against indiscriminate releasing of information.

Conclusion

Whistleblowers, public and private, are integral to American life and society. They serve as essential checks against governmental and private waste, illegality, and malpractice. From

[85] Whistleblower Protection Act of 1989, 15 U.S.C. § 2087 (1989).
[86] *Id.*
[87] Weiner, *supra* note 23.
[88] Espionage Act of 1917, Pub. L. No. 65-24 (1917).

founding father Benjamin Franklin to Frances Haugen, whistleblowers and their actions have served as important catalysts for changes that otherwise may not have happened. Despite and because of their integral role in revealing illegality in clandestine organizations, whistleblowers face significant repercussions for their actions, ranging from professional stagnation to imprisonment and personal injury.

The current model of whistleblower protection remains insufficient in facing the evolving issues of private-sector employees. While Dodd-Frank extended many protections to them, the act does not protect private-sector employees outside of its narrow definition of whistleblowers as those who provide pertinent information to the SEC.[89] Thus, facing risks of potential financial and personal damages, private employees are often discouraged from reporting on concerns that would, if unreported, be unidentified and unresolved by oversight agencies and the public at large, who often struggle to peer into the secretive organizations of corporations and private entities.

Preventing media disclosures in the current climate abridges against the fundamental purpose of whistleblowing. Whistleblowers are integral to the functioning of American society, as they reveal otherwise overlooked, unknown, or concealed illegality and malpractice. While the risks of leaks of trade secrets are valid concerns, they should not lead to the prevention of media disclosures but the careful consideration and regulation of such releases.

Consequently, Congress should either seek to amend or add language to the Dodd-Frank Act to define whistleblowers as those who report to the SEC or Congress, who may or may not also disclose information to other sources. Combined with safeguards of existing acts, such as the Espionage Act and provisions of the Whistleblower Protection Act, this expanded interpretation of Dodd-Frank ensures that the current protection of Dodd-Frank extends to whistleblowers such as Frances Haugen while maintaining the necessary checks against malicious leaks of trade secrets and threats against national security.

Future developments may alter the role and issues faced by federal and private sector whistleblowers. As is the case in Frances Haugen's case, protections in the future may be ambiguous or insufficient in their efforts to protect public and private sector

[89] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.4173, 111th Cong. (2010).

whistleblowers.[90] Future cases may thus require revisions and reconsiderations of existing language or acts to ensure the continuation of whistleblowing and its spirit of revealing and rectifying malpractice in the public interest. As the nature of whistleblowers evolve, so too should the nature of protection laws change.

[90] Iyengar, *supra* note 57.

Privacy Rights in the Digital Age: Utilizing a Traditionalist Approach to Protect Digital Data

Navid Massarat

Introduction

The Fourth Amendment protects citizens "in their persons, houses, papers, and effects against…" unwarranted physical governmental intrusions,[1] a freedom which commentators and jurists alike have commonly coined the right to privacy.[2] In the past half-decade, however, as new technologies such as cell phones, drones, and GPS have emerged as ubiquitous fixtures of modern society, it has become apparent that this traditionally physical right must be expanded to include digital spaces. Although the Supreme Court, acknowledging this need, has provided such Fourth Amendment extensions to digital spaces,[3] the Court's understanding and standards of Fourth Amendment rights have been inconsistent and incompatible with the complexities of modern technologies such as digital data. Various legal commentators have offered their consternation of the Court's inconsistent approach to privacy rights.[4] For these scholars, the Court's outdated

[1] U.S. Const. amend. IV.

[2] The Fourth Amendment and the general right to privacy have long been debated. While the term "a right to privacy" never appears in the Fourth Amendment, scholars argue that the Fourth Amendment encapsulates this general right. See Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) for undoubtedly the most seminal framework of the right to privacy. However, this debate is not the concern of this article. This article merely uses "the right to privacy" as shorthand for Fourth Amendment jurisprudence and precedent, notwithstanding the term's criticisms.

[3] *See generally* Katz v. United States, 389 U.S. 347 (1967).

[4] *See e.g.,* Christopher Slobogin, Privacy at Risk: The New Government Surveillance and the Fourth Amendment 33 (2007); Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. Crim. L. 19 (2015); Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. Davis L. Rev. 935 (2008); Kugler & Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 S. Ct. Rev. 205, 261; Daniel Solove, *Fourth Amendment Pragmatism,* 51 Boston College L. Rev. 1511 (2010); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 Stan. L. Rev. 119, 122 (2002);

understanding of privacy cannot keep up with the constantly evolving technological nuances of the digital age.

In *Carpenter v. United States,* the Court's latest and most pivotal Fourth Amendment case, expanded privacy rights to warrantless searches of digital data collected and stored online.[5] Although some jurists tout the Court's holding in *Carpenter* as "revolutionary,"[6] it is undeniably clear that *Carpenter* is not the final chapter of the story. Despite the Court's attempts otherwise, *Carpenter* fails to provide a comprehensive standard of privacy rights that applies to digital data, instead promulgating the already glaring issues of earlier precedent. Building upon the Court's four dissenting voices in *Carpenter,* this article demonstrates that the Court's historical inability to conceptualize privacy stems from its departure from the text and intent of the Fourth Amendment. Furthermore, this approach perpetuates an incomprehensible standard of privacy that has left lower courts without a determinative judicial test to apply Fourth Amendment rights methodically to various types of digital data.

Ultimately, only by heeding Justice Neil Gorsuch's dissent in *Carpenter* and relying on individuals' property interests in their digital data, can the Court properly expand and apply privacy rights under the Fourth Amendment to modern technologies. Notably, this argument differs from the traditional privacy-as-property based approach. Where the current originalist property-rights based model affords privacy rights rigidly along bright lines of ownership, a property-interest based framework serves as a loose guide to inform individual's interest in maintaining ownership while accounting for the 18th century equivalent of ownership in 21st century technologies. Specifically, a narrow scope of positive law that encompasses rights of control provides the best source to identify property interests and address the Court's overarching conceptual issues. Only a property-interest based approach rooted in positive law can ameliorate the lack of determinacy in Fourth Amendment jurisprudence and provide lower courts a robust standard of privacy in digital data.

This article addresses the Court's flawed understanding of privacy rights in individuals' digital data, along with proposing a property-interests model rooted in positive

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Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment*, 72 Miss. L. J. 5, 7 (2002).

[5] Carpenter v. United States, 138 S. Ct. 2206 (2018).

[6] *See e.g.,* Orin Kerr, *Implementing Carpenter*, *in* The Digital Fourth Amendment (forthcoming), https://ssrn.com/abstract=3301257; Daniel Solove, *Carpenter v. United States, Cell Phone Location Records, and the Third Party Doctrine*, TEACHPRIVACY (July 1, 2018).

law to remedy long-lasting flaws in the Court's Fourth Amendment precedent. Accordingly, Part I references landmark Supreme Court cases and describes the Court's standard of the right to privacy throughout the past century. This section culminates in an in-depth analysis of *Carpenter* and its role in reshaping Fourth Amendment jurisprudence. Part II describes the principal issues with the Court's standards of digital privacy in *Carpenter* that pervades the Court's underlying understandings of technology. Finally, Part III proposes and develops an approach to remedying these pivotal flaws in *Carpenter* through a property interest model rooted in positive law rights of control.

I. The Court's Standard of a Right to Digital Privacy

The Supreme Court first expanded Fourth Amendment rights to digital technologies in 1969 in the landmark case *Katz v. United States*.[7] In *Katz*, the U.S Supreme Court engaged with early precedent regarding wiretap technology first addressed in *Olmstead v. United States*.[8] *Olmstead* was the Court's first attempt to grapple with electronic technologies' effect on the notion of a search.[9] However, in *Olmstead*, the Court rejected the notion that individuals have privacy rights in their electronic phone conversations against being wiretapped without a warrant.[10] Using a rigid property-based approach derived from textualist interpretations of the Fourth Amendment, the Court in *Olmstead* reasoned that individuals are only protected against unreasonable searches and seizures of their physical property since the Fourth Amendment enumerates protections to only physical objects.[11] Thus a physical search must occur of physical property to trigger Fourth Amendment violations.

Realizing the coming of the digital age, however, the Court in *Katz* expressly overturned *Olmstead,* extending privacy rights for the first time from solely physical constructs to the electronic communications of an individual who was using a public phone booth.[12] Writing for the majority, Justice Potter Stewart explained that "the Fourth Amendment governs not only the seizure of tangible items," but also electronic objects as

[7] Katz v. United States, 389 U.S. 347, 351 (1967).
[8] Olmstead v. United States, 277 U.S. 438 (1928).
[9] *See id.*
[10] *Id.*
[11] *Id.* at 466.
[12] *See Katz,* 389 U.S. at 353 (explaining the Court's reasoning for departing from *Olmstead*).

well.[13] Essentially the Court rejected Olmstead's emphasis on physical seizures explaining that when the government surveils an individual's phone calls, it may not be conducting a physical intrusion under the traditional understanding of a search, but this practice nonetheless constitutes a search in the modern sense.[14] Moreover, the Court declined to assess whether Katz's conversations were his property. Taking another step to distance the Court from the property-rights model, the Court argued that electronic property rights were included in the original intent of the Fourth Amendment, writing that "the Fourth Amendment protects people, not places."[15]

While *Katz* heralded an evolution of privacy to technological spaces, it was in the concurring opinion written by Justice John Marshall Harlan that the Court outlined a determinative test for applying privacy to digital technologies in the future. Building upon the Court's understanding of privacy in the majority opinion, Justice Harlan established a two-pronged standard, later coined the *Katz* test, to identify an unconstitutional search under the Fourth Amendment.[16] Under the *Katz* test, Justice Harlan explained that a warrantless search is considered unlawful if (1) a person exhibits a subjective expectation of privacy in the information at issue and (2) society is prepared to recognize that expectation as objectively reasonable.[17] Effectively, under the majority opinion of *Katz,* the Court established the notion that the Fourth Amendment protections could apply to electronic technologies. And under Justice Harlan's *Katz* test, the Court detailed when those Fourth Amendment protections may exist.

Although *Katz* and its majority opinion proved to be a landmark Supreme Court case, it was Justice Harlan's concurring opinion that proved most influential, as many Courts began utilizing the *Katz* test as a determinative rule.[18] Moreover, it was the second prong of the *Katz* test, whether society was prepared to objectively hold an expectation of privacy as reasonable, that was most appealing to courts.[19] Under the objective prong of the *Katz* test, later courts established several instances of when society might afford a reasonable expectation of privacy and when the prong may not be met. One particular understanding,

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[13] *Id.* at 351.
[14] *Id.*
[15] *Id.*
[16] *See, id.* at 361 (Harlan J., concurring).
[17] *Id.* at 361 (Harlan J., concurring).
[18] Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi L. Rev. 113 (2015).
[19] *Id.*

the third-party doctrine, proved especially important. Derived from *Smith v. Maryland*[20] and *United States. v. Miller,*[21] the third-party doctrine rationalizes that society objectively does not afford any reasonable expectation of privacy in information voluntarily given to third parties. In *Smith* and *Miller*, the Court reasoned that since individuals voluntarily reveal their personal information to third parties, respectively banks and phone operators, these individuals relinquish any privacy rights they might hold in the shared personal information.[22] Later, Congress passed the Stored Communications Act, amending the Electronic Communications Act, codifying the third-party doctrine and providing law enforcement with a legal means of mandating third parties turn over digital data without the need for a warrant.[23] Ultimately, the third party doctrine and adjoining legislation established a new understanding of privacy under the *Katz* test, preventing anyone who voluntarily shared their digital personal records with third parties from claiming Fourth Amendment protections against warrantless searches.

Smith and *Miller's* interpretation of Justice Harlan's *Katz* test remained controlling precedent for individuals who voluntarily reveal their digital data to the third party. However, in 2018 the Court recently returned to the third-party doctrine in *Carpenter v. United States*,[24] ultimately leaving the third-party doctrine in question. In *Carpenter*, the FBI obtained Carpenter's Cell Site Location Information (CSLI) from his cell phone service provider without a warrant.[25] CSLI is historical cell phone data that is automatically transmitted from a user's wireless phone to multiple nearby cell phone towers, providing the user with internet and service accessibility.[26] In return, the cell phone carrier captures, triangulates, and stores the time, location, and other metadata of the wireless phone and nearby cell phone towers.[27] Since this information was voluntarily transmitted to the third party, the government could obtain 12,898 individual points of CSLI accumulated over 127 days, essentially surveilling Carpenter's phone location for a prolonged period under a court order lesser to a warrant

[20] 442 U.S. 735 (1979).
[21] 425 U.S. 435 (1976).
[22] *See Smith*, 442 U.S. at 742 and *Miller*, 425 U.S. at 442.
[23] 18 U.S.C. § 2702 (1986).
[24] 138 S. Ct. 2206 (2018).
[25] *Id.*
[26] Acharya, Bhairav, and Goyal, Richa, and Reddy, Jaideep, *Cell Phone Location Tracking*, Samuelson Law, Technology & Public Policy Clinic at UC Berkeley, School of Law, https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-06-07_Cell-Tracking-Primer_Final.pdf.
[27] *Id.*

pursuant to the third party doctrine.[28] However, the Court concluded that by obtaining the CSLI without a warrant, the government had violated Carpenter's Fourth Amendment right to privacy,[29] essentially casting doubt on both *Smith* and *Miller*. Writing the majority opinion for the Court, Chief Justice Roberts opined that *Smith* and *Miller* cannot be mechanically applied to all data controlled by third parties since not all digital data is voluntarily shared in the conventional sense.[30] Citing the Court's previous acknowledgement in *Riley v. California* of the pervasiveness of modern technologies, the Court noted that modern technologies like cell phones have become a fixture of everyday life.[31] These technologies have continued to evolve, the Court added, to involve more accurate, nuanced, and sensitive mechanisms.[32] For instance, cell phones automatically transmit CSLI regardless of whether the individual is actively using their cell phone or not,[33] CSLI can pinpoint an individual's location up to a radius of 50 meters,[34] and taken in the aggregate, CSLI can create a detailed chronicle of a person's long-term movements and behaviors.[35] Accordingly, since digital data like CSLI encompasses such intimate and sensitive information, the Court declined to apply the third-party doctrine, concluding that individuals do have a reasonable expectation of privacy in their CSLI despite traditional assumptions that this information is voluntarily given to the third-party.

II. The Court's Standard of Privacy Rights is Fundamentally Flawed

Although *Carpenter* addresses the question of whether and how to afford privacy rights to digital data in the context of CLSI, *Carpenter's* standard of Fourth Amendment privacy rights falls short of providing a comprehensive model for lower courts to follow for two main reasons. The underlying issue with *Carpenter* stems from its adherence to *Katz*, which was an unstable standard to begin with. First, by turning the issue in *Carpenter* on whether the government's search of the CSLI was objectively reasonable, the Court relies on an understanding of privacy that not only distorts the founders' intent, but is divorced

[28] *Carpenter*, 138 S. Ct. at 2212.
[29] *Id* at 2220.
[30] *Id.* at 2206.
[31] *Id.* at 2217 (citing Riley v. California, 573 U.S. 373, 403 (2014)).
[32] *See id.* at 2217 citing *Riley*, 573 U.S. 373.
[33] *Id.* at 2220.
[34] *Id.* at 2219.
[35] *Id.* at 2217.

from the plain reading of the text of the Fourth Amendment.[36] Secondly, as prior scholarly work has conclusively demonstrated, the reasonable expectation of privacy test has proven incomprehensible.[37] And despite the Court's attempts to clarify the *Katz* test with a conditional question of intimacy, the Court's reference to intimacy further exacerbates the untenability of its Fourth Amendment standard.

A. *The Court's Standard of a Search is Divorced from the Original Intent of the Fourth Amendment*

By utilizing the reasonable expectation of privacy test from *Katz*, the Court in *Carpenter* established that a Fourth Amendment violation occurs when the government conducts a search into a space that members of society objectively have a reasonable expectation of privacy.[38] However, this standard is divorced from both the intent and text of the Constitution. Justice Clarence Thomas details this originalist argument in his dissent in *Carpenter*.[39] According to Justice Thomas, the Court in *Carpenter* distorted the meaning of a search when it adopted the *Katz* test.[40] Under the criteria of the *Katz* test, the government conducts an unreasonable and thus unconstitutional search when it violates an individual's reasonable expectation of privacy.[41] Essentially in *Katz,* Justice Harlan rests an individual's privacy rights upon a framework of permissible and impermissible searches. Impermissible searches occur when society deems the search unreasonable, and conversely permissible searches occur when society deems the search reasonable.

However, Justice Thomas explains that this reimagination of a search holds no rational basis in the conventional meaning of a search.[42] The nature of search has never relied on accepted values and norms of society. A search by both the standards of today and the Founders' standards has always been based on the observable action "to look over or through for the purpose of finding something; to explore; to examine by inspection."[43] The *Katz* test not only deviates from the Founders' understanding of a search, but also

[36] *See generally, id.* at 2235 (Thomas J., dissenting).

[37] *See generally* Henry F. Fradella, Weston J. Morrow, Ryan G. Fischer & Connie Ireland, *Quantifying Katz: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRuM. L. 289, 294-337 (2011); Scott Hayward, Henry Fradella, and Ryan Fisher, *Does Privacy Require Secrecy: Societal Expectations of Privacy in the Digital Age*, 43 Am. J. Crim. L. 19 (2015).

[38] *See Katz,* 389 U.S. 347, 361 (Harlan J., concurring).

[39] *See Carpenter,* 138 S. Ct. at 2235 (Thomas J., dissenting).

[40] *Id.* at 2238 (Thomas J., dissenting).

[41] *Katz*, 389 U.S. 347, 361 (Harlan J., concurring).

[42] *See Carpenter,* 138 S. Ct. at 2206 (Thomas J., dissenting).

[43] *Search*, *An American Dictionary of the English Language* (1828) (reprint 6th ed. 1989).

complicates the legal definition of a search in a nonsensical manner by relating it to societal expectations.

Moreover, even where the Fourth Amendment affords protections "against *unreasonable* searches and seizures,"[44] the phrase "unreasonable searches," taken in context, also has little to do with society's expectations or beliefs. At the time of the ratification of the Constitution, the Framers defined reasonableness as an agreement to the reason or logic of natural and common law.[45] Both the principles of natural rights and the common law acted as the conceptual backbone to the Constitution.[46] Undoubtedly the most influential source of natural law,[47] philosopher John Locke argues that man has inherent rights to life, liberty, and property: the latter he defines as the "labour of his body, and the work of his hands."[48] According to Locke, property was so fundamental to a man's existence that government was created with the principal purpose of forming a "united strength of the whole society, to secure and defend… man's natural right of property."[49]

Thus, from Locke's natural rights to property, grew the Old English legal right to be secure in one's property and possessions. Perhaps the most well-known Old English case, "undoubtedly familiar to every American statesman at the time the Constitution was adopted,"[50] was *Entick v. Carrington*.[51] In the case, Lord Camden, the arbiter of the case, established the high levels of security an individual enjoys in their papers, which were the "owners' dearest property."[52] For Lord Camden, just as for Locke, "[t]he great end, for which men entered into society, was to secure their property."[53]

Essentially, from both natural and common law arose the right to privacy that underpins the Fourth Amendment. The Framers, in constructing the Fourth Amendment against unreasonable searches and seizures, guaranteed the right to privacy specifically to protect the natural law-based and common law models of individuals' property. For instance,

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[44] U.S. Const. amend. IV.

[45] Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181 (2016).

[46] *Id.* at 1280.

[47] *See Carpenter,* 136 S. Ct. at 2239 (Thomas J., dissenting) (citing Obergefell v. Hodges, 576 U.S. 644, 727 (2015) (Thomas J., dissenting) (explaining how Lockian theory related to newspapers, speeches, sermons, and letters))).

[48] John Locke, V. Of Property, *in* Second Treatise of Government, § 26 (1690).

[49] *Id.* at § 96.

[50] Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 1010 n.182 (2011).

[51] 19 Howell's State Trials 1029 (1765).

[52] Clancy, *supra* note 50, at 1066.

[53] *See* Entick v. Carrington, 19 Howell's State Trials at 1066.

one particular violation the Framers were particularly familiar with during the Colonial era were old English writs of assistance and general warrants, which authorized "searches without suspicion anywhere the searcher desired to look."[54] Writs, at the time, provided enforcers "permanent search warrants" with unlimited scope to search individuals' property.[55] Ostensibly, these writs of assistance and general warrants were "grievous and oppressive" violations of natural rights and common law of property, since individuals could not be secure in their property if the government had unlimited power to interfere with their possessory rights.[56] Ultimately, the Framers established indelible protections against unreasonable searches and seizures to prevent actions resembling writs of assistance and guard individuals' natural rights to property. They rested the reasonableness of a search upon the existence of circumscribed warrants and details required to produce probable cause. Moreover, the Founders explicitly enshrined in the later clause of the Fourth Amendment the particulars to meet probable cause as sworn oath "describing the place to be searched, and the persons or things to be seized."[57] In contrast, *Katz*, and by extension *Carpenter,* distort the Framers' intent in the Fourth Amendment's guarantees against unreasonable searches and seizures when they rest the unreasonableness of a search on society's beliefs, rather than the existence of *actual* property.

Where *Carpenter* and *Katz's* reasonable expectation of privacy test vacillates from the Framers' intent, the Court's standard in *Carpenter* is further divorced from the explicit language in the Fourth Amendment. The text of the Constitution provides security to individuals in "*their* persons, houses, papers, and effects."[58] Not only are privacy rights tied to property rights through the intent of the founders, but the Framers explicitly tied the existence of Fourth Amendment protections to ownership in the Fourth Amendment. *Carpenter* ultimately deviates from Fourth Amendment jurisprudence when it states that "property rights are not the sole measure of Fourth Amendment violations."[59] Needless to say, the Fourth Amendment guarantees general privacies to life that transcend mere protections to property,[60] however, these privacy rights must remain tethered to the actual

[54] Clancy, *supra* note 50, at 991.
[55] *Id.* at 992.
[56] Donohue, *supra* note 45, at 1266.
[57] U.S. Const. amend. IV.
[58] U.S. Const. amend. IV (emphasis added).
[59] *Carpenter,* 138 S. Ct. at 2213 (citing Soldal v. Cook County, 506 U. S. 56, 64 (1992)).
[60] *See* Boyd v. United States*,* 116 U.S. 616, 630 (1886) (explaining that searches of houses invade "the privacies of life").

protections the Fourth Amendment guarantees in four distinct categories of property.[61] As the Court famously wrote in *Katz*, the Fourth Amendment "protects people, not places."[62] However, the protections it affords to people are security in *their* property.

In brief, the Framers guaranteed against unreasonable searches and seizures in the Fourth Amendment specifically to protect against one's individual property. Although unreasonable searches were mentioned in the text of the Fourth Amendment, they were merely to introduce the more fundamental right of privacy in property. For Justice Thomas and other originalist thinkers, the *Katz* test and, by extension the standard in *Carpenter*, distort the meaning of the Fourth Amendment when it conditions privacy rights on whether a search was reasonable or unreasonable instead of turning more prudently on "whose property was searched."[63]

B. The Court's Condition of Intimacy Compounds Lower Courts' Confusion

Carpenter creates a second flaw in Fourth Amendment jurisprudence: practicality. Although Justice Thomas's traditionalist arguments bear importance to the theoretical jurisprudence of the Fourth Amendment, more practically, by adhering to precedent in *Katz*, the Court in *Carpenter* perpetuates an unworkable standard that cannot be easily followed by lower courts. As many jurists and legal commentators have espoused since its inception, the reasonable expectation of privacy test enumerated in *Katz* is fundamentally incomprehensible.[64] Essentially, the reasonable expectation of the privacy standard asks justices of the law to embrace the role of sociologist and interpret what society holds as objectively reasonable expectations.[65] However, as seen through numerous lower court and Supreme Court cases, judges' perceptions of society's reasonable expectations often do not reflect society's *actual* expectations of privacy. For instance, although the Court has established that there is no reasonable expectation of privacy in aerial surveillance of an individual's house or property,[66] follow-up polls and surveys determined that the defendants'

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[61] *Carpenter,* 138 S. Ct. at 2227 (Kennedy J., dissenting).

[62] *Katz,* 389 U.S. at 351.

[63] *Carpenter,* 136 S. Ct. at 2238 (Thomas J., dissenting).

[64] *See generally, supra* note 4.

[65] Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. Davis L. Rev. 935 (2008).

[66] *E.g.* Dow Chemical Co. v. United States, 476 U.S. 227 (1986); *California v. Ciraolo* 476 U.S. 207 (1986); *Florida v. Riley* 488 U.S. 445 (1989).

assumptions of privacy were shared by most Americans.[67] More generally, through various empirical studies, researchers have concluded that society typically holds far higher expectations of privacy than the courts have recognized.[68]

Where the *Katz* test alone would render *Carpenter's* standard of privacy untenable for lower courts, the Court in *Carpenter* introduces an additional question of intimacy conditioned on the mosaic theory that further complicates its standard. The mosaic theory was first conceptualized by scholars in response to *United States v. Jones*, which considered 28 days of continuous GPS tracking of an individual's vehicle.[69] The Court in *Jones* found that the government violated Jones's privacy when it placed a GPS tracker on Jones's car since it was for such a long period of time.[70] As later jurists theorized under the mosaic theory and in line with *Jones' rationale*, "a series of acts that are not searches in isolation amount to a search when considered as a group."[71]

Hoping to explain why society may offer heightened expectations of privacy to personal records, which traditionally held no such protections pursuant to *Smith* and *Miller*,[72] the Court in *Carpenter* utilizes the mosaic theory to differentiate the conventional personal information found in *Smith* and *Miller* from the digital data found in CSLI.[73] In *Carpenter,* the Court established that the nature of the information searched must also be considered to determine whether society affords a reasonable expectation of privacy under the *Katz* test.[74] Essentially, in *Carpenter,* the Court created an exception to the third-party doctrine.[75] Even though society traditionally afforded no reasonable expectation of privacy to personal records voluntarily shared with third parties, individuals' digital data may carry heightened expectations of privacy depending on their ability to reveal intimate details of an individual's

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[67] Christopher Slobogin, & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,* 42 Duke L.J. 727 (1993).

[68] *See* Henry F. Fradella, Weston J. Morrow, Ryan G. Fischer & Connie Ireland, *Quantifying Katz: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. Crim. L. 289, 294-337 (2011); Scott Hayward, Henry Fradella, and Ryan Fisher, *Does Privacy Require Secrecy: Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRuM. L. 19 (2015).

[69] 565 U.S. 400 (2012).

[70] *See id.*

[71] Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 320 (2012).

[72] *See Carpenter,* 136 S. Ct. at 2233 (Kennedy J., dissenting) (explaining how the Court's holding reverses decades of precedent from *Smith* and *Miller).*

[73] *See generally id.* at 2217.

[74] *See Carpenter*, 136 S. Ct. at 2219 (explaining that CSLI is much more revealing in nature than the documents sought in *Smith* or *Miller*).

[75] *But cf. Carpenter,* 136 S. Ct. at 2210 (arguing that the Court's majority opinion does not disturb precedent from *Smith* and *Miller*, despite ostensibly doing so).

life in the aggregate.[76] Taken as individual isolated data points, CSLI would reveal no more than a point in time where a cell phone resided. However, taken in the aggregate "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts."[77] Not only does the Court in *Carpenter* expand on the *Katz* test by relying on the mosaic theory, but it also introduces a question of intimacy. If the nature of the information is highly sensitive in the aggregate *and* has the capability to reveal "familial, political, professional, religious, and sexual associations," then society affords that information heightened levels of privacy.[78]

While the Court's added standard of intimacy helps to clarify the incoherent *Katz* test, it falls short of establishing thorough guidance that remedy the *Katz* test's underlying untenability. Several jurists have critiqued any condition of intimacy that rests on the mosaic theory as subject to a case-by-case analysis.[79] Since courts need not determine whether a search occurred given a greater or fewer aggregation of data, [80] lower courts applying *Carpenter* will be continually creating new standards of intimacy. Moreover, a case-by-case analysis may result in inconsistent findings of intimacy. For instance, as Justice Anthony Kennedy opines in his dissent in *Carpenter,* under the majority's standard of intimacy, lower courts would treat the conventional documents in *Smith* and *Miller* as highly intimate:

> What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.[81]

Furthermore, digital technologies are complex devices that in a case-by-case analysis, individual judges may treat the same technology in different manners. For instance, in *Carpenter* the Court focused on eight different variables to determine that CSLI was highly

[76] *Carpenter,* 136 S. Ct. at 2217.
[77] *Id.* at 2217.
[78] *Carpenter,* 136 S. Ct. at 2217, citing United States v. Jones, 565 U.S. 400, 415 (U.S., 2012) (Sotomayor J., concurring).
[79] *See e.g.* Kerr, *supra* note 5.
[80] Commonwealth v. McCarthy, 142 N.E.3d 1090, 1105 (Mass., 2020).
[81] *Carpenter*, 138 S. Ct. at 2232 (Kennedy J., dissenting).

intimate.[82] These variables range from the accuracy of CSLI, to CSLI's ability to reveal retrospective information.[83] Lower courts tasked with implementing *Carpenter* are ultimately given little guidance on determining intimacy. Furthermore, since various types of digital data exist, each with nuanced similarities and differences, mechanically applying *Carpenter's* analysis is only possible when the type of technology is akin to that in *Carpenter*. For instance, in *United States v. Hood*, when the Court of Appeals for the Second Circuit applied *Carpenter's* framework of intimacy to a search of an individual's IP addresses, they distinguished *Carpenter* and declined to extend privacy rights to the digital IP addresses.[84] Forced with weighing which factors bear importance to the intimate nature of IP addresses, the Second Circuit negated two crucial elements of intimacy outlined in *Carpenter*, instead emphasizing other factors and ultimately concluding that IP addresses were not directly sensitive in nature.[85]

Ultimately, as Professor Orin Kerr, one of the country's leading Fourth Amendment scholars argues, "a bright-line answer is needed."[86] Without proper guidance from *Carpenter* to establish clear standards of intimacy, the lower courts cannot properly assess the sensitive nature of various technologies. Perhaps more importantly, since the intimacy of data depends on the amount aggregated and searched, which courts decide on a case-by-case basis, law enforcement officials will never know whether the data they search is highly sensitive. A case-by-case standard of intimacy provides little guidance for acceptable action by law enforcement. Law enforcement can only guess *ex ante* to courts' *ex post facto* judgements.[87]

In sum, the Court's understanding of privacy in *Carpenter* is divorced from the Fourth Amendment's jurisprudence. Where the Court's holding in *Carpenter* is rooted in the reasonable expectation of privacy test from the *Katz* concurrence, this test departs from the intent of the Fourth Amendments emphasizing property to create an unworkable mandate of judicial discretion. Moreover, the Court's added question of intimacy only serves to

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[82] Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, Sup. Ct. Rev. 347 (2019).

[83] *Id.* at 373 (describing some of the characteristics that defined CSLI's intimacy: "(a) the number of people implicated (b) the volume of information (c) the revealing nature of the information (d) the lack of resource constraints in obtaining it (e) the retroactive nature of the data (f) the near perfect recall (g) the potential length of time for which information can be obtained and (h) the increasing precision").

[84] United States v. Hood, 920 F.3d 87 (1st Cir. 2019).

[85] *Id.* at 92.

[86] Orin S. Kerr, *Automated License Plate Readers, the Mosaic Theory, and the Fourth Amendment*, Volokh Conspiracy (2020), *available at* https://reason.com/2020/04/22/automated-license-plate-readers-the-mosaic-theory-and-the-fourth-amendment/

[87] *Id.*

complicate *Carpenter's* standard of privacy, certain to create case-by-case inconsistencies. Ultimately, the Court's lack of a comprehensive standard of privacy provides little guidance as lower courts adjudicate emerging and evolving digital technologies.

III. Justice Gorsuch's Traditionalist Approach and Analogies to Copyright Law Provide Liberal Expansions of Privacy Rights to Digital Data

Left with *Carpenter's* flawed standard of privacy, the question remains: how can the Court properly apply Fourth Amendment guarantees to protect an individual's extremely sensitive digital data? Justice Thomas, Alito, and Kennedy proposed a purely property-based solution in their dissents in *Carpenter*.[88] For these Justices, the issue in *Carpenter* should have focused solely on whether Carpenter's CSLI was *his* property.[89] This question is rooted in Fourth Amendment jurisprudence and avoids the pitfalls of *Katz* and *Carpenter* since it does not necessitate judicial interpretations of society's expectations of privacy to understand the Fourth Amendment, instead relying on established property and contract law. Essentially, a rigid property-based framework of privacy rights would address the issues in *Katz* and *Carpenter* by affording privacy solely in codified property. Using such a model in *Carpenter,* Justices Thomas, Alito, and Kennedy find that Carpenter holds no property rights since he signs a contract with the third party, and therefore Carpenter's CSLI would not be protected.[90]

Although a strict originalist approach to privacy rights would resolve many of the issues with *Katz* and *Carpenter*, a standard of privacy that rests upon rigid lines of property rights fails to meaningfully expand privacy rights in the digital age. As almost all digital data is maintained by a third-party and agreed upon through a relinquishment of ownership rights, it's difficult to imagine any protections for digital data under a property-based approach without added legislative protections that expressly grants property rights to digital data. Moreover, as the nature of technology is to continuously evolve, any legislation would inevitably lag behind, perhaps significantly, the development of technological nuances. Essentially for these traditionalist justices, Fourth Amendment protections cannot be applied to digital data, or at least rarely so.

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[88] *Carpenter,* 138 S. Ct. 2206, 2233, 2235, 2246.

[89] *E.g., Carpenter*, 138 S. Ct. 2206, 2242 (Thomas J., dissenting).

[90] *See Carpenter*, 138 S. Ct. 2206, 2242 (Thomas J., dissenting) (stating that Carpenter stipulates that the cell-site records are the business records of Sprint and MetroPCS).

However, textualist philosophies such as this discount a crucial subtleties of Fourth Amendment jurisprudence: property rights do not necessitate possession.[91] During the drafting of the Bill of Rights, one of the only changes to the original draft of the Fourth Amendment was to change the wording from "persons houses, papers, and *other property*" to the current iteration of the Amendment, "persons, houses, papers, and *effects*."[92] The Framers implemented this subtle alteration to "extend the meaning [of the Fourth Amendment] beyond personal property or possessions… to include commercial items and goods,"[93] which were included under the meaning of "effects" but not necessarily considered "property." Essentially the Fourth Amendment was reworded because the term "other property" was too narrow to encapsulate the non-possessory nature of some objects. Ultimately, for the Framers, possession was not a prerequisite to trigger Fourth Amendment protections.

Accordingly, a traditionalist approach to privacy rights can still apply Fourth Amendment protections to digital data. Justice Gorsuch offers such an approach in his separate dissent in *Carpenter*. For Justice Gorsuch, strict adherence to property rights is unsuitable to the nuances of digital technology, since individuals may maintain intrinsic interests in their digital data despite relinquishing literal possession or control.[94] Justice Gorsuch coins these interests as property interests and builds an overlying property-interest-based approach distinct from property rights since individuals may maintain property interests when they hold no property rights.[95] The balance of this section proposes a privacy framework built on Justice Gorsuch's model of inherent property interests. The first part of this section will outline and discuss how Justice Gorsuch structures his expansive model of property interests from traditionalistic Fourth Amendment roots. Justice Gorsuch's model of property interests is not complete however, lacking a source of law to identify when an individual maintains property interests. Although Justice Gorsuch posits positive law in general as a potential avenue for identifying property interests,[96] as the second part of this section will detail, a flexible positive law framework would introduce several ambiguities and discretionary flaws, falling into similar pitfalls of indeterminacy as *Katz*. Ultimately, only

[91] *See generally,* Donohue *supra* note 45 at 1301.
[92] 1 Annals of Cong. 454 (1789) (emphasis added).
[93] Donohue *supra* note 45, at 1301.
[94] *Carpenter,* 138 S. Ct. 2206, 2268 (Gorsuch J., dissenting).
[95] *Id.* at 2268 (Gorsuch J., dissenting).
[96] *Carpenter,* 138 S. Ct. 2206, 2272 (Gorsuch J., dissenting).

through a select positive law that either speaks to an explicit property right or implicates individuals' right to control may privacy interests offer a robust Fourth Amendment model and build a robust and determinative framework that offers proper guidance to lower courts.

A. Justice Gorsuch Traditionalist Property Interests Approach

While a traditional property-based approach to privacy rights resolves many of the underlying issues from *Katz* and *Carpenter,* a strict property-based framework declines to extend privacy rights to modern technologies. For classical originalists, *Carpenter* is a straightforward case. Carpenter held no ownership of the CSLI data and should therefore hold no privacy rights against a search of the CSLI data.[97]

Justice Gorsuch, however, articulates a slightly different approach. For Justice Gorsuch, a strict property-based approach fails to account for the technological nuances of personal digital data.[98] He explains in his dissenting opinion in *Carpenter,* that "the fact that a third-party has access to or possession of your papers and effects does not necessarily eliminate your interest in them."[99] Had it not been for Carpenter actively using his cell phone and subscribing to the third-party's service, the CSLI in question would have never been created. Hence, Justice Gorsuch proposes a slight deviation of the traditionalist property-as-privacy standard, instead advocating for an understanding of privacy rooted in the inherent property interests that an individual may maintain in digital data they create.[100] These property interests are not strictly tied to ownership as property rights are, Justice Gorsuch opines. While this approach still ties privacy interests to ownership, ownership would not be determined through literal property or contract law. Instead, a privacy model based on property interests accounts for the 21st century complexities of ownership in digital data. Where property rights are decided upon strict rules of ownership, property interests are decided where individuals may not hold actual property rights but nonetheless maintain interest in the content they create.

Justice Gorsuch does not claim to create this concept of privacy interests *de novo*. Citing foundational Supreme Court Cases in Fourth Amendment jurisprudence, Justice Gorsuch outlines how our understanding of ownership already acknowledges a conception of property interests. In *Ex parte Jackson,* for example, the Court held that individuals

[97] *See e.g., id.* at 2232 (Kennedy J., dissenting).
[98] *See id.* at 2268 (Gorsuch J., dissenting).
[99] *Id.* at 2268 (Gorsuch J., dissenting).
[100] *Id.*

maintain ownership and thus property interests in the contents of their letters, despite the fact that these letters are held by the United States Postal Service.[101] More fundamentally, Justice Gorsuch and several scholars point to common law tenets of bailment law.[102] A bailment is an exchange of an individual's object to another for safekeeping or a certain purpose.[103] Although the bailee holds possession of that object, the bailor retains ownership of the object, merely exchanging possession for an express purpose.[104] The common law understanding of bailment guarantees individuals' a modicum of ownership in objects they originally own even if they do not physically retain possession.[105] In short, foundational Supreme Court cases and the common law understanding of bailment support Justice Gorsuch's proposition of a property-based framework of Fourth Amendment jurisprudence rooted in an individual's inherent property interests rather than a strict possession.

B. A Strict Positive Law Framework that Relies on Rights of Control

Although Justice Gorsuch's proposal of property interests as privacy rights is rooted in Fourth Amendment jurisprudence, his Fourth Amendment model is not complete. Justice Gorsuch himself is uncertain whether Carpenter maintains property interests. "It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law," and thus Carpenter could hold some kind of property interests, Justice Gorsuch formulates.[106] But since Carpenter offers no evidence or sources of his property interests, Justice Gorsuch begrudgingly sides with the dissenters.[107] Justice Gorsuch leaves his model unfinished, questioning "what kind of legal interest is sufficient to make something yours? And what source of law determines that?"[108] Ultimately, he admits that "much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today."[109]

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[101] *Ex parte Jackson*, 96 U. S. 727 (1878).

[102] *Carpenter,* 138 S. Ct. 2206, 2268 (Gorsuch J., dissenting). *See also,* Donohue *supra* note 82; Jeremy M. Hall*, Bailment Law as Part of a Property-Based Fourth Amendment Framework*, 28 Geo. Mason L. Rev. 481 (2020).

[103] *Bailment*, *Black's Law Dictionary* (10th ed. 2014).

[104] *Carpenter,* 138 S. Ct. 2206, 2268 (Gorsuch J., dissenting).

[105] Donohue *supra* note 82, at 353.

[106] *Carpenter,* 138 S. Ct. 2206, 2272 (Gorsuch J., dissenting).

[107] *Id.*

[108] *Id.* at 2268.

[109] *Id.*

One source of law that Justice Gorsuch suggests may inform property interests is positive law.[110] Positive law simply refers to legislative statutes, both state and federal, which establish affirmative rights.[111] Essentially, positive law may be used in a property interest model to "say that a digital record has the attributes that normally make something property," and thus individuals would likely maintain property interests in that digital record.[112] Using positive law, courts will have clear determinative sources of when a property interest might exist, and when it might not.

Two main categories of positive law thus emerge to fulfill Justice Gorsuch's model. The first category includes positive law that specifically informs a right of property or ownership.[113] One such type of law is copyright law. Copyright law is, at its foundation, a classification of intellectual property that affords rights of ownership in original and fixed artistic works.[114] Copyright law would likely not inform property interests in digital data since copyright law only regulates works of expression and originality,[115] which digital data is not. However, if the digital data ever incorporated artistic expressions, then perhaps copyright law could act as a form of positive law establishing property interests. Moreover, it's hard to imagine the need for positive law that explicitly grants ownership in a property interest model. Since this type of law grants statutory rights to ownership, the law would be sufficient to trigger Fourth Amendment protections without accounting for property interests.

However, a second category of positive law also exists as "positive law need not be property-based."[116] More broadly positive law may originate from any forms of positive regulation that enumerate property-like attributes.[117] Since the role of positive law in a property interest model is to identify if individuals maintain a legal interest in objects that aren't necessarily their property, laws that demonstrate property like attributes may be indicative of the existence of property interest, and thus more useful for a property interest model. For instance, the Genetic Information Nondiscrimination Act prohibits the discrimination of individuals based on their genetic information from for example, insurers

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[110] *Id.* at 2272; *accord* William Baude & James Y. Stern*, The Positive Law Model of the Fourth Amendment,* 129 Harv. L. Rev. 1821, (2016) cited extensively by Justice Gorsuch and credited as inspiring Justice Gorsuch's property interest model.

[111] *Id.*

[112] *Id.* at 2270.

[113] Michael J. O'Connor, Digital Bailments, 22 U. Pa. J. Const. L. 1271, 1291 (2020).

[114] *See generally* 17 U.S.C. § 102.

[115] 17 U.S.C. § 102(b). *See also,* Stephen Fishman, The Copyright Handbook, 5, Nolo, 12TH e.d., 2014.

[116] Andrew Guthrie Ferguson, *Structural Sensor Surveillance*, 106 Iowa L. Rev. 47, 106 (2020).

[117] Michael J. O'Connor, *Digital Bailments*, 22 U. Pa. J. Const. L. 1271, 1286 (2020).

and employers.[118] In this manner, GINA treats genetic information as an object which some may access, and others may not. Although this federal law does not expressly guarantee genetic information property rights, it may identify where individuals maintain interests in their genetic records.

Although the second category of positive law seems much more applicable in Justice Gorsuch's flexible property interest model, a property interest model that draws from a wide scope of positive law is unworkable. Quite simply, laws that affirm property-like attributes would be at best approximative of property interests. Unless exact legislation vesting property rights exists, a property interests model that relies on approximative positive law would inevitably force judges to draw analogies. Professor Kerr draws similarities from these analogies to *Katz.*[119] Under *Katz* courts already look to analogies in positive law to determine whether a reasonable expectation of privacy exists.[120] For Professor Kerr, little difference exists between asking judges to draw analogies to identify property interests and analogies to identify expectations of privacy.[121] More broadly, Professor Kerr describes Justice Gorsuch's property interest model as a reimagination of *Katz* since legal property interests already inform reasonable expectations of privacy.[122] Professor Nicholas Kahn-Fogel agrees, stating that analogies to positive law appear more "aesthetic" than revolutionary.[123] For Professor Kahn-Fogel, relying on positive law reproduces many of the flaws of *Katz* since judges will use their discretion to decide how broad they draw their analogies of digital data to physical property.[124] Professor Laura Donohue argues that positive law can only be relied upon in part.[125] When no direct relationship exists between digital data and positive law, courts should rely on a simple but-for test: "where the underlying data arise from the actions of an individual, and that person has the original legal right to determine whether and with whom it is shared, they hold an ownership interest in it."[126] Ultimately a broad positive law framework would prove just as unworkable as *Katz,* providing little determinacy for lower courts.

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[118] 42 U.S.C § 2000ff–1.

[119] Orin S. Kerr, *Katz as Origionalism,* 71 Duke L.J. 1047, 1093 (2022).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Nicholas A. Kahn-Fogel, *Property, Privacy, and Justice Gorsuch's Expansive Fourth Amendment Originalism*, 43 Harv. J. L. & Pub. Pol'y 425, 476 (2020).

[124] *Id.* at 468.

[125] Donohue *supra* note 82.

[126] *Id.* at 409.

Certainly, Professor Kerr, Kahn-Fogel, and Donohue's critiques of approximative positive law outline a substantial flaw of Justice Gorsuch's property interest model, however, none offer solutions to enhance Justice Gorsuch's property interest model. Professor Kerr advocates for an abandonment of Justice Gorsuch's property interest model.[127] Professor Kahn-Fogel leaves little doubt of his rebuke to Justice Gorsuch.[128] And Professor Donohue proposes a secondary approach altogether when positive law cannot be relied upon.[129]

However, there is an alternative. Positive law can be used as an appropriate source of property interests if narrowly construed. Returning to Justice Gorsuch's initial support of positive law, positive law may establish property rights or property-like equivalency in digital data that the individual may simply never own.[130] Given the broad scope of positive law and the risks of indeterminacy, judges must instead specifically look to laws that guarantee a right to exclude and control, perhaps the most crucial attribute of property rights.[131] Rights of control afford legal interests in objects to individuals who don't necessarily maintain property rights. Since individuals can restrict access to their digital data from other private individuals, it follows that the law would vest interests of ownership in their digital data. For instance, the Computer Fraud and Abuse Act creates protections against private citizens who "intentionally accesses a computer without authorization or exceeds authorized access."[132] In this manner the act offers individuals control over various types of digital material, such as emails and messages, although they do not physically retain possession or ownership of that material.[133]

It does not matter that the law merely grants this right against other private individuals. Under a property interest model, any affirmative right of control granted against private civilians indicates a larger property interest which shields individuals from both public and governmental intrusions.[134] One of the best examples of property interests could be found in *Katz* itself. If the Court in *Katz* had looked to positive law, the Court would have found legislation within the California Penal Code prohibiting private citizens from

[127] Kerr *supra* note 119, at 1093.
[128] Kahn-Fogel *supra* note 123, at 476.
[129] Donohue *supra* note 82, at 409.
[130] *Carpenter*, 138 S. Ct. 2206, 2270 (Gorsuch J., dissenting).
[131] O'Connor, *supra* note 117, at 1286.
[132] 18 U.S.C. § 1030(a)(2).
[133] Matthew Tokson, *Inescapable Surveillance,* 106 Cornell L. Rev. 409, (2021)
[134] Richard M. Re, *The Positive Law Floor*, 129 Harv. L. Rev. F. 313, 332 (2016).

"eavesdrop[ing] upon or record[ing] the confidential communication[s]" of individuals.[135] Under a property interests model, since the California law guaranteed some basic form of control or protection to Katz, this protection could be used to inform Katz's property interests in his cell phone. Although Katz did not maintain actual ownership or physical possession of his electronic communications, he maintained basic Fourth Amendment rights under Justice Gorsuch's property interest model indicative of California positive law.

Ultimately, a property interest-based framework that relies on narrow positive law provides lower courts a more robust and comprehensive standard to follow when determining whether digital data are protected under the Fourth Amendment. Judges applying this standard to digital data should look first to whether existing positive law, either state or federal, exists which draw analogies to existing property laws. If not, judges should then look to laws which create a right to control. If either exist, individuals likely would hold property or controlling interests, which would guarantee them Fourth Amendment protections against warrantless searches. Despite concerns otherwise, a rigid positive law framework that relies on either property law or rights of control avoids the judicial pitfalls that accompany the *Katz* and *Carpenter* standard, since it is rooted in the original interpretations of the Constitutional right to property and does not rely on vacillating interpretations and analogies. Overall, this solution creates the best framework to determine where the Fourth Amendment guarantees exist.

Conclusion

Although the Supreme Court must expand Fourth Amendment protections to digital data in an increasingly digitized age, the Court's current precedent and application of the Fourth Amendment is riddled with flaws. Despite its attempts to clarify its standard of privacy in *Carpenter,* the Supreme Court has yet to still offer a robust privacy framework. Although traditionalist interpretations of the Fourth Amendment which rely on property-based approaches provide tethered interpretations of the Fourth Amendment, these originalist standards do not account for the nuances of modern technology. Instead, the best model must be derived from an individual's property interests, which underpin property rights and exist despite contractual limitations. Moreover, the most suitable source to identify these property interests is in analogies to copyright law.

[135] Baude & Stern *supra* note 110 at 1826.

Ultimately, courts must adopt a property interest-based framework that relies on analogies to copyright law for a robust and comprehensive standard of privacy rights. To be precise, this article advocates for a modified traditionalist approach to privacy rights not on certain ideological grounds. Instead, a modified traditionalist approach remedies many of the flaws of the current privacy framework. This model would offer lower courts explicit guidance in addressing the futures of digital data and modern technology, while maintaining Constitutional roots in classic Fourth Amendment jurisprudence. Moreover, law enforcement officers seeking to search an object without a warrant need no longer wonder if their actions would violate an individual's Fourth Amendment rights. In sum, a privacy rights model rooted in copyright law provides lower courts, law enforcement officials, and U.S. citizens an expansive yet clearly constrained standard of privacy.

ProudBoysUncensored: Evaluating the Role of Section 230 in Preventing Violent Extremist Action Online

Olivia Legault

Introduction

In the wake of tragedy and conflict, many people turn to social media to connect with others and share their thoughts online. In a similar way, communities formed online by shared goals and ideologies engage in discussion prior to these events, circulating propaganda, expanding their community, and searching for ways to enact their proposed change in society. One of these channels of communication, "ProudBoysUncensored," found on Telegram, is just one of the locations that extremist far-right group the Proud Boys convene.[1] This group has migrated, along with many others, to encrypted messaging platforms such as Signal and Telegram, after a mass-ban on accounts in more mainstream social media services like Twitter and Facebook.[2] The catalyst for this migration was in part due to an attack on the U.S. Capitol on January 6th, 2021, where groups including the Proud Boys took part in attempting to disrupt the election certification process.[3]

The Proud Boys are a fraternal organization of self-described "Western chauvinists' who romanticize a traditional, male-dominated version of Western culture."[4] Research from the Combating Terrorism Center at West Point found that for them, along with other "contemporary extreme far-right hate movements born of the internet's troll factories and

[1] Jensen, Michael, Elizabeth Yates, and Sheehan Kane. *Proud Boys Crimes and Characteristics*, START: COLLEGE PARK, MD 2 (2022), https://www.start.umd.edu/sites/default/files/publications/local_attachments/Proud%20Boy%20Crimes%20and%20Characteristics%20January%202022%20FINAL.pdf.

[2] *Id* at 1.

[3] *Id* at 2.

[4] *Id* at 2.

echo chambers, social media has played a crucial role in the organizing and evolution of the Proud Boys brand."[5] They are also no strangers to violence.

> While the Proud Boys vehemently deny adhering to a racist ideology, the organization is deeply rooted in white nationalism and misogyny. As of December 31, 2021, 83 Proud Boys members and sympathizers have allegedly carried out ideologically motivated crimes in the United States… including 54 Proud Boys defendants who participated in the Capitol breach on January 6, 2021.[6]

Prior to this attack, these communities engaged online with barely any legal retribution for the potentially dangerous ideology they possessed.[7] The attack on January 6th show that holding Internet Service Providers, (ISPs) and other content hosting platforms like Twitter, Facebook, and Instagram, should be held legally responsible for the content they allow on their sites.

The roots of online communication law go back to the Internet's inception, and they are heavily based on the protections provided by the First Amendment, among other prior communications laws. However, the evolution of the Internet since the creation of these protections has shown that nuance and adjustment are necessary in determining liability in situations that may lead to danger or violence in the real world. This adjustment is also essential to promoting the same ideas of freedom and safety that the prior legislation worked to account for.

This article will use the history and intent of prior internet communications law to demonstrate in detail why further action needs to be taken against entities that host harmful content and violent extremist organizations. It will include the importance of preventing censorship, while also demonstrating that these platforms can be incentivized to participate in increasing efforts to moderate and remove this content. One of these proposed solutions is a "duty of care" standard that preserves some existing immunities that ISPs currently have, but with more proactive incentivization to discourage harmful content. In order to present this and other solutions to the problem of harmful extremism online, context is necessary to understand the specific history of internet communications and liability law. This will serve as a backbone for the proposed solutions.

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[5] Matthew Kriner & Jon Lewis, *The Evolution of the Boogaloo Movement*, 14 CTC SENTINEL 22 (2021).
[6] *Id.*
[7] *Id.*

The core of the internet communications law that will be covered in this article can be found within Section 230 of the Communications Decency Act of 1996. This law was created as a response to disputes surrounding content published online, specifically outlining who is responsible for both hosting and creating online media.[8] This law creates an important liability shield that perseveres in effect today.[9] It also prevents ISPs from being held legally liable for hosting violent extremist content online.[10]

One of the first cases to be tried under this law was *Zeran v. America Online*, *Inc* (1997). Kenneth Zeran's name and phone number were unknowingly attached to offensive content hosted on an America Online (AOL) community board, and as a result he sued AOL in federal court for the defamatory content. The Fourth Circuit Court of Appeals ruled that Section 230 creates a broad immunity for ISPs, which protects them from being held legally responsible for the "defamatory postings of third parties."[11] This liability shield is a pillar of protection for ISPs that is necessary to create a "free flow of speech online."[12]

Section 230 is based largely on the philosophy of speech protection found in the First Amendment.[13] It has been described as "one of its most important 'speech-enhancing statutes' ever,"[14] and cases like *Zeran v. America Online*, *Inc* (1997) show the extent of its protection of speech. However, there are caveats to the protection that ISPs receive under Section 230. These provisions generally arise when it is determined that an ISP is responsible for the content creation or, according to the Electronic Frontier Foundation, when their actions go beyond the "Good Faith" that Section 230 provides for.[15]

The "Good Faith" intention of Section 230 is the second fact of speech protection. It extends the ability for ISPs to remove content they deem to be illegal or inappropriate for

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[8] 47 U.S.C. § 230(c)(2).

[9] Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved.

[10] *Id.*

[11] David L. Hudson, Jr., *Zeran v. America Online, Inc.* (4th Cir.) (1997), MIDDLE TENN. STATE UNIV.: FIRST AMENDMENT ENCYCLOPEDIA (Jan. 15, 2022) https://www.mtsu.edu/first-amendment/article/613/zeran-v-america-online-inc-4th-cir.

[12] *Id.*

[13] Johnson & Castro, *supra* note 9.

[14] Eric Goldman, *How Section 230 Enhances the First Amendment*, AM. CONST. SOC'Y 1-5 (July 2020), https://www.acslaw.org/wp-content/uploads/2020/07/How-Section-230-Enhances-the-First-Amendment_July-2020.pdf.

[15] *Section 230 Protections*, ELEC. FRONTIER FOUND. (JAN. 20, 2022) https://www.eff.org/issues/bloggers/legal/liability/230.

their platform, without having to face legal action for removing content. This includes most accusations of censorship, content removal bias, and more.[16]

While critical to the existence and function of communication online, events like January 6th, 2021, and research on the mobilization of extremist organizations online, show that the current system is too lenient on ISPs.[17]

This article will also outline what content specifically counts as violent or extremist, and why it should therefore be removed from the umbrella of protection. Communication online has evolved and centralized into massive platforms and social media entities. This requires a re-definition of what it means to be violently extremist online, how responses to this content should be moderated, and who is liable for the content that is hosted. For example, the Anti-Defamation League highlights in their research on how tactics like recruitment and ideology promotion in online spaces lead to the execution of violent actions offline.[18] It is important to prevent the further production and promotion of this content. An internet marketplace where these actions are considered dangerous and unwelcome follows in accordance with similar laws regarding freedom of speech and the First Amendment. Furthermore, the responsibility of ISPs should be realigned to increase action against this content.

This article will use the original essence of Section 230 alongside anti-terrorism legislation like the USA PATRIOT Act to determine whether this liability shield continues to apply with content that promotes or incites violent extremism. Criticisms of Section 230 and content regulation will be evaluated to determine whether ISPs should be held liable, and how Section 230 can be amended to match this philosophy. Based strongly within the constraints of existing law and legislation, several solutions will be proposed that maintains the original spirit of Section 230 and incites action against dangerous extremist content online.

I. Background

A. Congress creates a refined view of Section 230

[16] Johnson & Castro, *supra* note 9.

[17] *Id.*

[18] Propaganda, Extremism, and Online Recruitment Tactics, ANTI-DEFAMATION LEAGUE (Jan 2022), https://www.adl.org/education/resources/tools-and-strategies/table-talk/propaganda-extremism-online-recruitment.

Section 230 provides a duality in protection described by Senator Ron Wyden (D-OR) as "a shield, by protecting online services when they overlook potentially objectionable content, and as a sword, by also protecting them when they remove potentially objectionable content."[19] This sword and shield approach crucially allows ISPs to moderate content to a reasonable degree and promotes a wide range of free of speech protection on the internet. Without this, companies could be held liable for everything people say on their platform, and they could be held legally responsible for enforcing a set of standards or content moderation that requires deleting or removing inappropriate or illegal content.[20]

ISPs and social media platforms can act as either publishers or distributors. If they are treated as distributors, they are held by the precedent created in *Smith v. California (1959).* In this case, the Superior Court of California ruled that the defendant, a book distributor, could not be held responsible for the content of each book it sold. The court reasoned that it would be "unreasonable" and would require near "omniscience" to do so.[21] This is especially true when considering the unfathomable amount of content that is produced and uploaded to social media giants like Facebook today. Over time, these companies have attempted to tackle this issue by creating and enforcing algorithmic content promotion and deletion, generally referred to as content moderation. This process is often so massive that it must be outsourced, creating a further degree of distance between the company and the content it hosts.[22]

While the designation of an entity as a distributor creates distance from the liability of hosting content, the case of *Stratton Oakmont v. Prodigy (1995)* shows how ISPs can also treated as publishers and are subject to different precedent based on this designation. Here, the Court held that Prodigy "had a set of content guidelines that outlined rules for user-generated content, a software program that filtered out offensive language, and moderators who enforced the content guidelines…"[23] These guidelines established it as a publisher, not a distributor, "due to its editorial control, and was therefore liable for the defamatory

[19] Johnson & Castro, *supra* note 9.

[20] See Jason Kelley, *Section 230 is Good, Actually,* ELEC. FRONTIER FOUND. (Dec. 3, 2020), https://www.eff.org/deeplinks/2020/12/section-230-good-actually.

[21] Stratton Oakmont Inc. v. Prodigy Services Co., 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995).

[22] Katie Schoolov, *Why content moderation costs billions and is so tricky for Facebook, Twitter, YouTube and others.*, CNBC (February 27, 2021), https://www.cnbc.com/2021/02/27/content-moderation-on-social-media.html.

[23] Johnson & Castro, *supra* note 9; Stratton Oakmont 1995 WL 805178 at 3.

statements in question."[24] The distinction of publisher versus distributor signifies editorial control by the site that connects it directly to the content being published.[25] This direct connection has more recently taken on the form of much more subtle endorsement, such as through content promotion, partnership deals, and use of influencer marketing.

The presence of content moderation does not automatically constitute liability on the part of the ISP.[26] The criteria that qualifies an ISP to be held liable for the content it hosts must meet a relatively strict standard, best exemplified in *Fair Housing Council of San Fernando Valley v. Roommate.com (2012)* and *FTC v. Accusearch (2009)*.[27] In both cases, Section 230 immunity was denied on the basis that "a service provider is 'responsible' for the development of offensive content … if it in some way specifically encourages development of what is offensive about the content."[28] Another crucial element in *FTC v. Accusearch (2009)* is that Accusearch advertised and was directly involved with content that was illegal, specifically the selling of personal information. This case is one of the extremely rare occasions of an ISP being held liable under Section 230.[29]

The limited criteria for bypassing the liability shield that Section 230 provides is largely influenced by these two parts: direct involvement on the part of the ISP, and involvement of illegal content.[30] In examining the liability that content hosts face when it comes to extremism, it is important to consider both the content in question as well as the method of hosting that the ISP is providing. In order to fully examine and categorize content as belonging under the umbrella of "extremist" or violent in nature, it must fall under a realm of unprotected or illegal speech under both Section 230 and the First Amendment.[31] This can be seen most clearly in the realm of anti-terrorism legislation, specifically the USA PATRIOT Act, which further define the scope of terrorist activity to a domestic level, and can provide guidelines for when content crosses the line of legality.[32]

B. Precedent and Liability for Extremist Content in the Context of Section 230

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[24] Johnson & Castro, *supra* note 9.

[25] Stratton Oakmont 1995 WL 805178 at 4.

[26] Johnson & Castro, *supra* note 9.

[27] Id.

[28] Fed. Trade Comm'n. v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009).

[29] Federal Trade Comm'n v. Accusearch, Inc*,* WL 4356786 (D. Wyo. Sept. 28, 2007), aff'd, 570 F.3d 1187 (10th Cir. 2009).

[30] Venkat Balasubramani, Online Intermediary Immunity Under Section 230, 72 *Business Lawyer* 72 275 (2016): 275–86. https://www.jstor.org/stable/26419123.

[31] Brandenburg v. Ohio*,* 395 U.S. 444, 89 S. Ct. 1827 (1969).

[32] Jaime M. Freilich, *Section 230's Liability Shield in the Age of Online Terrorist*, 83 BROOK. L. REV. 675 (2017).

Content connected to extremist or terrorist activities have been at the core of the argument for legal liability on the part of ISPs. The clearest example involves the revival of cases against Google and Facebook, which came under fire for alleged aiding and abetting in acts of international terrorism.[33] These cases will exemplify several important factors of how liability claims involved in extremist situations are handled, as well as the criticisms against the verdicts.

Firstly, liability claims made against Google by the family of American citizen Nohemi Gonzalez, who was killed in a terrorist attack in Paris in 2016, were mostly dismissed under Section 230 under a "revenue sharing model" as opposed to the publisher or distributor model.[34] The Court held that the allegations did not support direct liability on the part of Google because they found no motivation in supporting the content beyond profiting from shared advertising revenue.[35] Claims of liability on the part of Google were supported by the Anti-Terrorism Act (ATA), which was originally intended to oppose terrorist organizations who committed acts of violence. This introduced complications of secondary liability, because Google was not the direct perpetrator of the acts.[36] In this case, the plaintiffs did adequately allege that Google held knowledge of its involvement in ISIS's terrorist activities, this knowledge alone was not "sufficiently substantial to amount to aiding and abetting under the law."[37]

Another complaint brought by the family of a victim of an attack in Istanbul further expands upon these ideas, though it was dismissed before it reached a judgment regarding the implication of Section 230 in the case. The argument outlined how "social media companies provided services that were central to ISIS's growth and expansion, and that the assistance was provided over many years."[38] This coincides with research conducted by the Anti-Defamation League and other organizations regarding the use of social media platforms

[33] Holly Barker, *Twitter, Google, Facebook Mostly Immune to ISIS Attack Lawsuits*, BLOOMBERG L. (June 22, 2021, 7:30 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/twitter-google-facebook-mostly-immune-to-isis-attack-lawsuits.

[34] *Id.*

[35] Gonzales v. Google, Inc., 234 F.R.D. 674 (N.D. Cal. 2006).

[36] Lanier Sapperstein, *The Anti-Terrorism Act: Recent Developments Lead to Greater Clarity*, LAW.COM: N.Y. L.J. (June 8, 2020, 11:30 AM), https://www.law.com/newyorklawjournal/2020/06/08/the-anti-terrorism-act-recent-developments-lead-to-greater-clarity/.

[37] Barker, *supra* note 33.

[38] *Gonzales*, 234 F.R.D. at 20.

by extremist groups.[39] Furthermore, "the use of media coverage as well as government pressure concerning the use of platforms by ISIS fostered awareness of their involvement in the activities that ISIS was promoting on their platforms."[40] Lastly, the complaint alleged that sufficient action was not taken by these companies to prevent ISIS from promoting its terrorist agenda.[41]

While these companies were protected from liability by provisions of Section 230, these cases have prompted mass criticism and a call to redefine the direction of liability in these cases. The U.S Court of Appeals for the Ninth Circuit suggested that Congress revisit Section 230 on the basis that it "is likely premised on an antiquated understanding of the extent to which it is possible to screen content posted by third parties,"[42] although Congress has yet to follow through with this revision. The development of algorithms and content screeners has far outgrown the point it previously held at the internet's inception, and many companies, including Facebook, Microsoft, Twitter, and Google all now participate in a mass effort to counter terrorism, misinformation, and hate speech online.[43] However, these algorithms are not perfect, and they operate entirely by the grace of the companies directing them. In fact, reports have found that "Facebook's recommendation algorithm was still promoting to some users militia content by groups such as the Three Percenters — whose members have been charged with conspiracy in the Capitol riot," even after an attempted mass-purging of accounts who violated their policy against violent content.[44] This allows the systems to remain "opaque, unaccountable and poorly understood."[45] In addition to content regulation, the court also stated the need to investigate the regulation of these algorithms as a possible solution to create a more updated balance of liability.

C. Qualifications for extremist content are created by existing anti-terrorist legislation

The definition and limits of liability for illegal or terrorist content online is clearly defined by both the ATA and Section 230. However, the definition of what constitutes

[39] ANTI-DEFAMATION LEAGUE, supra note 18.

[40] Barker, *supra* note 33.

[41] *Id.*

[42] *Id.*

[43] Robert Gorwa, Reuben Binns, & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, BIG DATA & SOC'Y, Jan.–June 2020, at 1–15.

[44] Shirin Ghaffary, *Does Banning Online Extremists Work? It Depends*, VOX (FEB. 3, 2022, 6:30 AM), https://www.vox.com/recode/22913046/deplatforming-extremists-ban-qanon-proud-boys-boogaloo-oathkeepers-three-percenters-trump.

[45] *Id.*

extremist content is less clear. Thus far, the cases included have largely focused on incidents that fall squarely under the definition of terrorism, with acts and content created by groups the U.S. recognizes clearly as terrorist organizations. Beyond that, however, the basis for "extremist" content and organizations of violence on social media is reliant upon the definition of other anti-terrorism legislation, including the USA PATRIOT Act. This act pushes the law closer to a definition for domestic terrorism, though the U.S has yet to designate any official groups under this discretion. Section 802 of the USA PATRIOT Act allows for the inclusion of domestic activities under the terrorism umbrella, while not drastically altering the definition of terrorism itself.

The definition and acknowledgement of domestic extremism that the USA PATRIOT Act creates allows for the inclusion of "home grown" terrorists, including individuals "inspired to commit violence after viewing terrorist videos online."[46] Lawsuits against Google, Facebook, and other organizations showcase the legal reaction to the acts committed by these individuals. Their arguments include that these ISPs are perpetrators of the terrorist propaganda online, and directly links them as enabling the inspiration of future "home grown" terrorists. The criticisms from the courts responding to these cases inspire the need to investigate and improve Section 230's response to incidents specifically falling within the realm of the ATA, the USA PATRIOT Act, and other extremist or terrorist action. Amending the provision would not only "provide the victims' families with legal redress against parties who have provided material support to terrorists,"[47] but it would also demand a stronger and more transparent response against extremist content by ISPs. These companies are aware of the problem, but their responses consist of entirely internal motivation and lack legal pressure because Section 230 shields them from facing external legal action.[48]

> The definition of terrorism was re-defined by the USA PATRIOT Act as:
>
> An act 'dangerous to human life' that is a violation of the criminal laws of a state or the United States, if the act appears to be intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping. Additionally, the acts have to occur primarily within the territorial

[46] Freilich *supra* note 32, at 678.
[47] *Id.*
[48] *Id.* at 680.

> jurisdiction of the United States and if they do not, may be regarded as international terrorism.[49]

There is no legal definition of extremist content at the current time, but this does not mean that it does not exist or cause harm. Across the globe, many countries provide their own definition based on cultural and social contexts. In the U.S., "The FBI defines violent extremism as the "encouraging, condoning, justifying, or supporting the commission of a violent act to achieve political, ideological, religious, social, or economic goals."[50]

Criticism of Section 230 often encapsulates acts beyond terrorism, such as hate speech and misinformation, with the implication being that these words and acts have equally devastating consequences.[51] However, these categories must be appropriately analyzed within the balance of free speech that Section 230 creates. There is criticism of amendment to Section 230 regarding this "over-censorship," as well as claiming that the current provision allowing ISPs to self-moderate content violates the First Amendment.

II. The First Amendment and the Roles of Free Speech and Intent

A. The Limitations of Free Speech Online

The decision of *Reno v. ACLU (1997)* declared the internet a "free speech zone" and designated a level of speech protection like books, newspapers, and magazines.[52] This designation offers less limitations than something like a broadcasting network, because of the function of the Internet as a mass participatory forum of speech and communication. In addition to this, there is an equal desire to protect the "marketplace of free ideas" present on the Internet.[53] *Reno v. ACLU (1997)* explores how past internet regulation has attempted to form. Justice Sandra Day O'Connor and Justice William H. Rehnquist dissented to the ruling against stronger internet regulation, describing how these protections could act as a kind of "zoning law," and could effectively separate adult zones on the Internet from zones

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[49] *How the USA PATRIOT Act Redefines "Domestic Terrorism"*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism (Feb. 2022).

[50] *The Development Response to Violent Extremism and Insurgency: Putting Principles into Practice,* USAID POLICY 2 (2011).

[51] Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFAREBLOG (Feb. 3, 2021), https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment.

[52] *Technology and Liberty: Internet Free Speech*, AM. CIV. LIBERTIES UNION (Feb. 2022), https://www.aclu.org/other/technology-and-liberty-internet-free-speech.

[53] *Id.*

accessible by minors.[54] At the time, the technology was deemed insufficient to create this zoning in a constitutional manner. Should this technology become available in the future, the discussion was left open-ended to explore those possibilities.[55] This lack of technological ability and the vague wording within the Communications Decency Act contributed to this instance of internet regulation being struck down as unconstitutional.

The rejection of this regulation has led to a misunderstanding of content neutrality online. In May 2020, President Trump issued an Executive Order which sought to prevent ISP's use of "selective censorship."[56] This order further calls into question the reach of Section 230 in its protection of ISP's ability to self-moderate content. The intent within this Executive Order comes from the viewpoint that by shielding ISPs from the consequences of taking down certain content, they are engaging in a form of censorship. However, this idea of selective censorship and proposed "internet neutrality" is not a requirement for Section 230, which merely protects ISPs under the good faith rule of their ability to self-moderate content.[57] This freedom of self-moderation of content is equally important to the equilibrium balance of the "market of ideas" on the Internet as is found in rulings against stricter regulation of content. Content hosting platforms that take action to remove potentially harmful content is not an overreach of their status, as clearly shown by Section 230.

B. Anti-Terrorist Legislation Upholds the Standards of the First Amendment

In order to explore whether it may be possible to limit extremist action online, it must be examined how this speech and content interacts with the responsibilities of ISPs and the First Amendment. To identify where the limits of speech online become extreme and criminal, anti-terrorism legislation like the USA PATRIOT Act defines this context. In addition to this, research into extremist groups online can be utilized to analyze where this content becomes most prominently connected to the ISP's it is hosted on, and therefore when it becomes entangled with the responsibility of these ISPs to more vigilantly remove and prevent this content.

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[54] Reno v. Am. Civ. Liberties Union, 521 U.S. 844 (1997).

[55] *Ronald Kahn, Reno v. American Civil Liberties Union (1997)*, MIDDLE TENN. STATE UNIV.: FIRST AMEND. ENCYCLOPEDIA (2022), https://www.mtsu.edu/first-amendment/article/531/reno-v-american-civil-liberties-union.

[56] CONG. RSCH. SERV., UPDATE: SECTION 230 AND THE EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP (2020).

[57] Johnson & Castro, *supra* note 9.

The First Amendment lists unprotected speech as speech that "induces harm, encourages illegal activity, or that propagates certain types of obscenity."[58] This provides a way to determine if the content of the speech online is itself illegal. In order to avoid the pitfalls of vague language and factors, this category of illegal speech can be extended to cover extremist or violent speech by using the provisions found in the USA PATRIOT Act. These provisions are declared as the following illegal acts: to "(i) intimidate or coerce a civilian population (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping."[59] The application of "illegal activity" and "harm" found within the listed illegal speech within the First Amendment can be applied to the criteria within the PATRIOT Act, specifically within the arenas where extremist violence is most often found, according to research done on how this content is organized online.

Prior precedent for how the First Amendment has interacted with anti-terrorism legislation can be found within several resources. Firstly, in *Holder v Humanitarian Law Project*, the Court found that "Congress may bar supporting the legitimate activities of certain foreign terrorist organizations through speech made to, under the direction of, or in coordination with those groups."[60] This instance clearly outlines how speech in the assistance or coordination with designated terrorist groups is treated, but it extends further to cover general violence and harm in other ways. The Supreme Court has generally held that First Amendment protections extend to speech that "advocates violence in the abstract," but not to speech "that threatens or facilitates violence in a more specific or immediate way," which is potentially open to be restricted or punished.[61] The types of speech that exceed the "abstract" are most clearly defined by the "Brandenburg Test," which examines the viability of immanence versus threat and determines the effect and danger of speech. Derived from the case of *Brandenburg v. Ohio*, the test was established by the Supreme Court decision that created a three-part analysis for determining the direction, imminence, and likelihood of lawless action. The important distinction between this sufficiently imminent, directed, likely

[58] Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (2021), https://hbr.org/2021/08/its-time-to-update-section-230.

[59] AM. CIV. LIBERTIES UNION, *supra* note 49.

[60] CONG. RSCH. SERV., TERRORISM, VIOLENT EXTREMISM, AND THE INTERNET: FREE SPEECH CONSIDERATIONS (2019).

[61] *Id.*

lawless action is contrasted by the legal protection of "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence."[62]

The Brandenburg Test, as well as other strict guidelines for speech involving declared terrorist groups, provides strong precedent for determining extreme speech that is potentially punishable by law. It provides the crucial nuance necessary in addressing situations of potentially violent extremism, which are not always strictly defined by existing terrorist legislation but has been found to be similarly punishable. It also works within the context of the First Amendment. The sentiment behind the precedent of avoiding overly restrictive or ambiguous Internet regulation, as well as with the counterarguments of preserving a sense of neutrality and avoiding bias are reflected in how speech protection is viewed through the First Amendment. *United States v. Ballard (1944)* provides an example of how ambiguities in language can create problems of potential bias or redefinition of belief through something like religion, where the Justice William O. Douglass stated that "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree…"[63] The use of the Brandenburg Test and similar analysis of speech to assess "clear and present danger" removes the potential problem of having to reconstruct ideas of belief or content of statements, ideally removing the possibility for isolating a particular religious or ideological group in an unconstitutional way.[64] Finally, this definition of illegal speech benefits from being removed from the context of the legislation surrounding declared terrorist organizations, specifically the possibility of future domestic terrorist organizations. This association potentially raise huge legal challenges under the First Amendment's protections of freedom of assembly and association and would be dependent on the future definition of domestic terrorism.[65]

C. Refining Qualifications for Extremist Groups and Content

Research into how extremist groups online function demonstrates where extremist content is most often found, and therefore where to analyze the application of these free

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[62] *Id.*

[63] Joseph Grinstein, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347 (1996).

[64] *Id.*

[65] Nicole Narea, *Labeling Groups Like the Proud Boys "Domestic Terrorists" Won't Fix Anything*, VOX (FEB. 19, 2021, 12:00 PM), https://www.vox.com/policy-and-politics/2021/2/19/22278598/proud-boys-domestic-terrorism-canada.

speech limitations. These core locations of extremist content are the spread of propaganda, the use of radicalization, and mobilization.[66] These are the areas that the ISPs would be held liable for if they are to actively promote or negligently fail to remove this content. Actions like hosting communications or websites containing propaganda connect social media companies and individuals who actively support extremist causes.

One study from the George Washington University Program on Extremism tracked the use of Twitter by ISIS supporters in America and their process of organization and radicalization. This eventually led to a 17-year-old Virginian being charged with the aforementioned material support of terrorism by providing information and transportation to ISIS recruits.[67] Encrypted communication platforms, such as Telegram, provide locations for people to gather and exchange information like plans for potential action, or other methods of support like transferring funding.[68] Other platforms, like Twitter and Facebook, allow for the spread of propaganda and direct incitement of action to a potentially large audience of followers.

There is another important distinction here to be made, involving again the challenges surrounding domestically based incidents. The United States does not currently designate any organizations as domestic terrorists. Countries like Canada have recently designated groups like the Proud Boys, which have chapters internationally, as domestic terrorist organizations.[69] However, critics of this idea state that there would be serious First Amendment concerns which could potentially target political dissidents on both the left and the right of the political spectrum, a similar concern found within the ideas of online media censorship discussed previously.[70] Furthermore, experts also state that a domestic terrorism designation may not progress effective legal action against attacks and plots, "which according to the Department of Homeland Security, primarily come from right-wing extremists acting as individuals, rather than as organized groups."[71]

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[66] THE NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, THE USE OF SOCIAL MEDIA BY UNITED STATES EXTREMISTS 1-5 (2018).

[67] Scott Shane, Matt Apuzzo & Eric Schmitt, *Americans Attracted to ISIS Find an 'Echo Chamber' on Social Media*, N.Y. TIMES (Dec. 8, 2015), https://www.nytimescom/2015/12/09/us/americans-attracted-to-isis-find-an-echo-chamber-on-social-meda.html?_r=0.

[68] BENNETT CLIFFORD & HELEN POWELL, ENCRYPTED EXTREMISM: INSIDE THE ENGLISH-SPEAKING ISLAMIC STATE ECOSYSTEM ON TELEGRAM 3-5 (2019).

[69] *Currently Listed Entities*, PUB. SAFETY CAN.: NAT'L SEC. (2022), https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#510.

[70] Johnson & Castro, *supra* note 9.

[71] *Id.*

III. Proposed Solutions

A. Applying the Duty of Care Standard

The legal precedent and philosophy behind Section 230 is to protect the mass marketplace of communication on the Internet. However, research and more recent precedent, such as evolving anti-terrorism legislation and the identification of extremist content online, has shown that different provisions are needed. These are crucial in order to prevent these organizations or actors from directly taking advantage of these hosted Internet spaces to incite illegal or harmful activity, such as the events seen on January 6th at the U.S Capitol, or in the previous suits against Google, Facebook, and other social media giants.

The growing threat of domestic terrorism and its potential organization online can no longer be ignored, and the intentions of groups like the Proud Boys are shown through their willingness to take online action into the real world. Regarding reactions to domestic terrorism, Attorney General Merrick Garland stated that the goals were to continue to understand and share information regarding these threats, as well as working "to prevent these domestic terrorists from successfully recruiting, inciting, and mobilizing Americans to violence."[72] Finally, he stated, "the long-term issues that contribute to domestic terrorism in our country must be addressed to ensure that this threat diminishes over generations to come."[73] These goals strongly align with the criticism of how Section 230 does not properly handle the responsibility of ISPs in managing and monitoring this potentially illegal or extremist content.

These content hosting platforms are becoming increasingly involved in illegal action offline, and they cannot continue to be barred from the responsibilities they hold by being a crucial actor in this entanglement.

There are several proposed solutions to encompass this belief. The first of these solutions follows a dual approach that holds ISPs to a "duty of care" standard, while preserving some existing immunities.[74] This standard would aim to go beyond the current

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[72] Brandon Gage, *POTUS Introduces His 'National Strategy for Countering Domestic Terrorism'*, HILLREPORTER.COM (June 15, 2021), https://hillreporter.com/potus-introduces-his-national-strategy-for-countering-domestic-terrorism-104047.

[73] Merrick B. Garland, Attorney General, Dep't Just., Remarks: Domestic Terrorism Policy Address (June 2021) (transcript available at https://www.justice.gov).

[74] Daphne Keller, *Systemic Duties of Care and Intermediary Liability*, STAN. L. SCH.: CTR. FOR INTERNET & SOC'Y (May 28, 2020, 2:28 PM), http://cyberlaw.stanford.edu/blog/2020/05/systemic-duties-care-and-intermediary-liability.

"notice-and-takedown based legal model"[75] to proactively address illegal content, and to encourage platforms to engage in better content moderation practices, while simultaneously allowing these platforms to be shielded from liability of content they were unaware of or unable to moderate.

The duty of care provision traditionally addresses speech that is not protected by the First Amendment, but the application in this context would be extended to the previously defined areas where extremist content is found. This would cover not only terrorist activity, but also violent action that is organized outside of this definition, such as white supremacist groups or neo-Nazi organizations. This would not restrict the way that social media platforms seek to promote themselves and their content, but it would force them to allocate substantially greater resources and attention to tackling dangerous content in a more timely manner. It should also aim to meet the same goals of preserving and even stimulating the marketplace of ideas that the previously open Section 230 protections encouraged, similarly to how businesses have a common law duty to avoid causing their customers harm, while still being able to innovate these measures to create competition and interest in their product or service.

This duty of care responsibility could potentially cause platforms to therefore be held liable under that same common law for the actions of either "unreasonably creating an unsafe environment, as well as if they unreasonably failed to prevent one user from harming another user or the public."[76] This could discourage ISPs from promoting dangerous content for profit. This goal of enforcing a duty of care regulation online has been seen in legal precedent regarding obscene content, in the case of a Supreme Court ruling that in June of 2021. This case found that Facebook could not be shielded by Section 230 for sex-trafficking recruitment that occurs on its platform. The Court stated that "We do not understand Section 230 to 'create a lawless no-man's-land on the Internet.'"[77] This standard can be equally applied to the context of extremist content.

B. Amending the Reasonable Care Standard

Rather than regulating ISPs as a whole, as well as potentially changing the landscape of how information is created and communicated online as with the duty of care solution, the "reasonable care standard" solution targets specific incidents of illegal speech or content

[75] *Id.*
[76] Smith & Alstyne, *supra* note 58.
[77] *Id.*

online and evaluates the role of the platform in the perpetuation of this content. If the ISP is found liable for perpetuating or encouraging the speech or content that created a clear and present danger, such as knowingly promoting the information as popular or profitable, then they may be held liable separately than the speaker for a negligent contribution.[78] This would effectively be comparable to the precedent found in *Fair Housing Council of San Fernando Valley v. Roommate.com (2012)*[79] and *FTC v. Accusearch (2009)*.[80] This has yet to take official legal effect because a substantial case containing this argument has yet to successfully challenge these current limits of Section 230.[81] In effect, this would create a reasonable care standard within Section 230, that creates a "negligence centered approach to intermediary liability," and allows courts to include the context of the content or speech at hand as well as the effort by an ISP to remove or provide notice of the content.[82]

A combination of these solutions covers both the arena of content regulation, and the ISP portion of liability. If added to the standard of Section 230, these provisions could enable cases pertaining to violent or extremist content to be prosecuted alongside the content hosts, as prior courts have argued they should be.

One problem facing these solutions relates back to the criticism of both over and under-regulation of content online that Section 230 allows for. This criticism centers around the idea of an overreach of government control within the Internet, which would cross the established boundaries of freedom of speech, as well as other constitutional provisions. In the example of *Epic v. DHS* (2018), the plaintiffs alleged that "Media Monitoring System" in development by the defendants posed a serious risk to privacy and "threatened to chill the exercise of press freedoms."[83] The systems in development included tools to provide high level tracking and monitoring of social media information, as well as rebranding tools and communication tools. This case is a sound example of the widespread criticism that can be drawn from an operation that impedes on privacy in the social media sphere. This, combined with criticism of "selective regulation,"[84] is a reminder of how "acceptable content

[78] Ryan Hagemann, A Precision Regulation Approach to Stopping Illegal Activities Online, IBM: THINKPOLICY BLOG (July 10, 2019), https://www.ibm.com/blogs/policy/cda-230/.

[79] 666 F.3d 1216 (9th Cir. 2012).

[80] 570 F.3d 1187 (10th Cir. 2009).

[81] Kelley, *supra* note 20.

[82] Hagemann, *supra* note 78.

[83] EPIC v. DHS, No. 1:18-cv-01268-KBJ (D.D.C. filed May 30, 2018).

[84] CONG. RSCH. SERV., *supra* note 56.

standards" beyond what was previously outlined as illegal content can be extremely subjective and are out of the control of the government based on the freedom of marketplace of ideas that Section 230 was created around. The limits of Section 230 can be amended carefully and specifically, if the definitions for extremist content are used, and if legal liability is limited to situations where platforms and ISPs are proven to have promoted or negligently ignored this content.

Conclusion

The creation of Section 230 to shield hosts of online content originated with optimistic intention about the potential for the Internet to become a highway of information exchange, full of potential for how it could impact the future. This optimistic stance holds today in many ways, and the Internet has changed the way that many aspects of the world function. However, these real-world impacts extend in both positive and negative directions, and it is the duty of Section 230 to evolve with these changing circumstances. Precedent has been established for many fields of this evolving world, including the way that extremism and terrorism is understood and prevented, as well as how freedom of speech is limited by under these constraints and within the scope of the Internet. To keep with accordance of the governments and the law's goals to promote freedom while also preventing violence, discord, and negative societal impact, the real implications of communication online and how this communication is facilitated cannot be ignored. There must be a change in how ISPs are incentivized to review the way that illegal or harmful content is processed on their platforms, in a way that both promotes the freedom of the marketplace of the Internet while also drawing a line against content and services that support violence and harm in the world.

Both identifying and moderating this illegal content is difficult, but the technology is constantly evolving to meet the needs of the system. The universal response according to legal criticism and further research is that the current status of Section 230 must change to accommodate the liability for hosting extremist content that ISPs are responsible for.

Attorney General Garland stated in his remarks that it is crucial to address the future of this violence as well as the present.[85] Research has found that these extremist and terrorist movements often target young people and can be influenced by private elements like social media algorithms and profit. The impact of these extremist movements and efforts is not

[85] Garland, Remarks, *supra* note 52.

even yet quantifiable by this research and is still being understood in its long-term effects. The reality is that social media platforms have become massively influential for communication in society, and the law must continue to follow its tradition of evolving alongside these advancements. The laws surrounding Section 230 must be amended with the solutions stated above in order to continue to both provide justice for victims of extremist violence, and to incentivize ISPs to do their part in preventing extremism and violence online how they see fit. The companies that work to control how data and communication shape the world cannot be removed from responsibility that this movement has on society, and especially on how this enables violence in the physical world.

The balance and freedom created by early Internet regulatory law has allowed this virtual landscape to flourish in many ways. It is important to acknowledge the power and importance of the freedom that is present in all the legal precedent surrounding communications law and Section 230. It is also equally as important to acknowledge the need to build upon these laws based on the changing landscape of the Internet, and the impact that extremist movements have on the world.

An Incomplete Transaction: Analyzing the Inequity Problem in DDR by Redefining Reparations

Andy Tomusiak

Introduction: DDR and the Inequity Problem

Throughout their long use in the history of armed conflict, peace agreements have struggled to balance idealism and implementation. Over the past three decades, as the international community has become increasingly involved in the process of mediating peace agreements, the need to provide a structure for the breaking off of hostilities was realized through the creation of disarmament, demobilization, and reintegration (DDR) programs.[1] Originally conceptualized with a narrow focus on the technical aspects of decommissioning weapons (disarmament) and breaking the chain of command of the hostile party (demobilization),[2] DDR has since experienced a shift in focus towards broader peacebuilding efforts present in the reintegration phase.[3] A 2006 statement by then-Secretary-General Kofi Annan placed DDR under the umbrella of the contemporary liberal peacebuilding agenda, identifying a need to connect it to "the wider peace, recovery, and development frameworks."[4] The revised Integrated Disarmament, Demobilization, and Reintegration Standards (IDDRS), the guiding standards for UN DDR efforts, echoed this shift towards a development and human rights-based approach in 2019. According to the IDDRS, integrated DDR "helps build national capacity for long-term reintegration and security"[5] and "has evolved beyond support to national, linear and sequenced DDR programs, to become

[1] Robert Muggah, *The Emperor's Clothes?, in* SECURITY AND POST-CONFLICT RECONSTRUCTION 1, 5-6 (Robert Muggah ed., 2008).

[2] *Id.* at 4-5.

[3] Robert Muggah & Chris O'Donnell*, Next Generation Disarmament, Demobilization and Reintegration*, STABILITY: INT'L J. OF SECURITY & DEV., 4(1) Art. 30, 6 (2015).

[4] G.A. Res. 60/705, ¶ 9(a) (Mar. 2, 2006).

[5] UNITED NATIONS INTER-AGENCY WORKING GROUP ON DDR, *The UN Approach to DDR* in INTEGRATED DISARMAMENT, DEMOBILIZATION AND REINTEGRATION STANDARDS § 2.10, at 10 (2019), available at https://www.unddr.org/the-iddrs/ [hereinafter IDDRS 2019].

a process addressing the entire peace continuum."[6] Furthermore, integrated DDR programs "recognize the need to contribute to the right to reparation and to guarantees of non-repetition," a clear nod to an effort to sequence DDR and transitional justice (TJ).[7] Massively expanding the scope of DDR has allowed it to play a defining role in whether national and international peacebuilding efforts are perceived as successful and even more importantly, whether durable reconciliation is actually achieved. In fact, a General Assembly report even goes as far as to describe the quality of a DDR program as "the single most important factor determining the success of peace operations."[8]

Attempting to shift DDR towards the mainstream peacebuilding and human rights agenda raises questions over the compatibility of DDR's goals and methods with this agenda.[9] DDR focuses on allocating resources like stipends, job training, and housing to ex-combatants (XCs) to incentivize them to lay down arms and reenter society. Because of this, DDR may seem to fundamentally differ in outlook compared to peace and development frameworks and transitional justice which value accountability and victim rights.[10] Through this lens, DDR and peacebuilding principles like human rights traditionally exist on different sides of the 'peace versus justice' debate which grapples with how to approach societal reconstruction after armed conflict or atrocity.[11] The perception that DDR rewards bad behavior by dedicating resources to bad actors creates the "inequity problem," which constitutes one of the greatest challenges to successful integrated DDR.[12] Perceived special treatment for combatants undermines trust in the government and in UN peacekeeping missions supporting the reconciliation effort.[13] In particular, the government may lose credibility in its mission to establish a fair social order and include XCs in that order.

Two general frameworks exist in post-conflict rebuilding, DDR and transitional justice. Issues like the inequity problem have led the international community to view DDR

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[6] *Id.* at 12.

[7] *Id.* at 10.

[8] *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change*, U.N. GAOR, 59th Sess., Agenda Item 55, ¶ 227, U.N. Doc. A/59/565 (Dec. 2, 2004).

[9] Lars Waldorf, *Getting the Gunpowder Out of Their Heads: The Limits of Rights-Based DDR*, HUM. RTS. QUARTERLY, 35(3), 702 (2013).

[10] *Id.*

[11] *Id.*; *see generally* Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, INT'L J. OF HUM. RTS., 30(1), 96 (2008).

[12] Pablo de Greiff, *DDR and Reparations, in* DISARMING THE PAST 132, 135 (Ana C. Patel, Pablo de Greiff, & Lars Waldorf ed., 2009).

[13] Waldorf, *supra* note 9, at 714.

and TJ as conflicting approaches with incompatible values.[14] At first glance, the two approaches do seem to differ in focus and method. DDR prioritizes peace and security in the short term, neutralizing the threat combatants pose. TJ prioritizes justice and rights, attempting to redress the damage done to victims. However, these differences are not as fundamental as they seem. This article examines one form of transitional justice widely seen as most emblematic of TJ's principles of justice and victim-centeredness: reparations.[15] This article argues that both DDR and reparations share two important characteristics: their transactional nature and the goal of restoration of the equal status of citizens after a wrongful act. The current concept of reparations does not reflect these similarities, obscuring opportunities to coordinate DDR and reparations. This article offers a redefinition of reparation to reflect the transaction between victim and perpetrator that occurs. Focusing on the similarities of DDR and reparations rather than their differences allows us to see how DDR and TJ can better be coordinated to address issues such as the inequity problem.

I. The Clash Between DDR and TJ

Traditionally, DDR practitioners and practitioners have remained in "separate academic and professional silos" leading to "wide gaps in practice and perception."[16] This disagreement is not rooted in technical policy issues, but moral and ethical questions arising from how grievances and injustices that arise during conflict can be addressed.

A. The Development of Rights-Based DDR

Human rights, as the secular foundation of "definitive moral authority"[17], have been a key reference point for critics of DDR's priorities and methods. The very definition of TJ is framed around protecting human rights: "Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able

[14] Mark Freeman, *Amnesties and DDR Programs*, in DISARMING THE PAST 37 (Ana C. Patel, Pablo de Greiff, & Lars Waldorf ed., 2009).

[15] *See The Nature and Objective of Reparations*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf (last visited 15 March 2022); Rim El Gantri and Arnaud Yaliki, *'A Drop of Water on a Hot Stone': Justice for Victims in the Central African Republic*, INT'L CTR. FOR TRANSITIONAL JUST. (2021), https://www.ictj.org/sites/default/files/ICTJ_Report_CAR_EN.pdf.

[16] Freeman, *supra* note 14, at 37.

[17] STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS 2 (2013).

to provide an adequate response."[18] DDR, on the other hand, does not have this obvious and foundational link to human rights. By attempting to reframe DDR through the lens of human rights, the international community has signaled its discomfort at the moral and ethical implications of DDR's priorities.

The notion of a human-rights based approach (HRBA) is a new concept even in the development sphere in which it was created. Though the modern concept of human rights was codified and internationalized in 1948 with the passage of the Universal Declaration of Human Rights, states used development in the post-WWII and Cold War era as a diplomatic instrument to maintain alliances between the developing and non-developing world.[19] The development community did not begin to adopt the language of human rights until the post-Soviet era in order to adopt a fresh ideological foundation in the face of the new order and the abject failure of economic reform programs such as the Washington Consensus.[20] The 1993 World Conference on Human Rights in Vienna was first to affirm this interdependence of democracy, human rights, and sustainable development in this new era.[21] In 2003, the UN attempted to create a standard set of guiding principles for development in a document titled *The Human Rights-Based Approach to Development Cooperation – Towards a Common Understanding Among the United Nations Agencies*, which yielded six pillars: universality and inalienability, indivisibility, interdependence and interrelatedness, accountability and the rule of law, participation and inclusion, and equality and non-discrimination.[22]

It was only after this evolution that the HRBA permeated into peacekeeping and DDR spheres. Secretary-General Kofi Annan in a 2006 report announced the concept of "integrated" DDR, which explicitly tied the principles mentioned in the HRBA to DDR, including non-discrimination, accountability, and participation.[23] University of Essex law professor and transitional justice expert Lars Waldorf notes two key implications of the

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[18] *What is Transitional Justice?* INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/about/transitional-justice. (last visited Jan. 23, 2022).

[19] Morten Broberg & Hans-Otto Sano, *Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences*, INT'L J. OF HUM. RTS., 22(5), 666 (2018).

[20] Peter Uvin, *From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development*, DEV. IN PRACTICE, 17(4/5), 597 (2007).

[21] Brigitte Hamm, (2001). *A Human Rights Approach to Development*, HUM. RTS. QUARTERLY, *23*(4), 1007 (2001).

[22] *See* UNITED NATIONS DEVELOPMENT GROUP: A RIGHTS BASED APPROACH TO DEVELOPMENT COOPERATION – TOWARDS A COMMON UNDERSTANDING AMONG UN AGENCIES 2 (2003).

[23] U.N. Secretary-General, *Disarmament, Demobilization and Reintegration*, ¶ 29, 31, 34**,** U.N. Doc. A/60/705 (Mar. 2, 2006).

HRBA for DDR: first, that non-discrimination means that DDR programs must also provide benefits to the communities receiving them and second, that measures taken by DDR programs must fall within the guidelines of international human rights law and international humanitarian law (IHL).[24] These qualities closely resemble the right to reparation and the emphasis placed on the human rights framework in TJ.[25] The effort to make DDR resemble TJ more closely is a clear nod to TJ as the "righteous" approach to post-conflict rebuilding.

B. The Perception of Unprincipled Amnesty

Despite the evolution of DDR into a human rights-based practice that better matches TJ norms, a key point of contention exists over the role of amnesties. According to amnesty and transitional justice expert Mark Freeman, amnesties are traditionally viewed by TJ practitioners as directly counterproductive to goals of accountability and justice.[26] Amnesties are seen as promoting impunity as a dangerous new norm, undermining faith in rule of law.[27] DDR practitioners, on the other hand, view amnesty as "uncontroversial" and a "key incentive or precondition for a successful DDR program."[28] The experts Freeman describes seem to believe that DDR and TJ have irreconcilable views of the role of amnesty, based on divergent views of the value of peace versus justice.

However, a history of TJ's evolution challenges this view. While these goals have remained fixed, methods of achieving them have varied significantly since the field's inception. Law professor and TJ expert Ruti Teitel famously identified three distinct phases in TJ genealogy. The first phase is rooted in the Nazi war crimes trials held from 1945-1949 in Nuremberg, Germany.[29] Although the political conditions that drove the trials had abated by the 1950s, Teitel argues that the precedent set by holding a sovereign state accountable to a universal rights-based legal code cemented the proceedings at Nuremberg as the first phase in a new justice phenomenon.[30] Phase two describes the transitions that occurred in Latin America in the 1980s as a result of Samuel Huntington's theory of the post-Soviet "third wave" of democratization.[31] Teitel notes a gravitation towards amnesty over

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[24] Waldorf, *supra* note 9, at 708.
[25] G.A. Res. 60/147, ¶ 11 (Mar. 21, 2006).
[26] Freeman, *supra* note 14, at 37.
[27] *Id.*
[28] *Id.*
[29] Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J., 70 (2003).
[30] *Id.*
[31] *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

punishment during this phase in response to the practical challenge of facilitating governmental transition away from a powerful and entrenched political elite.[32] As the international community attempted to pivot from the heavy retributive focus of phase one in the face of tough rule-of-law dilemmas, new TJ mechanisms like truth commissions gained favor over prosecution.[33] Phase three, which Teitel calls "steady-state" TJ, reflects a further response to global conditions where the majority of armed conflicts exist in the gray zone between the traditional poles of war and peace.[34] The normalization of TJ in a globalized world, specifically through institutions like the ICC, characterize this final phase.[35]

How does this genealogy challenge the idea that DDR and TJ have irreconcilable differences on the topic of amnesty? If TJ's contemporary stance on amnesty can be attributed to the field's fundamental human rights-based principles, then the phase two acceptance of amnesty Teitel recounts should not be considered part of TJ genealogy, but rather a different field entirely. This is not rational; Teitel clearly acknowledges that phase two thinking was a shift of tactics, not a shift in fundamental goals.[36] Phase two prioritized victim interests like the other phases but attempted to promote those interests by incentivizing government transition through the promise of amnesty.[37] Indeed, phase two responses still prioritize the human rights interests of the previous phase, just through a "broader, societal, restorative approach."[38] Thus, we can conclude that differences between DDR and TJ are limited to this *era* of thinking rather than a more irreconcilable difference. Freeman concurs with this conclusion, writing, "it is not necessarily or automatically a contradiction—in human rights terms—to be simultaneously pro-prosecutions, pro-DDR, and pro-amnesties."[39]

Not only are DDR and TJ not necessarily contradictory in their ideologies of amnesty, the development of the HRBA has brought them legally and practically in line too. As Lars Waldorf's analysis of the implications of the HRBA on DDR concluded, contemporary DDR programs reject amnesty for certain types of egregious crimes.[40] While

[32] Teitel, *supra* note 29, at 76.
[33] *Id.* at 78.
[34] *Id.* at 89-90.
[35] *Id.*
[36] RUTI G. TEITEL, TRANSITIONAL JUSTICE 53 (2000).
[37] *Id.*
[38] Teitel, *supra* note 29, at 81.
[39] Freeman, *supra* note 14, at 63.
[40] *Id.*

both the endorsement and prohibition of amnesty is conspicuously absent from international treaty law,[41] the UN stance with respect to certain crimes is more clearly defined. In 2004, the "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" demanded that the UN: "Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court."[42]

Serious questions raised about the problems created by imposing the HRBA on DDR affirm that the HRBA has indeed changed DDR norms.[43] Although the UN Secretary-General in 2004 permitted certain "carefully crafted" amnesties to be utilized as part of the DDR process, they can never violate the UN's prohibition of amnesty for egregious crimes or each state's duty to prosecute such crimes under international law.[44] The IDDRS states on the matter, "individuals shall be ineligible for DDR programmes if they have committed, or if there is a clear and reasonable indication that they knowingly committed war crimes, terrorist acts or offences, crimes against humanity and/or genocide."[45] In principle and in legal doctrine, HRBA-guided DDR and TJ are not mutually exclusive approaches.

II. Misconceptions About DDR and TJ's Relationship

When the international community describes a need to coordinate DDR and TJ, it is doing so not because it assumes they are similar but because it assumes they are fundamentally different. This may seem to be a reasonably straightforward conclusion; after all, DDR and TJ operate on different timelines with focuses on different people, and occasionally seem to be actively working against each other. However, DDR and reparations share fundamental transactional characteristics and the goal of restoration of the equal status of citizens after a wrongful act. In addition to DDR and TJ being reconcilable on the highly contested issue of amnesty, these similarities inform how DDR and TJ may work together in a complementary way.

A. Shared Attributes of DDR and Reparations

[41] *Id.* at 40.

[42] U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 64(c), U.N. Doc. S/2004/616 (Aug. 23, 2004).

[43] E.g. Waldorf, *supra* note 9.

[44] U.N. Secretary General, *supra* note 40, at ¶ 32.

[45] IDDRS (2019), *supra* note 5, § 4.20, at 24.

Differences in DDR and reparations are amplified by too narrow of a focus on the short-term, tactical measures they take rather than the long-term, strategic visions of the programs. In an ICTJ research brief, DDR expert Pablo de Greiff describes trust-building as the main overlapping point of DDR and reparations.[46] While trust-building is an important component of what DDR and reparations programs do, it is done at the ground level. Removing the magnifying glass to look instead at the legal philosophy behind DDR and reparations reveals more fundamental similarities.

Reparations are based on the legal principle of *restitutio in integrum*, or the full return of an injured party to uninjured condition.[47] Though it is not recognized in literature, DDR shares this same goal; by neutralizing the threat of ex-combatants through a combination of immediate (disarmament) short- and long-term (deconstruction of armed group) and strictly long-term measures (provision of sustainable livelihoods for XCs), it seeks to return to a condition where victims experience no threat and can enjoy a full range of rights and privileges. This is fully consistent with traditionally cited examples of restitution as the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment, and return of property.[48]

DDR and reparations also share the fundamental goal of political equality among people. In a successful DDR program, "ex-combatant" is a title only used for the duration of the program. The final goal is to facilitate the acceptance of full civilian status by both the fighter and their community members. In other words, the purpose of DDR is to diminish the perception of XCs as a special class and restore their full status as community members.[49] De Greiff describes a very similar principle in reparations called "inclusiveness," where the enfranchisement of all people as equal participants in a common political project helps reach the just aims of a state.[50]

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[46] Pablo de Greiff, *Establishing Links Between DDR and Transitional Justice*, INT'L CTR. FOR TRANSITIONAL JUST. 4 (2010), https://www.ictj.org/sites/default/files/ICTJ-DDR-Reparations-ResearchBrief-2010-English.pdf.

[47] Cristián Correa, *Getting to Full Restitution*, INT'L CTR. FOR TRANSITIONAL JUST. 2 (2017), https://www.ictj.org/sites/default/files/ICTJ-Briefing-Court-Reparations-2017.pdf.

[48] Theo van Boven, *Victims' Rights to Remedy and Reparation: United Nations Principles and Guidelines*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY 19, 38-39 (Carla Ferstman & Mariana Goetz eds., 2020).

[49] Cornelis Steenken, *Disarmament, Demobilization, and Reintegration: A Practical* Overview, PEACE OPS. TRAINING. INST., 40 (2017).

[50] De Greiff, *supra* note 12, at 146.

While DDR and reparations may employ different strategies to reach their goals, this does not mean they are working at cross-purposes. The ultimate goal of transitional justice is to restore the social contract among citizens and between citizens and their government. Like any contract, this requires buy-in from both parties. DDR and reparations represent two sides of the same coin in this regard. Casting DDR and reparations as adversarial approaches is not accurate and undermines DDR's chance to succeed. Such a view is not reflective of the grand strategic goals of DDR and reparations, which are closely aligned.

B. An Incomplete Reparations Definition

The reason these core linkages between DDR and reparations are not recognized is due in part to a vague and incomplete working definition of reparations among the international community. Common current definitions unintentionally obscure the bilateral nature of the social contract reparations seek to address and in doing so reinforce the perceived adversarial relationship between DDR and reparations that exists. This article next discusses two problematic aspects of the current reparations: its failure to reflect the transactional nature of reparations and its failure to define the needs of victims rather than the obligations of the state.

1. Defining Reparations in Terms of Victim Needs

The right to reparation in the most current iteration of public international law is outlined in the 2006 UN General Assembly Resolution titled *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. Those who meet specific victim criteria are entitled to, in the case of "gross violations of international human rights law or serious violations of international humanitarian law," "adequate, effective, and prompt reparation for harm suffered."[51] Though there is no strict definition of "gross" and "serious" violations, it should be understood that these phrases address the most egregious of transgressions, particularly of right to life, the right to physical and moral integrity of the human person, and the international crimes described in the Rome Statute of the International Criminal Court.[52]

[51] U.N. General Assembly, *supra* note 23. Underline added for emphasis.
[52] Van Boven, *supra* note 48, at 33-34.

What does this mean for practitioners? In reparations literature and case law, "adequate, prompt, and effective" is rarely positively defined, though breaches are identified. In *Bautista de Arellana vs. Colombia*, the UN Human Rights Committee (HRC) ruled out certain types of remedies, writing: "Purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."[53] Article 2, Paragraph 3 of the HRC covenant refers back to the idea of an adequate, prompt, and effective remedy.[54] Yet, the very wording of "adequate, prompt, and effective" invites certain questions. Does the victim have a say in what "adequate" means to them, or is it simply to fulfill the minimum obligations of the state or perpetrator in accordance with international law? How is "effective" measured, and with respect to whom? Like the social contract, reparations have effects on both victims and perpetrators. While victims are redressed and provided with recognition for the harm they suffered,[55] perpetrators are given the opportunity to demonstrate remorse and thereby reclaim their moral character. Regaining their equal political and moral status is a key step towards reacceptance and has proven to be a significant incentive for XCs.[56] When the current reparations framework leaves these questions open, the roles and relevance of victims, perpetrators, and states are unclear and the path to reconciliation is obstructed.

III. Redefining Reparations and Applying the Definition

A. Redefining Reparations

To address the issues raised in the last section, this article will first propose a revised definition of reparations. In 2004, UC San Diego law professor Roy L. Brooks offered a definition that described reparations for gross violations of international human rights law and international humanitarian law as "an apology revealed and realized."[57] While Brooks' definition concisely captures the essential aspect of reparation as being perpetrator-owned

[53] U.N. Hum. Rts. Comm., Bautista de Arellana v. Colombia, U.N. Doc. CCPR/C/55/D/563/1993, ¶ 8(2) (Nov. 13, 1995).

[54] *International Covenant on Civil and Political Rights*, Art. 2, ¶ 3 (Mar. 23, 1976).

[55] De Greiff, *supra* note 12, at 139.

[56] Robert Muggah & Chris O'Donnell, *Next Generation Disarmament, Demobilization and Reintegration*, STABILITY: INT'L J. OF SECURITY AND DEV., 4(1) Art. 30, 5 (2015).

[57] Roy L. Brooks, *Getting Reparations for Slavery Right - Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 256 (2004).

and demonstrating a genuine forward-looking readiness to participate in an egalitarian political project,[58] it falls into the trap of the vast body of reparations literature that fails to highlight the necessary transaction between perpetrators and victims. This article uses the word "transaction" not in the sense of a single transfer of material, but to highlight the interactive and collaborative nature of reparations.

The notion of including victims in the process of apology writing is not without precedent, although it has existed sparingly. In 2012, the Inter-American Court of Human Rights offered a list of criteria a good apology should fulfill drawing from a review of the apology given by Salvadoran President Carlos Mauricio Funes Cartagena to the families of victims of the 1981 El Mozote massacre in which national armed forces murdered hundreds of civilians during the Salvadoran Civil War. The Court concluded that this apology was appropriate and well-crafted in part because the state ensured the victims a) agreed upon the statement of responsibility prior to delivery, and b) attended and participated in the formal disclosure of the apology.[59] The actual inclusion of the victim as a party to the apology clearly plays a beneficial role and goes beyond the optimistic call for perpetrators to be sensitive to victim feelings in crafting an apology.[60] Thus, to elevate the role of the victim and thus the legitimacy of the reparative process, this article suggests altering Brooks' definition by including one additional aspect: a reparation is an apology *revealed, realized,* and *accepted*. Adding this term to the equation casts reparation as a bilateral agreement rather than a unilateral action. The victims are empowered by their enfranchisement as a party to the reparation.

It is essential to clarify that this article does not argue that acceptance of a reparation must be empirically measurable. Defining who is a victim and determining how this group can collectively "accept" a reparation is a serious and valid question, but this paper is focused on the broader framework. A discussion of the feasibility of analyzing the efficacy of a reparation at redressing the harm done to victims through a referendum or public opinion poll or any other method is beyond the scope of this paper. The concept of acceptance for

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[58] *Id.*

[59] Inter-Am. Court H.R., *Massacres of El Mozote and Nearby Places v. El Salvador (Merits, reparations, and costs)*, Judgment of 25 October 2012, Series C, No. 252, ¶ 357.

[60] Ruben Carranza, Cristián Correa, and Elena Naughton, *More Than Words: Apologies as a Form of Reparation*, INT'L CTR. FOR TRANSITIONAL JUST. (2015), https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf.

the purposes of this paper is merely definitional, designed to propose a new way of thinking about reparations and how they might relate to DDR.

B. Applying the Transactional Reparations Lens to the Inequity Problem

How can this new definition help make DDR and TJ work better together for post-conflict societies? By breaking down DDR, we can see how this transactional reparation definition helps us pinpoint where and why the inequity problem emerges in DDR. This analysis will show how DDR is composed of a pair of reparations: reparations to the state and reparations to society. We will see that this second part of the equation, reparations to society, is one-sided and lacks the reciprocity necessary to match our transactional reparation definition. This allows states and practitioners to focus their energy and resources at the point of greatest friction for post-conflict reconciliation.

When an armed group constitutes a threat to a state, assuming that all states are fundamentally self-preserving, we can infer that any peace process with buy-in from the national government will preserve the integrity of the state in some way. This may require the complete dismantlement of the armed group, the integration of the armed group into the national armed forces, or the integration of the group's political leadership into the government in a power-sharing arrangement. While the state may choose from this spectrum of options according to its relative strength in negotiating at that point in the conflict, it will regardless choose an option that dismantles the insurgent threat to its sovereignty. Throughout this process, if the armed group chooses to participate in the peace agreement, its participation is completely voluntary. No matter its reason for taking up arms, as an insurgent group, its preference, like the government's, is to win a total victory. The decision of the armed group to voluntarily participate in dismantling the threat to the state and its execution of that decision by disarming and demobilizing matches the first part of our definition, an apology *revealed* and *realized*. Since disarmament and demobilization are directly linked to the armed group's capacity to threaten the state's sovereignty, this article will call this phase "reparations to state." However, this analysis only describes part of the stages required in our proposed transactional definition for reparations. For disarmament and demobilization to truly qualify as reparations to the state under the new definition, the apology must also be accepted by the victimized party. While there is no provision in international law prohibiting the use of force by non-state armed groups (NSAGs) against

state authorities,[61] states consider internal insurrections illegal and NSAG members are subject to domestic criminal prosecution even if they have not violated IHL.[62] The state thus demonstrates its acceptance of the NSAG's apology in demobilization, where XCs undergo a formal legal process restoring their civilian status without the state subjecting them to prosecution.[63] With buy-in from both parties, the transaction is completed.

However, disarmament and the return of legal status is only one part of what makes a DDR program successful. The long-term social, economic, and political reintegration of XCs is far less standardized and more difficult to measure. Because XCs carry the burden of demonstrating they are ready and willing to participate as equal community members, this article will call this second phase "reparations to society." However, this phase does not match the previous logical sequence of identifying the apology revealed and realized by XCs and subsequently accepted by the victimized party. Rather, to address the security concerns created by internally displaced XCs, they are reinserted back into communities before they can provide some form of apology. The order is disrupted; victims are asked to accept the apology of XCs by inviting them back into their communities and treating them as equals before an apology has been revealed *or* realized. Instead, victims are asked to accept on trust that their apology will come later, as XCs prove their genuine intentions to contribute to peace and progress. For traumatized post-war societies in which generalized interpersonal trust has been shown to be degraded,[64] this is a tremendous ask. Studies of the outcome of DDR programs in Côte D'Ivoire[65] and Burundi[66] affirm this tension, noting the necessity of personal reconciliation for effective social reintegration. From this gap in reciprocity emerges the inequity problem.

Conclusion

[61] ROBERT KOLB, INTERNATIONAL LAW ON THE MAINTENANCE OF PEACE: JUS CONTRA BELLUM 441 (2019).

[62] Marco Sassòli, and Yuval Shany. *DEBATE: Should the Obligations of States and Armed Groups Under International Humanitarian Law Really be Equal?* International Review of the Red Cross 93 (882): 425–442., 437 (2011).

[63] IDDRS (2019), *supra* note 5, § 4.20, at 3.

[64] Richard Traunmüller, David Born, & Markus Freitag, *How Civil War Experience Affects Dimensions of Social Trust in a Cross-National Comparison*, SOC. SCI. RES. NETWORK, 22 (2015).

[65] Jessica Moody, *Reaching for the Impossible?: Coordinating DDR and Transitional Justice in Post-Conflict Côte d'Ivoire*, INT'L. PEACEKEEPING, 28(1), 126 (2020).

[66] Rens Willems and Mathijs van Leeuwen, *Reconciling Reintegration: The Complexity of Economic and Social Reintegration of Ex-Combatants in Burundi*, DISASTERS, 39(2), 318 (2015).

The above analysis of the roots of the inequity problem shows how DDR and reparations, (and therefore TJ) can complement each other rather than work at cross purposes. It should be acknowledged that this article describes concepts like "perpetrator" and "victim" very generally, and it does this intentionally. There is a great deal of nuance when it comes to specific cases, especially for unwilling participants in hostilities like child soldiers and conscripts. Similarly, choosing what kind of initiatives could fill the inequity gap without discouraging participation and without compromising the necessary speed with which DDR must be conducted to address the security situation is beyond the scope of this paper. These important and delicate discussions are purposefully left out to focus on the value this article hopes to provide: an insight into conceptual barriers preventing DDR and TJ from being coordinated and an expanded definition that helps lower those barriers.

A reparations-based analysis of DDR is intended to highlight how DDR can be sequenced to set the stage for later success in redressing victims through transitional justice programs. Embracing the transactional reparations framework for DDR allows the UN mission, the local government, and NGOs to demonstrate an early commitment to accountability. Likewise, efficient coordination provides XCs an early way to take initiative and demonstrate remorse, a step in the right direction towards alleviating victim hesitation about accepting them as full-fledged citizens.

A reparations model for DDR is not only useful to practitioners formulating DDR and TJ programs for their own understanding, but is also helpful to communicate to the local community to minimize confusion about the aims or methods of DDR and foster trust and buy-in. The explanation that measures that seemingly benefit XCs unfairly are part of a necessary set of steps that enable the state to fulfill its obligations of truth, justice, reparations, and non-repetition to its citizens may be accurate, but not helpful for empowering victims or inspiring confidence in the peacebuilding process. Showing recognition of the frustrations of victims by addressing how their needs will be met and transparency over methods go far further towards bolstering mission and government legitimacy. Ultimately, closing the conceptual gap between DDR and TJ will help states and international actors formulate more unified programs, helping the two approaches form a comprehensive approach to assisting societies as they make the difficult transition from war to peace.

Out-of-Precinct, Out of Play: Considering the Constitutionality of Discarding Out-of-Precinct Votes

Kelsey Marx

Introduction

On July 1, 2021, the Supreme Court issued its controversial decision in *Brnovich v. Democratic National Committee*.[1] The 6-3 majority, led by Justice Samuel Alito, upheld two facially neutral Arizona election laws that the Democratic National Committee ("DNC") claimed had a discriminatory effect on racial minorities' right to vote. One of the laws at issue was Arizona House Bill 2023, which criminalized the collection of mail-in ballots by anyone other than an election official, postal worker, caregiver, or family member. The other point of legal contention was Arizona's out-of-precinct ("OOP") policy, which refers to the state's longstanding practice of discarding votes entirely if they are cast in the wrong precinct.

Specifically, the DNC challenged these policies under Section II of the Voting Rights Act of 1965. Section II prohibits laws that deny or abridge the right to vote due to someone's race or color.[2] The majority's decision in *Brnovich* was ultimately criticized for weakening Section II; but, while it is still a topic of national conversation, Arizona's OOP policy should also be reviewed in another light before it falls back into its usual shroud of obscurity. Although the Court did not find Arizona's OOP policy to be racially discriminatory, the Court did not evaluate whether the policy places an unconstitutional burden on the right to vote in violation of the First Amendment and the Equal Protection

[1] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2330 (2021).
[2] 52 U.S.C. § 10301(a).

Clause of the Fourteenth Amendment.[3] In other words, the *Brnovich* Court only evaluated whether Arizona's policy was racially discriminatory, found that it was not, and stopped there.[4] But although that question did not make it to the Supreme Court, it nevertheless is very ripe for review.

This article undertakes that inquiry, considering the constitutionality of Arizona's OOP policy, particularly in light of the statutory requirements set forth by the Help America Vote Act of 2002 ("HAVA"). Part I begins with the constitutional foundations of election administration, sheds light on HAVA and the issues Congress sought to address, and traces the legal standard used by the Supreme Court to evaluate facially neutral election laws. Part II explores the contours of precinct-based voting in greater depth, lays out a key legal decision that resulted from an ambiguity in HAVA, and discusses the practical consequences of Arizona's OOP policy. Part III, using the standard the Supreme Court typically applies to facially neutral state election laws, weighs the OOP policy's burden on the right to vote against the interests put forth by Arizona to justify the practice. Ultimately, the results of this inquiry suggest that many of Arizona's original justifications for its OOP policy are no longer applicable in light of the existing mandates of HAVA.

I. Powers and Precedent in Election Administration

A. The Elections Clause

The United States has a "hyperfederalized" way of administering elections.[5] In place of a central election authority, roughly 13,000 distinct election jurisdictions across the country each have their own cocktail of procedures, administrative caliber, population, and financial footing.[6] The United States Constitution intentionally sets up elections this way: Article I, Section 4, Clause 1 of the Constitution, known as the Elections Clause,[7] places the power to determine the "times, places, and manner" of federal elections in the hands of each

[3] Democratic Nat. Comm. v. Hobbs, 948 F.3d 989, 999 (9th Cir. 2020).

[4] "The question is whether that policy unequally affects minority citizens' opportunity to cast a vote;" Brnovich, 141 S. Ct. at 2366.

[5] Alec C. Ewald, *The Way We Vote: The Local Dimension of American Suffrage* 3 (2009).

[6] Nat. Comm'n. on Election Reform, *To Assure Pride and Confidence in The Electoral Process* 29 (2001).

[7] U.S. Const. art. I, § 4.

state's legislature,[8] and legislatures have frequently delegated the task of election administration to local governments.[9]

The Elections Clause concurrently empowers Congress to "make or alter" a state's procedures for federal elections at any time.[10] The Framers feared that, without proper oversight, states might forgo federal elections entirely to deliberately sabotage the national government.[11] In Federalist 59, Alexander Hamilton warned that giving absolute time, place, and manner power to state legislatures "would leave the existence of the Union entirely at their mercy,"[12] emphasizing that since no overarching election law could adequately apply "to every probable change in the situation of the country...a discretionary power over elections ought to exist somewhere."[13] Furthermore, Hamilton felt that the diverse composition of Congress provided an added safeguard against potential abuse of this regulatory power.[14]

B. Congressional Regulation of Election Administration After 2000

Alexander Hamilton's prediction that the diversity of Congress would limit its use of the power to make or alter a state's election laws seems to have been realized. A vast majority of election procedures remain up to state law. But the debacle in Florida during the 2000 presidential election—when an extraordinarily close result and ill-fated recount exposed major administrative flaws, drew intense criticism, and ended in electoral (and legal[15]) chaos—necessarily spurred Congress into action.[16] Voter registration rolls were inaccurate, ballot designs were confusing, and voting equipment was out of date.[17] Jumbled efforts to count and recount ballots dragged on for weeks before the Supreme Court shut it

[8] Interestingly, the Supreme Court interpreted the word "legislature" in the Elections Clause to encompass all lawmaking power in a state rather than the specific legislative body—a definition unique to the Elections Clause and not applied to other uses of "legislature" in the Constitution. This arose from another Arizona-based case regarding the constitutionality of an independent redistricting commission. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).

[9] Heather K. Gerken, *The Democracy Index: Why Our Election System Is Failing and How to Fix It* 20–25 (2009).

[10] U.S. Const. art. I, § 4.

[11] Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997 (2021). See footnote 57.

[12] The Federalist No. 59 (Alexander Hamilton).

[13] *Id.*

[14] The Federalist No. 60 (Alexander Hamilton).

[15] Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[16] Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 Fla. St. U. L. Rev. 377, 378 (2001).

[17] U.S. Comm'n On Civil Rights, *Voting Irregularities In Florida During The 2000 Presidential Election* (June 2001).

down in *Bush v. Gore*.[18] In a nation predicated on a democratic promise, countless qualified voters were disenfranchised through no fault of their own.[19] So, wielding its constitutional capacity to regulate federal elections, Congress overwhelmingly passed the Help America Vote Act of 2002 ("HAVA"),[20] and President Bush signed it into law on October 29, 2002.[21]

HAVA was a prompt and noble response to an array of dire problems: it allocated millions of dollars to help states update their voting equipment;[22] and created the Election Assistance Commission ("EAC"), an agency that studies election procedures and creates voluntary election guidelines for state and local governments.[23] The law also mandates several procedures to safeguard the right to vote amidst technical or administrative shortcomings, such as those that occurred in Florida.[24] For example, one of HAVA's provisions is its requirement that each state keep a computerized, statewide database of its registered voters.[25] The database must be accessible by local election officials and is coordinated with other government databases in the state.[26] This provision emerged after the inadequacy of voter records caused eligible voters to be wrongfully turned away from the polls in 2000.[27] Of the estimated 4-6 million votes "lost" in that election nationwide, 1.5-3 million of them were attributed to voter registration issues, including outdated or inaccurate recordkeeping by administrators.[28] Another of HAVA's most dynamic safeguards is the use of provisional voting. Also known as "fail-safe" voting,[29] this process allows individuals whose eligibility to vote is disputed to cast their ballot provisionally as opposed to being turned away from the polls altogether.[30] If election officials can subsequently verify that the individual was in fact eligible to vote, their provisional ballot is counted like an ordinary vote.[31]

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[18] *Bush,* 531 U.S. at 98.

[19] Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 205 (2013).

[20] The Help America Vote Act of 2002, 52 U.S.C. §§ 20901-21145.

[21] Karen L. Shanton, Cong. Rsch. Serv., R46949, *The Help America Vote Act of 2002 (HAVA): Overview and Ongoing Role in Election Administration Policy*, 30 (2021).

[22] 52 U.S.C. §§ 20901-20906.

[23] *Id.* at §§ 20921-21072.

[24] *Id.* at §§ 21081-21085.

[25] *Id.* at § 21083(a).

[26] *Id.* at § 21083(a)(1)(A)(iv)-(v).

[27] Symposium, *The End of the Beginning for Election Reform*, 9 Geo. J. On Poverty L. & Pol'y 285, 320-21 (2002).

[28] The Caltech/MIT Voting Tech. Project, Voting: What Is, What Could Be 8-9 (2001).

[29] 52 U.S.C. § 21082.

[30] *Id.* at § 21082(a).

[31] *Id.* at § 21082(a)(4).

But despite its many requirements, HAVA was not a federal overhaul of elections. In fact, HAVA is intentionally full of statutory ambiguities[32] in order to give states significant leeway in how they choose to implement its requirements.[33] Since HAVA was enacted, controversial and artful exercises of this discretion have spurred lawsuits all over the country, including some of those filed by Republicans during the 2020 election cycle.[34] And, as Part II of this piece explains, it was this ambiguous nature that enabled Arizona to maintain the OOP policy at issue in *Brnovich*.

C. Election Administration and the Supreme Court

Many of the election-related cases decided by the Supreme Court concern issues like racial discrimination, reapportionment, and vote dilution; those cases are largely beyond the scope of this article. This discussion pertains to state and local election laws that impose some burden on the right to vote but are facially neutral and administrative in nature. This section traces the legal lineage of the Supreme Court's current approach to cases of this character.

There is a substantial line of Supreme Court precedent evoking strict scrutiny when a facially neutral election law completely denies the franchise to a group or individual.[35] To survive strict scrutiny, a challenged law must be narrowly tailored to advance a compelling state interest.[36] In *Dunn v. Blumstein* (1972), the Court struck down a Tennessee election law requiring voters to reside in the state for at least a year before they could vote there.[37] Six of the seven participating Justices agreed that the state lacked a compelling interest to justify the law's burden on the right to vote.[38] The Court concluded that if "other, reasonable ways to achieve [a state's] goals with a lesser burden" on constitutional rights were available, "a state may not choose the way of greater interference."[39] Prior to *Dunn,* the Court also struck

[32] 48 Cong. Rec. H7838 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

[33] 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.").

[34] For examples concerning provisional ballots, see Hamm v. Boockvar, No. 602 MD 2020, (Pa. Commw. Ct. 2020) and Ziccarelli v. Allegheny Cty. Bd. of Elections, No. GD-20-011793, (W.D. Pa. 2020).

[35] Brief for Prof. Erwin Chemerinsky as Amicus Curiae, Crawford v. Marion County Election Bd., 553 US 181 (2008).

[36] *Id.*

[37] Dunn v. Blumstein, 405 U.S. 360 (1972).

[38] *Id.*

[39] *Id.* at 336.

down facially neutral election laws via strict scrutiny in *Williams v. Rhodes* (1968) and *Kramer v. Union Free School District No. 15* (1969).[40]

The Court subsequently clarified that not all laws that burden the right to vote should automatically be subject to strict scrutiny.[41] Instead, the Court developed an alternative framework to determine the level of scrutiny in challenges to state election laws. Rather than defaulting to strict scrutiny, the *Anderson-Burdick* test weighs a state's asserted interests in the challenged law against the law's burden on the right to vote, then uses a sliding scale to determine the appropriate level of scrutiny.[42] If the law imposes a severe burden on the right to vote, strict scrutiny is applied—just like it was in *Dunn, Williams,* and *Kramer*.[43] The lower the burden is, however, the closer to a rational basis test the standard gets, making it easier for a challenged law to survive.

The *Anderson-Burdick* test originally arose in challenges to state laws that restricted which candidates' names would appear on the ballot. In *Anderson v. Celebrezze* (1983), the Court struck down an Ohio law that imposed an excessively early filing deadline for independent candidates who wanted to appear on the ballot.[44] In *Burdick v. Takushi* (1992), on the other hand, the Court accepted Hawaii's stated interest in narrowing its overall field of candidates and upheld the state's prohibition on write-in candidates.[45]

The *Dunn* line of cases (where the Court applied strict scrutiny) were challenges to laws that placed a direct burden on the right to vote. On the other hand, *Anderson-Burdick's* namesake cases dealt with laws about candidates that did not stop anyone from exercising their vote entirely (though the Court acknowledged that laws affecting the rights of candidates inevitably have some kind of effect on individuals' right to vote[46]). Because the original applications of the *Anderson-Burdick* framework concerned only indirect burdens on the right to vote—and because the *Anderson-Burdick* cases never specifically denounced *Dunn* [47]—there was initially some uncertainty as to whether the test would also apply to laws that burdened the right to vote directly.

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[40] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).
[41] Burdick v. Takushi, 504 U.S. 428, 432 (1992).
[42] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
[43] *Burdick*, 504 U.S. at 434.
[44] *Anderson*, 460 U.S. at 780.
[45] *Burdick*, 504 U.S. at 428.
[46] *Anderson*, 460 U.S. at 786; *Burdick*, 504 U.S. at 433.
[47] *Id.*

The Court subsequently affirmed that the test did apply to laws that directly burdened the right to vote when it used the *Anderson-Burdick* framework to uphold an Indiana voter ID law in *Crawford v. Marion County Election Bd.* (2008). In a splintered decision, the Court's plurality used the framework to uphold an Indiana law requiring voters to present a photo ID before being allowed to vote.[48] Vast disagreement among the Justices about how to apply the *Anderson-Burdick* test's sliding-scale framework in *Crawford* illustrated how challenging it can be to navigate the relatively ambiguous sliding-scale aspect of the *Anderson-Burdick* test.[49] Yet given that the Court just applied this framework to *Brnovich*—where some voters had their votes thrown out entirely—the Court's A*nderson-Burdick* framework is evidently here to stay.

II. Out-of-Precinct, Out of Play

A. Precinct-Based Voting

Precincts are small, contiguous geographic districts used to help administer elections in the United States.[50] As the Court reiterated in *Brnovich*, precinct-based voting has an extensive history in the United States.[51] Very early in American history, voting took place only at the county seat, requiring voters to travel up to twenty-five miles to cast their ballot.[52] In 1778, New York adopted a form of precinct-based voting to reduce the potentially treacherous journey traveling that far required in the eighteenth century, operating multiple, spread out polling places instead of just one.[53] Today, precincts are used almost exclusively for administrative purposes.[54] Since precincts are the smallest units in election administration, election results are typically reported on a precinct-by-precinct basis,[55] and many jurisdictions use precincts to assign voters to their polling place.

B. HAVA's "Jurisdiction" Problem

[48] *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008).

[49] *Crawford*, 553 U.S. at 181.

[50] *U.S. Election Assistance Comm'n, Local Election Officials' Guide to Redistricting* 19 (2021).

[51] *Brnovich*, 141 S. Ct. at 2339.

[52] Robert J. Dinkin, *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776-1789*, (1982).

[53] *Id.* at 97.

[54] In fact, Kansas—which defines precincts based on geography, not population—has some precincts where nobody lives. Kan. Stat. Ann. § 25-26a02(a).

[55] National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, Table 17 (2020).

Because many of HAVA's requirements—including provisional voting—went into effect in 2004,[56] that year's general election raised several legal questions about the statute's ambiguities. An issue that sparked a great deal of controversy (and in turn, a great deal of litigation[57]) was whether HAVA required states to provide and/or count provisional ballots to voters who show up at the wrong precinct.[58] In order to be issued a provisional ballot, HAVA simply requires voters to affirm that they are "a registered voter in the jurisdiction in which the[y] desire to vote."[59] The question of whether to issue provisional ballots to OOP voters arose because Congress did not define "jurisdiction" in the statute.[60] Different interpretations of the term had different legal implications for OOP voters. If "jurisdiction" refers to a county or municipality, then an individual would be allowed to vote provisionally at any precinct in their locality. On the other hand, if "jurisdiction" is interpreted to mean "precinct," OOP voters would not be entitled to provisional ballots.

When this question came up in the Northern District of Ohio,[61] the court looked to earlier federal election law—the National Voter Registration Act of 1993[62] —for an answer.[63] The court determined that Congress's use of the term "jurisdiction" in HAVA meant the same thing as "registrar's jurisdiction" as defined in the National Voter Registration Act: the unit of government that maintains voters' registrations.[64] Voter registration is not maintained at the precinct level.[65] Thus, the court concluded that OOP voting was permissible, and that HAVA requires states to count OOP votes for federal offices.[66]

However, the U.S. Court of Appeals for the Sixth Circuit disagreed.[67] The court determined that Congress deliberately left "jurisdiction" undefined in the statute,[68] leaving the interpretation up to each state.[69] Yet the Sixth Circuit also held that anyone who insists

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[56] 52 U.S.C. § 21082(d).

[57] Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206 (2005). See footnote 195 for examples.

[58] *Id.* at 1228-29.

[59] 52 U.S.C. § 21082(a).

[60] *Id.* at § 21082.

[61] *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975.

[62] 52 U.S.C. §§ 20501–20511.

[63] *Sandusky*, 339 F. Supp. 2d at 990.

[64] 52 U.S.C. § 20507(j).

[65] *Sandus*ky, 339 F. Supp. 2d at 990.

[66] *Id.*

[67] *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 579 (6th Cir. 2004).

[68] *Id.* at 575-76.

[69] 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.").

and is willing to attest that they are a qualified voter in the "jurisdiction" must be *given* a provisional ballot under HAVA.[70] Confusingly, HAVA also left the procedures for determining which provisional ballots to count up to the states, saying only that a provisional ballot should be counted *according to state law* if the individual is eligible to vote *under state law*.[71] In other words, HAVA requires that OOP voters be *given* provisional ballots (if they insist on them), but does not require those same votes to be counted.

C. Arizona's Out-of-Precinct Policy

Arizona's election laws operate as if "jurisdiction" means "precinct."[72] Thus, Arizona completely disregards provisional votes—including votes for federal and statewide offices—if they are cast in the wrong precinct.[73] This is true even when the voter is otherwise wholly entitled to vote in every race listed on the OOP ballot.[74] The practical result of this pairing is that an OOP Arizona voter is legally entitled to cast a provisional ballot that Arizona law prohibits from being counted.[75]

There are real administrative benefits of precinct-based voting (these are discussed further in Part III). But in practice, the OOP policy can be detrimental to voters in a few ways. As Justice Elena Kagan's dissent in *Brnovich* notes, 10,979 Arizona voters had their entire ballots discarded in the 2012 election simply because they were cast in the wrong precinct, representing about a third of the votes in the entire nation that were discarded for that reason.[76] Furthermore, when Arizona's largest county changed 40% of polling places before the 2012 election, voters affected by those changes cast OOP votes at a substantially higher rate than other voters.[77]

D. A Further Consideration: Reprecincting

Because precincts are the smallest electoral units, they ordinarily cannot transcend the boundaries of larger political districts.[78] In other words, a single precinct should not be

[70] *Sandusky*, 387 F.3d at 565.
[71] 52 U.S.C. § 21082(a)(4).
[72] Ariz. Rev. Stat. § 16-122.
[73] *Id.*
[74] *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 832 (D. Ariz. 2018).
[75] Ariz. Rev. Stat. § 16-584(B).
[76] *Brnovich*, 141 S. Ct. at 2367.
[77] *Id.* at 2368.
[78] U.S. Election Assistance Comm'n, *supra* note 50 at 14.

split between two different legislative districts—that frustrates the administrative benefit of precincts, and in some cases is unlawful.[79]

But legislators do not always conform their legislative maps to existing precinct lines. If the lines of a new legislative district cut through a single precinct, that precinct's boundaries must be redrawn to prevent a split.[80] Reprecincting can also occur independent of legislative redistricting and can be easy to justify in administrative, nonpartisan, or technical terms.[81]

This concomitant process of "reprecincting" does not receive the kind of attention that legislative redistricting does,[82] but it matters: polling places are assigned according to precinct lines, so when precincts change, a voter's polling place can change, too. Reprecincting might mean that the polling location a voter has gone to for a decade is no longer the one they are eligible to vote at. In a state like Arizona that refuses to count OOP votes from even a neighboring precinct, local officials could be at liberty to create a great deal of confusion by tinkering with precinct lines.

III. A Constitutional Analysis of Arizona's OOP Policy

The Supreme Court has made clear that it will apply the *Anderson-Burdick* test to challenges to a state's election law. Thus, to determine whether Arizona's OOP policy constitutes a permissible burden on the right to vote, its burden must be weighed against the state's asserted interests in its policy. Thus, it is first necessary to thoroughly consider both sides.

A. Considering the Voters' Burden

The *Brnovich* opinion is limited in its discussion of the burden on the right to vote imposed by Arizona's OOP policy. *Brnovich's* Section II challenge requires proof that a law renders the political process not "equally open" to minorities.[83] In discounting that possibility, the *Brnovich* Court reasons that the "mere inconvenience" of identifying and traveling to the correct precinct does exceed the "usual burdens of voting."[84] Because this

[79] *Id.*
[80] *Id.*
[81] Brian Amos, Daniel A. Smith, & Casey St. Claire, *Reprecincting and Voting Behavior,* 39 Pol. Behavior, 153 (2016).
[82] *Id.*
[83] 52 U. S. C. §10301(b).
[84] *Brnovich*, 141 S. Ct. at 2338.

"usual burden" applied to everyone, the Court did not consider it a violation of Section II.[85] *Brnovich* does not take the discussion much further than that. But an inquiry into its precedent of choice—the origin of the "usual burdens of voting" phrase—offers additional insight.

The phrase came from the Court's decision in *Crawford v. Marion County Election Bd.*, the case that upheld Indiana's requirement that voters present a photo ID.[86] Although Indiana offered photo IDs for free,[87] the Court recognized that there is a "somewhat heavier burden" on certain voters, such as those who lack the documents required to obtain the ID or have a religious objection to being photographed.[88] The law was upheld, at least in part, because Indiana provides a remedy for that "somewhat heavier burden": voters who do not have a photo ID can cast a provisional ballot, sign an affidavit at the circuit court clerk's office (up to 10 days after the provisional ballot is cast), and have that provisional ballot count.[89] Both the controlling and concurring opinions in *Crawford* included this fact to justify deeming the law's requirements a "usual burden of voting," including the opinion that *Brnovich* approvingly cites.[90]

But Arizona's OOP policy offers no such remedy. A voter who goes to the wrong precinct, signs an affidavit, and votes provisionally is—by law—wholly disenfranchised under any circumstance. There is no apparent way for someone who has voted in the wrong precinct to correct their error and redeem their eligibility to vote in that election. Yet Arizona offers other voters the chance to "cure" their ballots after election day. For example, if a voter's signature on an absentee ballot does not match their signature on file, or if they do not have sufficient identification on election day and must vote provisionally, Arizona law gives voters five business days after the election to verify their identity and have their vote count.[91] Yet, that is not the case for OOP voters. Given the OOP policy's automatic disenfranchisement and the complete absence of a remedy, caution should be exercised before dismissively analogizing it to the "usual burdens of voting" examined in *Crawford*.

At the same time, the burden presented by Arizona's OOP policy differs from the burden examined in *Dunn v. Blumstein*. The issue presented in that case was a durational

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[85] *Id. at* 2327.
[86] *Crawford*, 553 U.S. at 181.
[87] Ind. Code Ann. §9–24–16–10(b).
[88] *Crawford*, 553 U.S. at 181.
[89] Ind. Code Ann. § 3-11.7-5-2.5(2).
[90] *Crawford*, 553 U.S. at 181.
[91] Ariz. Rev. Stat. § 16-550(a).

residence requirement in Tennessee that excluded new residents—voters who had lived in Tennessee for less than a year—from the franchise entirely. For their entire first year in the state, new residents of Tennessee had no ability to vote at all. In contrast, Arizonans who are potentially affected by the OOP policy at least have other, non-precinct-based ways to vote available to them, such as absentee and early voting. Given these alternative ways for Arizonans to vote—options that were not present for the voters in *Dunn*—the burden on the right to vote imposed by Arizona's OOP policy does not appear to reach the same magnitude as the burden imposed in *Dunn*.

B. Considering the State's Interests

The existing *Brnovich* opinion does offer consideration of the strength of Arizona's interests in its OOP policy, deeming them an "important factor" in its Section II analysis.[92] Thus, the Court's opinion provides valuable insight into the kinds of interests Arizona would put forth if asked to defend the same policy in the context of an *Anderson-Burdick* analysis.

First, the Court notes that Arizona has a substantial interest in the prevention of fraud.[93] The apparent theory is that electoral fraudsters could have a field day going from precinct to precinct unchecked and casting multiple ballots if OOP voting was allowed. Indeed, when voter registration was maintained locally and difficult to cross-check between precincts, strict in-precinct voting was certainly necessary to prevent fraud.

That might still be a concern today if states didn't have a computerized, statewide voter database that can be accessed by local election officials. But they already do—it is mandated by HAVA.[94] When election officials evaluate whether a provisional ballot should count (as HAVA also already requires them to do[95]), screening out duplicative votes seems administratively feasible. In fact, Arizona already does it.[96] Under Arizona law, voters who are sent an absentee ballot can still vote in-person on election day without surrendering their absentee ballot—they just have to do so provisionally.[97] As long as the absentee ballot was not also sent back, that provisional ballot will count.[98] Beyond the presently abysmal potential for the kind of "precinct hopping" fraud previously described (which, of course, is

[92] *Brnovich*, 141 S. Ct. at 2327.
[93] *Id.* at 2340.
[94] 52 U.S.C. § 21083(a).
[95] *Id.* at § 21082(a)(3).
[96] Ariz. Rev. Stat. § 16-584(d).
[97] *Id.* at § 16-579(B).
[98] *Id.* at § 16-584(d).

also already a class 5 felony in Arizona[99]), it is hard to come up with another way that the OOP policy currently advances Arizona's interest in preventing fraud.

It is also difficult to discern what administrative purpose the OOP policy still serves. As mentioned, strict in-precinct voting was necessary when voter registration was administered at the precinct level. But due to HAVA's existing mandates, Arizona already has a statewide database,[100] is required to keep it accurate and updated,[101] and must make it accessible to any local election official in the state.[102] Furthermore, HAVA already requires Arizona to issue provisional ballots to OOP voters[103] and "promptly verify" the eligibility of those voters after their ballots are cast,[104] so administering them entails no new costs. Arizona already screens out duplicate votes[105] and criminalizes the act of casting duplicate votes.[106]

The *Brnovich* Court contends that partially counting OOP votes would "complicate the process of tabulation and could lead to disputes and delay."[107] It is certainly true that partial counting—discerning which races the OOP voter would otherwise be eligible to vote in—takes a few extra minutes.[108] But there is a clear administrative solution: Arizona could simply count OOP votes in the races that all precincts vote in: President, Senate, statewide offices (such as Governor), and statewide ballot initiatives. Once administrators confirm the eligibility of the provisional voter (which they are already required to do[109]) no additional research would be needed to verify their eligibility to vote in these races. Many states already partially count OOP votes in this manner.[110]

There is also concern that not strictly enforcing the "vote-in-your-precinct rule" will undermine voters' adherence to Arizona's precinct-based system.[111] The *Brnovich* majority warns that permitting OOP voting might encourage people to "vote in whichever place is

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[99] *Id.* at § 16-1016(3).
[100] 52 U.S.C. § 21083(a)(1)(A).
[101] *Id.* at § 21083(a)(2).
[102] *Id.* at § 21083(a)(1)(A)(v).
[103] *Sandusky*, 387 F.3d at 565.
[104] 52 U.S.C. § 21082(a)(3).
[105] Ariz. Rev. Stat. § 16-584(d).
[106] *Id.* at § 16-1016(3).
[107] *Brnovich*, 141 S. Ct. at 2346.
[108] *Hobbs*, 948 F.3d at 1031.
[109] 52 U.S.C. § 21082(a)(3).
[110] *Brnovich*, 141 S. Ct. at 2369.
[111] *Id.*

most convenient even if they know that it is not their assigned polling place."[112] But the partial-counting method just proposed, which would count OOP votes in races that all precincts vote in, does not eliminate deterrents against OOP voting. Under a partial-counting policy, OOP voters would still have their votes discarded in local and congressional elections.[113] Giving these remaining deterrents, whatever elusive benefit Arizona derives from compliance with its "vote-in-your-precinct rule" would probably be unaffected under a partial-counting scenario. Yet Arizona still refuses to count those votes.

C. Application

Under the *Anderson-Burdick* framework, strict scrutiny is applied only in instances where the burden on the right to vote is severe.[114] Considering the fact that Arizonans have other, non-precinct-based ways to vote, Arizona's OOP policy does not appear to constitute such a case, and strict scrutiny is unlikely to apply.

Any burden below "severe" is subject to a corresponding level of scrutiny. As demonstrated in the splintered array of *Crawford* opinions, this relatively vague sliding scale has proven tricky for even Supreme Court justices to navigate. The *Anderson* Court laid out this general rule: a "[s]tate's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions" on the right to vote.[115] It is known from *Brnovich* that the Court considers Arizona's OOP policy to be nondiscriminatory; but considering the existing mandates of HAVA, it is unclear which of Arizona's "important regulatory interests" its OOP policy still serves.

While the *Anderson-Burdick* test's sliding scale framework may be confusing, the result of its application here is not: there does not appear to be any important state interest left that could justify the burden on the right to vote imposed by Arizona's OOP policy.

Conclusion

Even though the use of absentee and early voting is increasing, millions of Americans still cast their ballots in-person on election day.[116] While it may not violate Section II of the Voting Rights Act because it is not based on race, Arizona's policy of wholly

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[112] *Id.* at 2346.
[113] *Id.* at 2369.
[114] *Burdick*, 504 U.S. at 434.
[115] *Anderson*, 460 U.S. at 788.
[116] U.S. Election Assistance Comm'n, *Election Administration and Voting Survey 2020 Comprehensive Report* 8 (2020).

disqualifying OOP provisional ballots may be unconstitutional under the *Anderson-Burdick* test because it creates an unreasonable burden on the right of all Arizonans to vote, regardless of their race. Furthermore, the OOP policy is a glaring example of exactly the kind of arbitrary disenfranchisement that HAVA was enacted to prevent. Any subsequent judicial or legislative evaluation of the OOP policy's constitutionality must consider HAVA's existing mandates and their effect on any previously feasible state interests put forth by Arizona. Voters deserve to rest assured that their ballot will not be disposed of on an arbitrary and unjustified basis—and no American should lose their right to vote by a precinct.

Applying the *Milkovich* Standard: A Consideration of the Strengths, Weaknesses, and Proposals for Improvement in *Milkovich v. Lorain Journal Co.* (1990)

Kaleigh Werner

Introduction: First Amendment Freedom of Speech

When it comes to statements of opinion, whether published by a large news organization, a small journal, or an individual, the First Amendment right to freedom of speech and the press is not absolute. A right that was once thought to protect all published opinions, has faced multiple examinations as Supreme Court decisions have reflected the ongoing tension between protecting the freedom of speech and open debate by U.S. citizens and protecting an individual's reputation. The right to express statements of opinion on matters of public interest comes, by its very nature, with the ability to harm a name or reputation if the statement is interpreted as containing a factual assertion. If the statement is interpreted as a factual assertion while also causing harm, a defamation case might be brought. In the landmark case of *Milkovich v. Lorain Journal Co.*, a standard or test was announced that is now used to determine the validity of a libel lawsuit.[1] The *Milkovich* Court established a set of guidelines to help in determining whether a statement contains a factual assertion or is a pure opinion on matters of public interest. Ultimately, while the *Milkovich* standard addresses questions left by earlier precedents as well as the requirement needed to resolve the particulars of the case, a more specific standard would serve to eliminate subjective reasoning in determining whether a statement is an opinion or includes facts.

This article will review cases prior to *Milkovich* that established restrictions on published opinions. An evaluation of the Court's decision in *Milkovich* will be based on prior case law, as well as on an examination of the majority opinion to assess its reasoning and

[1] Milkovich v. Lorain Journal Co., 497 U.S. 89 (1990).

potential impact. The article will introduce and discuss the criticisms of *Milkovich* made by both the Court and academic journals, as well as the dissenting opinions of Justices in the case. Finally, the article proposes a new standard that may better address issues of subjectivity and bias that have been left unresolved.

I. Background of Defamation Law and the *Milkovich* Case

A. The Tort of Defamation

Defamation is defined by common law as "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person."[2] The harm caused by defamation includes both written and oral defamation, referred to as libel and slander respectively.[3] Defamation is established as an unprotected and limited category of speech which means it can be regulated as containing constitutionally prohibited content. This was established in the 1990 case of *R.A.V. vs. St. Paul*.[4]

In 1990, a teenager, R.A.V, from St. Paul, Minnesota allegedly burned a cross inside the fence of private property owned by a Black family. He was charged with the violation of the city's "Bias-Motivated Crime Ordinance" which established that the placement of a "symbol, object, appellation, characterization, or graffiti--including a burning cross--which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender" on public or private property, as a misdemeanor.[5] R.A.V. successfully argued in Minnesota's trial court that the ordinance was too broad and was content-based, and, as such, violated the First Amendment. The Supreme Court of Minnesota reversed and remanded, deciding that the ordinance was not overly broad and could be narrowly interpreted as only referring to actions or fighting words that would inflict harm and immediately incite violence. The Court concluded that "[s]o interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public

[2] 28 U.S.C. §4101 (1).

[3] *See* Melinda J. Branscomb, Liability and Damages in Libel and Slander Law, 47 TENN. L. REV. 814 (1980), https://digitalcommons.law.seattleu.edu/faculty/699.

[4] R.A.V. v. St. Paul, 505 U.S. 377 (1992).

[5] *Id.*

safety and order…and therefore is not prohibited by the first amendment."[6] However, the United States Supreme Court reversed and remanded, pointing to the fact that only the use of fighting words or conduct related to any other category of hate crime was permitted by the ordinance. Therefore, due to this content-based discrimination, the Court concluded that the ordinance was not serving the ostensible purpose of protecting the community from harm and violence and was in violation of First Amendment freedom of speech principles.[7] *R.A.V.* addressed the definitions of limited speech in its analysis of the constitutionality of the city's ordinance. The Court held that categories of limited speech included obscenity, defamation, and fighting words, but the government could not regulate these types of speech based on their own biases or hostility if they contained a permitted message.[8] This was the first-time defamation had been referred to by the Court as a form of limited speech.

The most common ways limited speech is restricted is through civil lawsuits, criminal prosecutions, and prior restraint.[9] The highest level of scrutiny, strict scrutiny, is used in cases involving government discrimination against a plaintiff. This level of judicial review is applied to laws that "infringe upon a fundamental right" or that have discriminated against a class of individuals.[10] Strict scrutiny is used in matters involving content-based speech, which includes defamation.

In the *Restatement of Torts (2d) § 559 Defamatory Communication Defined,* defamation law is defined: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[11] The elements of a defamation claim are different in each state. However, there are federal requirements surrounding the burden of proof required in cases concerning public figures and cases involving private individuals. The actual malice standard of proof was adopted in *New York Times Co v. Sullivan* (1964).[12]

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[6] *In the Matter of the WELFARE of R.A.V.,* 464 N.W.2d 507, 511 (Minn.1991).

[7] R.A.V. vs. St. Paul*,* 505 U.S. 377 (1992).

[8] *Id.*

[9] *See* Kathleen Ann Ruane, Cong. Research Serv., Freedom of Speech and Press: Exceptions to the First Amendment (2014).

[10] *Strict Scrutiny*, Legal Information Institute, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Jan. 10, 2022).

[11] RESTATEMENT (SECOND) OF TORTS § 559.

[12] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

In 1960, the *New York Times* published an advertisement about a civil rights demonstration in which students from Montgomery, Alabama participated. Four officials, including L.B. Sullivan, were mentioned in an advertisement that included information about police action against both the students and Dr. Martin Luther King Jr. Sullivan argued that as the city commissioner who had the responsibility of overseeing police activity, his reputation was harmed by the references. These references included a statement "that truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus" after the demonstration on the state capitol steps, and that Dr. King had been arrested seven times.[13] However, the police had only been deployed near the campus, they did not "ring" it, and they were not responding to the demonstration.[14] While it was never determined by the trial court that these statements in the advertisement specifically attacked Sullivan, the Court did determine that harm was done to his reputation based on the assumption that he must have been responsible for the police conduct because of his position.[15] A former employee of Sullivan testified that if he had believed the statements that were made, he would not want to be associated with Sullivan and would not want him as commissioner.[16] For Sullivan to receive punitive damages, Alabama law required him to have made a written demand for a retraction and for the defendant to have denied or ignored this request.[17] Sullivan made this request and never received a response, therefore allowing him to receive punitive damages.[18] The Supreme Court of Alabama affirmed the trial judge's rulings that the statements were referring to Sullivan and that malice could be inferred, specifically in reference to the Times' "irresponsibility" in publishing statements that could be proved inaccurate due to earlier articles printed by them.[19] However, the United States Supreme Court granted certiorari, reversed, and remanded. The Court held that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is with knowledge of its falsity or with reckless disregard of whether it was true or false.[20]

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[13] *Sullivan*, 376 U.S. at 258 (1964).
[14] *Id.* at 258.
[15] *Id.* at 260.
[16] *Id.*
[17] *See* ALA. CODE, Tit. 7, § 914 (2018).
[18] *Sullivan*, 376 U.S. at 261 (1964).
[19] *Id.* at 263.
[20] *Id.* at 265.

B. Standard of Proof: Public v. Private Individuals

The question of whether a private individual should be required to meet the same burden of proof was considered by the Court in *Rosenbloom v. Metromedia, Inc.* (1971).[21]

In *Rosenbloom,* the Court addressed whether the standard established in *Sullivan* for public figures and officials should apply to a private individual. The petitioner brought a libel action against WIP broadcast news in Philadelphia for airing a series of broadcasts about a lawsuit against him for distributing nudist magazines.[22] The petitioner, George Rosenbloom, was arrested in 1963 when the Special Investigations Squad for the Philadelphia Police Department was investigating a newsstand operator for allegedly selling obscene magazines. Rosenbloom was delivering nudist magazines to the newsstand when he was immediately arrested.[23] Following his arrest, the department was able to obtain a search warrant of both Rosenbloom's home and another property that he used as a warehouse for the magazines at issue.[24] Captain Ferguson of the Philadelphia Police Department, spoke to several media outlets, including WIP, after Rosenbloom was arrested for the second time following the search and seizure of both properties.[25] On October 4, 1963, WIP put out two broadcasts with specific details about Rosenbloom's arrests that they had received from Captain Ferguson.[26] The information was broadcast five more times over the following twelve hours, all of which stated that the police had taken "allegedly" and "reportedly" obscene materials.[27] On October 21st and 25th, WIP broadcasted several more reports of Rosenbloom's lawsuit that he had filed against multiple city officials and news outlets in which Rosenbloom claimed that the magazines and books that the police had seized were not actually obscene and demanded an end to all future police interference with his business.[28] WIP went on to make the statements: "The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business," as well as further details about Rosenbloom's lawsuit and the district judge's

[21] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
[22] *Id.* at 33.
[23] *Id.* at 32.
[24] *Id.*
[25] *Id.* at 33.
[26] *Id.*
[27] *Id.* at 34.
[28] *Id.*

pending decision.[29] Rosenbloom tried to contact WIP and inquire about these broadcasts, but the conversation was cut short when a newscaster hung up the phone.[30] The broadcasts were made prior to Rosenbloom being acquitted of the obscenity charges against him. The District Court ruled that the standard set in *Sullivan* did not apply in Rosenbloom's case, as he was not a public figure. However, the Court of Appeals for the Third Circuit reversed, and the U.S. Supreme Court, on certiorari, affirmed this ruling.[31] The Court found that because the issue involved the city's campaign to enforce obscenity laws through police action, the matter was one of public interest. Supreme Court Justice Brennan delivered the majority opinion, stating "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[32] Ultimately, the Court held that the First Amendment right to an open and robust debate in the public sphere was required to be protected by applying the same standard set in *Sullivan* to private individuals when the subject involved a matter of public interest.[33]

Following *Rosenbloom*, the Court took up the case of *Gertz v. Robert Welch, Inc.* (1974), in which it ultimately decided that private individuals could not be required to prove actual malice to prevail in a defamation case.[34] In 1968, Nuccio, a Chicago police officer, shot and killed a young boy. Nuccio was prosecuted and convicted of second-degree murder.[35] Elmer Gertz, the petitioner, was retained by the family of the boy who was shot to represent them against Nuccio in a civil litigation.[36] A year later, in March of 1969, the managing editor of the American Opinion, a magazine, published an article entitled, "FRAME-UP: Richard Nuccio and The War On Police."[37] In the piece, Gertz was referred to as a "Leninist" and a "Communist-fronter."[38] Additionally, the article stated that "Gertz had been an officer of the National Lawyers Guild, described as a Communist organization and that "he had been an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our

[29] *Id.* at 35.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 43.
[33] *Id.*
[34] *See* Gertz v. Robert Welch Inc., 418 U.S. 323 (1974).
[35] *Id.*
[36] *Id.*
[37] *Id.* at 325.
[38] *Id.* at 326.

government."[39] Each reference was inaccurate, Gertz was a member of the National Lawyers Guild, but fifteen years before the article was published it is unclear whether he left on his own.[40] The Court addressed the precedent set in *Rosenbloom*; wherein private individuals were required to adhere to the same burden of proof as public officials when the subject was a matter of public interest.[41] Justice Lewis F. Powell Jr., writing for the majority, concluded that private individuals should not be required to meet the same burden of proof as public figures, reasoning that the First Amendment does not provide the same protection against defamation suits by private individuals as it does for suits by public officials. Justice Powell acknowledged the trade-off of protecting some falsehoods to protect the rights guaranteed under the First Amendment.[42] He also, however, recognized that states and the courts had a legitimate interest in the protection of a private individual's dignity and personality.[43]

Moreover, Justice Powell noted the fact that public officials have more access to effective lines of communication in situations in which they need to clear their names or counter any false statements about them.[44] This also means that public officials and individuals that run for office are automatically subjected to a higher degree of public scrutiny and involvement in public affairs.[45] While public figures and officials voluntarily expose themselves to the possibility of risking their reputation due to false statements against them by the media, private individuals are entitled to greater protection.[46] The *Gertz* decision ultimately excluded private individuals from the actual malice standard of proof.

Twelve years later, in *Philadelphia Newspapers v. Hepps* (1986), the Court addressed the level and burden of proof distribution required for private individuals to receive damages from claims of defamation.[47] In 1985, the Philadelphia Inquirer, owned by Philadelphia Newspapers Inc., published an article about Maurice Hepps, a principal stockholder in a chain of beverage stores.[48] The article claimed that this stockholder had ties to organized

[39] *E.g., Gertz*, 418 U.S. 323 (1974).
[40] *Id.*
[41] *See* Rosenbloom v. Metromedia, 403 U.S. 29 (1971).
[42] *Gertz*, 418 U.S. at 341 (1974).
[43] *Id.*
[44] *Id.* at 344.
[45] *Id.*
[46] *Id.*
[47] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).
[48] *Id.* at 769.

crime and was able to affect government decisions using those connections.[49] Hepps filed a defamation suit against the newspaper and the authors of the article.[50] The trial court ruled that a Pennsylvania statute violated the First Amendment because it required the defendants in a defamation lawsuit to carry the burden of proving that the allegedly defamatory statements were true rather than requiring the plaintiff to carry the burden of proof of falsity.[51] Hepps appealed and the Pennsylvania Supreme Court reversed the ruling holding that the statute did not violate the First Amendment and the defendant could be subjected to this burden of proof.[52] The U.S. Supreme Court then reversed and remanded and[53] found that under the First Amendment, a plaintiff that is seeking to recover damages is the party that is required to prove the falsity of the statements.[54]

C. The Milkovich Case and Standard

The case of *Milkovich v. Lorain Journal Co.*, 497 U.S. 89 (1991) introduced a standard that built upon the decisions of both *Gertz* and *Sullivan*. In 1974, Michael Milkovich, the petitioner, was the Ohio Maple Heights High School wrestling coach.[55] During this year, his wrestling team was involved in an altercation with an opposing team from Mentor High School, leading to multiple injuries.[56] Following the incident, the Ohio High School Athletic Association (OHSAA) organized a hearing where both Milkovich and the Superintendent of Schools for Maple Heights, H. Don Scott, testified. The OHSAA placed the Maple Heights wrestling team on probation and made them ineligible for the state tournament in 1975.[57]

Not long after, many parents and teammates sued the OHSAA in the Ohio Court of Common Pleas on the grounds that the OHSAA did not follow due process of law during the hearing.[58] Once again, Milkovich and Scott testified. Following the proceedings, the probation and ineligibility were overturned because the court found that due process had been denied.[59] The next day, Lorain Journal Company published an article in their newspaper, News-Herald, by J. Theodore Diadiun where he claimed that the petitioner had

[49] *Id.*
[50] *Id.*
[51] *Id.* at 767.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
[56] *Id.* at 4.
[57] *Id.*
[58] *Id.*
[59] *Id.*

lied during his testimony.[60] Within the specific nine passages and the title, "Maple beat the law with the 'big lie,'" there was a clear indication that the petitioner had committed perjury.[61] According to Ohio's definition, defamation per se "reflects upon the character of [the plaintiff] by bringing him into ridicule, hatred, or contempt, or affects him injuriously in his trade or profession."[62] Milkovich made the claim that the statements in question constituted defamation per se.[63]

Milkovich filed a defamation action against Lorain Journal Co. in the Court of Common Pleas of Lake County, Ohio.[64] The trial court submitted a summary judgment finding that Milkovich's claims did not meet the actual malice standard.[65] Milkovich appealed and the Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded on the grounds that the actual malice standard of *Sullivan* could be proven.[66] The Ohio Supreme Court did not accept the appeal and the U.S. Supreme Court denied certiorari.[67] On remand, the trial court entered a summary judgment in favor of Lorain Journal Co. based on the determination that what was stated in the column was opinion protected against any libel action by the First Amendment, and Milkovich was a public figure who did not sufficiently prove actual malice.[68] The Ohio Supreme Court in a 7-2 decision reversed the ruling as the majority found that Milkovich was not a public figure or official. Therefore, Milkovich did not have to meet the more difficult burden of the proof standard set by *Sullivan.* Additionally, the court found that the assertions made were factual and therefore were not constitutionally protected opinions because Diadiun had made the claim that Milkovich, among other things, had committed perjury.[69]

Two years after the Ohio Supreme Court decided the Milkovich case, they reversed their decision that Diadiun's statements contained factual assertions and concluded that the column contained an opinion that was constitutionally protected.[70] This decision arose out

[60] *Id.*
[61] *Id.*
[62] Becker v. Toulmin, 138 N.E.2d 391, 395 (Ohio 1956).
[63] Milkovich v. Lorain Journal Co., 497 U.S. 1, 7 (1990).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 8.
[68] *Id.*
[69] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
[70] *Id.*

of their consideration of Superintendent Scott's appeal of his own defamation lawsuit.[71] The Ohio Supreme Court cited the case of *Ollman v. Evans* (1984)[72] and the four factors it established that would govern whether statements are fact or opinion.[73] In *Ollman*, two nationally published columnists, Rowland Evans, and Robert Novak wrote a column in 1978 entitled "The Marxist Professor's Intentions," about Bertell Ollman, a political science professor at New York University. Ollman had been nominated for the position of head of the University of Maryland's Department of Government and Politics.[74] He filed defamation claims against Evans and Novak after they used their column to advance the narrative of him using the position solely to indoctrinate students and convert them to socialism, as well as to promote Marxism.[75] The two columnists used quotes from Ollman's article, "On Teaching Marxism and Building the Movement," as well as his "principal work," *Alienation: Marx's Conception of Man in Capitalist Society* as support for their claims.[76] However, Ollman "rejected the allegation that he used the classroom to indoctrinate students and set the column's quotations from his writings in what he viewed as their proper context."[77] To find a plaintiff, the District of Columbia's Defamation Elements requires as follows:

> The defendant made a false or defamatory statement concerning the plaintiff; The defendant published the statement without privilege to a third party; The defendant's fault in publishing the statement amounted to at least negligence; And either the statement was actionable as a matter of law irrespective of special harm or its publication caused the plaintiff special harm.[78]

The District Court of New York ruled in favor of Evans and Novak due to its conclusion that the article was expressing the opinions of both columnists and their own interpretations of Ollman's previous work and was not a false statement.[79] Accordingly, the District Court found Evans' and Novak's column to be protected by the First Amendment. A four-factor test was developed which included: (1) an analysis of the meaning and usage of the statement, (2) a determination of whether the statement is verifiable or unverifiable, (3) a consideration of the general context in which it was used and (4) a consideration of the larger social context

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[71] *Id.*
[72] Ollman v. Evans, 750 F.2d 970 (1984).
[73] Milkovich v. Lorain Journal Co., 497 U.S. 1, 9 (1990).
[74] *Ollman*, 750 F.2d at 971 (1984).
[75] *Id.* at 973.
[76] *Id.*
[77] *Id.*
[78] D.C. CODE § 31–2231.05. Defamation.
[79] *Id.*

in which it was used. The court noted that *Gertz* had failed to address how to distinguish between fact and opinion yet set a requirement for doing so for a defamation claim to be affirmed. For the court to reach the decision that the defendants' column was purely opinion, it established the four-prong test that would eventually be used and adopted in part in the *Milkovich* standard.

The case was then appealed to the U.S. Supreme Court which granted certiorari.[80] The Court reversed the Ohio Supreme Court decision and ruled in favor of Milkovich, concluding that the statement in question could be factually proven and did not amount to a statement of opinion.[81] The primary consideration in this case by the Court was the idea of an absolute opinion privilege that had been inferred from the First Amendment.[82] The *Milkovich* standard was ultimately created to address the issue of opinions implying factual assertions thereby causing damage or harm to an individual. The Milkovich Court set forth factors that should be considered in deciding whether a reasonable reader would understand a statement to imply the assertion of or undisclosed knowledge of defamatory facts. The standard includes three factors to determine whether a defamation suit should be dismissed. The first is whether the statements at issue are provable as false, meaning whether the language of the statement can be proven true or false by a core of objective evidence.[83] The second is whether the statements at issue are assumed to be stating facts, as opposed to using hyperbolic language, or rhetoric, which means that imaginative expression is still protected as well.[84] Third, statements must be considered in the general tenor in which they are given.[85] Using this standard, the Court concluded that the protections of the First Amendment had to be balanced with protecting an individual's reputation as well and in doing so, the Court reversed the decision by the Ohio Supreme Court and ruled in favor of the plaintiff Milkovich.[86]

II. An Analysis of The *Milkovich* Case

A. The Balance of Protections

[80] *Id.* at 10.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 18.
[84] *Milkovich,* 497 U.S. at 20.
[85] *Id.* at 21.
[86] *Id.* at 22-23.

The decision delivered by Justice Rehnquist in *Milkovich* determined that there would be no more absolute protection of opinion.[87] The Court's majority in this case upheld past precedents that ensured the continuation of both protection of the First Amendment and the protection of an individual's reputation. The Court relied on its decision in *Hepps* holding that when a statement is made regarding a matter of public interest, and the media is the defendant, the statement must be proved false before liability is assessed.[88] This means that libel actions will not be pursued against a defendant before a determination is made on whether the statements in question have factual assertion. The Court elected to uphold this in their decision in *Milkovich* because in placing the burden of proof on the plaintiff in a defamation case, rather than on a media defendant, there would be little apprehension or fear of liability charges when publishing speech that pertains to matters of public interest.[89] In other words, the freedom to engage in an open and robust debate, and the freedom of the press, is not lost when this precedent is upheld. In so doing, the Court acknowledged the fundamental importance of First Amendment protections.

In developing the *Milkovich* standard, the Court moved to recognize the type of wording and speech that is used in statements that are commonly subjected to a defamation action.[90] Justice Rehnquist explained that about statements that are obviously using rhetorical hyperbole, there cannot be a valid libel case.[91] When the Ohio Supreme Court applied the *Ollman* test to Superintendent Scott's case, it made the determination that Diadiun's statements were not verifiable.[92] This meant that the statements did not have factual assertions and were opinions. In *Ollman*, the consideration of whether a statement is verifiable or unverifiable is described as whether the statement can be proved true or false.[93] If a statement is unverifiable, it cannot be viewed as having any factual assertion.[94] Unverifiable statements are opinions because they do not convey real facts. If such statements are analyzed by a jury in a defamation suit, this would violate the First Amendment because the jury would be attempting to assess the information as true or false

[87] *Id.* at 18.
[88] *Hepps*, 475 U.S. 767 (1986).
[89] *Milkovich,* 497 U.S. at 16 (1990).
[90] *Id.*
[91] *Id.* at 17.
[92] *Id.* at 9.
[93] *Ollman*, 750 F.2d 981 (1984).
[94] *Id.*

based on subjective reasoning.[95] Tort law prohibits this kind of jury examination.[96] In *Milkovich*, the Court found that Diadiun's statements had factual assertion, i.e., they were verifiable, on the grounds that they could be proven true or false based on the two sworn testimonies he gave.[97] The testimonies were therefore the objective evidence that would prove falsity. The Court's determination that Diadiun's statements were verifiable is an example of how the Court attempted to ensure that the First Amendment was being upheld. There was no violation of the rights guaranteed in the First Amendment because the Court was not examining a statement of opinion. Justice Rehnquist directly addressed an issue that had been left open by the decision in *Gertz*, that is, whether there is an absolute protection of opinion under the First Amendment, and answered it in the negative.

Ultimately, this misconception stemmed from an acknowledgment by the Court in *Gertz* that there is no such thing as false ideas.[98] Additionally, the *Gertz* Court explained that opinions were only able to be corrected or proved to be correct by other competing ideas.[99] In *Milkovich,* Justice Rehnquist explained that this message was not meant to place absolute protection over published opinion statements because that would ignore that opinions can imply objective fact.[100] The message was instead meant to convey the concept of a "marketplace of ideas" which was introduced by Justice Holmes. The Court decided that to protect an individual's reputation, there could be no absolute protection of opinion.[101] For example, if a statement claims that an individual is a thief, this implies that the author of the statement has evidence of this being true. Even if the statement was framed differently and the author said instead, "I think this person is a thief," this still implies that the author has reasoning to believe this to be true. Both statements carry the same potential of harm to that individual's reputation because both carry the assumption of the factual claim. Statements that are obviously expressed as opinions by using the wording, "I think" or "In my opinion" would no longer be allowed an additional level of constitutional protection by the Court.[102] *Milkovich* is not inconsistent with the decision in *Ollman*. The *Ollman* test requires a

[95] *Id.*
[96] *Id.*
[97] *Milkovich,* 497 U.S. at 16 (1990).
[98] *Id.* at 18.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 19.
[102] *Id.*

determination of whether a statement is provable. Under *Ollman* a statement may appear to be unverifiable but if the statement can be determined through objective evidence to be true or false, it can be the subject of a defamation case. Conversely, if the opinion cannot be proved through objective evidence, it is protected.

The precedent in *Hepps* also supports the Court's decision to remove this absolute protection as well. Justice Rehnquist posited that the precedent established in *Hepps* would continue to protect opinion that does not imply factual assertion.[103] *Hepps* requires the plaintiff in defamation cases to prove that the allegedly defamatory statements are false before they can receive damages.[104] This means that any statement concerning public interest is protected if it cannot be proved false. Therefore, the First Amendment continues to be upheld, and "rhetoric hyperbole" along with "imaginative expression" continues to be protected.[105]

In terms of the statements at issue in *Milkovich*, the Court agreed with the plaintiff that the language Diadiun used did not fall under the protective umbrella of "rhetoric hyperbole" or "imaginative expression."[106] Diadiun did not use figurative language when stating that Milkovich had committed perjury.[107] The language used implied that the statement was a fact and Milkovich had lied under oath. Additionally, the statement was referring to an objective event. This was determined to imply factual assertion as the Court was able to use court records as objective evidence to determine whether the statement was false.[108]

B. Criticisms of Milkovich

According to Justices Brennan and Marshall, who both wrote the dissenting opinions in *Milkovich*, the balance between the protection of the First Amendment and an individual's reputation was not upheld by the majority. Justice Brennan wrote:

> Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny, in this case, does not "hol[d] the balance true," *ante,* at 23, between protection of individual reputation and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court

[103] *Id.* at 20.
[104] *Hepps*, 475 U.S. 767 (1986).
[105] *Milkovich,* 497 U.S. at 20 (1990).
[106] *Id.* at 21.
[107] *Id.*
[108] *Id.*at 22.

> reconfirmed today, they should be found not libel as a matter of constitutional law.[109]

Relying on the last two factors of the *Ollman* test, Justice Brennan did not believe that the statements at issue in *Milkovich* constituted defamation. Justice Brennan outlines in his dissent how opinions and beliefs "are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts."[110] Based on the language used and the fact that Diadiun was not at the OHSAA trials, Justice Brennan argues that there is no way any reasonable person reading the article would believe that Lorain Journal Co. was implying as a fact that Milkovich had committed perjury. Brennan argued that it was clear to any reader that Diadiun was angry with the court's reversal of the OHSAA decision and was trying to explain what he thought might have caused the decision.[111] Justice Brennan made his dissent on the grounds that the majority opinion did not sufficiently protect the First Amendment when it determined these statements to be libel.[112] While Justice Brennan did not agree with the resulting decision by the Court, he did agree with the application of the test proposed in *Ollman*.[113] His dissent is not based on a disagreement on the law or the standard but on the application of the law to the specific facts of the case. Justice Brennan points to the fact that the last two factors of the *Ollman* test do not support a conclusion that Diadiun's statements contain factual assertion, but rather are opinions.[114] Since Diadiun's language clearly conveyed that he was not present during any of the trials where Milkovich testified, Justice Brennan explained that there was reason for readers to believe the statements were speculation.[115] Brennan is referring to the tone that the article exemplifies and what readers would generally believe about the information from this tone. In other words, Justice Brennan relies on the part of the *Ollman* test that requires an examination of the general context in which the statements are given. Justice Brennan is characterizing Diadiun's tone as upset and angry, both of which involve emotional rhetoric.[116] Justice Brennan then references the last prong of the *Ollman*

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[109] *Id.* at 33.
[110] *Id.* at 25.
[111] *Id.* at 30.
[112] *Id.*
[113] *Id.* 24-25.
[114] *Id.* at 32.
[115] *Id.*
[116] *Id.*

test, the social context, and writes that the statement obviously constituted opinion because the column was published as an editorial with a title that began with "TD Says."[117] Justice Brennan's dissent demonstrates that the *Ollman* factors, to the extent that they were adopted by *Milkovich,* do not operate as an exact science - Justice Brennan points to and heavily weighs two factors that support an opinion conclusion yet according to the second part of the *Ollman* test, the statements can still be actionable if they can be proved, and court records existed that could prove them to be false.

Additionally, an article published by the University of Miami School of Law Institutional Repository, *"A Matter of Opinion: Milkovich Four Years Later"* (2014) by Kathryn D. Sowle, points to another criticism that arose from the decision. Sowle argues that in removing the absolute opinion privilege, there would no longer be some protection of falsehood which may deter the media from publishing pieces relating to matters of public interest.[118] The article cites *Gertz* because the Court, in that case, made it clear it wanted to protect some falsehood to protect some speech that matters. However, when the Court ruled in *Milkovich,* the majority opinion made no reference to ensuring that this precedent of protection of falsehood would be upheld. In fact, the opposite was inferred when Justice Rehnquist noted that even obvious claims of opinion were still able to carry false factual assertion and therefore could be actionable.[119] The Court in *Milkovich* does not mention that this principle of *Gertz* is necessary for the First Amendment to be protected. Additionally, the criticism offered by Sowle is further muted by the continuing language in *Gertz,* "Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation."[120] Taken in its entirety, *Milkovich* protects the First Amendment right to maintaining an open and robust debate in the public sphere by confirming the proposition that an opinion would be protected so long as it did not have the ability to be proven false based on objective evidence or facts – thereby attempting a balance between competing interests. Importantly, hyperbole and "imaginative expression" is still protected by *Milkovich* without the fear of civil liability.

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[117] *Id.*

[118] *See K*athryn D. Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL Rts. J. 467 (1994).

[119] *Milkovich,* 497 U.S. at 19 (1990).

[120] *Gertz,* 418 U.S. 323 (1974).

It is clear there is a contradiction when Diadiun's statements are assessed under the first two factors of the *Ollman* test and are assumed to have factual assertions and when they are assessed under the last two factors and assumed to be an opinion. The majority does not reference the last two considerations when reaching its conclusion about the nature of the statements at issue. The questions left unanswered by the *Ollman* test and unaddressed in the *Milkovich* decision justify Justice Brennan's concerns voiced in his dissent. The value and weight to be given to each prong of the *Ollman* test is unknown and it is unclear whether a statement will be considered to have factual assertion based on all four prongs or just some of the prongs. There is no clear answer as to what it means for the statement if the general and social context of the statement appears to render its opinion. *Ollman* does indicate that if the statement is verifiable, then it can be actionable in a defamation case. However, there is no definition or guidance of how a statement is to be assessed as verifiable or unverifiable and the majority opinion in *Milkovich* gives little insight into how this can be decided in future cases. While the decision that Diaidun's statements could be proved to be true or false made sense in this case due to objective evidence in court records, this level of proof may not be available for other statements that are the subject of defamation lawsuits in the future. This uncertainty highlights the need for a more specific standard to be developed to decipher whether a statement can be subjected to a defamation action.

III. A New Standard Moving Forward

A. Verifiable vs. Unverifiable

While the determination in *Milkovich* is valid in terms of the requirements of the case, there were holes left in past precedents that the standard did not effectively address for courts to successfully navigate defamation cases in the future. There is still confusion remaining when it comes to deciding what makes a statement verifiable and actionable. Although defamation elements vary by state, the concerns Justice Brennan raised in his dissenting opinion allude to the need for a more specific standard to be given as guidance to the states. Justice Brennan wrote:

> The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention in order "to confine the perimeters of [an] unprotected

> category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."[121]

Justice Brennan acknowledges this in his dissent, while also disagreeing with the majority's conclusion that Diadiun's statement contained factual assertion. Justice Brennan points to the fact that Diadiun acknowledged in his article that he was only speculating, at some points using words like "it seemed" to describe the testimony the petitioner had given. The defendant openly guessed and expressed his assumptions about the trial since he wasn't there. Although Justice Brennan did not agree with the decision to find the statements subject to liability, he leaves open the question of whether the statements should have been examined to be true or false? In other words, because the majority did not take into consideration the social context in which the article was written, there needs to be clarification on the factors that can determine whether a statement is provable or verifiable.

The majority opinion in *Ollman* confirmed the difficulty in deciding what is verifiable and unverifiable.[122] In fact, the court acknowledged this and only offered the advice of trusting the experiences of the trial judges. Yet *Milkovich* proved that this cannot be relied upon in defamation cases that result in a statement that can be fairly characterized as both fact and opinion. In her article, "*Constitutional Law—Changes in Defamation Law for the Eighth Circuit*" (1991), Lisa M. Montpetit argues that, because the *Milkovich* standard narrowed the definition of what can be considered as opinion due to the emphasis it put on permitting actions against all verifiable statements, a new standard is required that considers the general context when deciding if the statement is verifiable.[123] In other words, to effectively consider a statement to have factual assertion, the factors that would be considered in assessing whether a statement is verifiable must include the general context in which the statement is given and not just the general tenor that the Court used in this case. This would eliminate any possibility of acting against opinions even if they are assumed to be factual from the wording of the statement. Instead of having a third and separate prong that considers the general tenor, the general context needs to be considered prior to deciding if the statement can be proved true or false. The new proposal would move the second prong of the standard, considering the wording within the statement to the first prong and

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[121] *Milkovich.,* 497 U.S. at 25 (1990).

[122] *Ollman*, 750 F.2d 982 (1984).

[123] *See* Lisa M Montpetit, *Constitutional Law—Changes in Defamation Law for the Eighth Circuit*, 17 WM. MITCHELL L. R. 784–827 (1991).

general context to the second prong. Ultimately, Montpetit argues that the *Milkovich* decision and its standard impose a "subjective threshold of opinion" which ultimately leaves the consideration of verifiability up to the interpretation of judges.[124] This is not a valid approach and consideration of general context is necessary to ensure objective fact is pursued.

Furthermore, Sowle proposes in, "*A Matter of Opinion: Milkovich Four Years Later*," the next clarification that is needed to address the questions left by *Hepps*.[125] Sowle explains that pursuant to the precedent of *Hepps*, a plaintiff must be able to prove the statements at issue are false, however, it remains unclear if a plaintiff would be able to collect damages if they proved a statement of opinion to be false.[126] Sowle gives an example of a statement regarding a business practice being "discreditable," and whether the plaintiff could receive damages if they were able to convince the judge or jury that this was not true. In other words, even if a statement is put forth as pure opinion, it could still technically be actionable if the plaintiff is able to prove it to be false. Therefore, before making the decision as to whether a statement is verifiable, the definitions of fact and opinion need to be further distinguished in a new standard so that past precedents do not continue to foster confusion. Sowle argues that there has been no concrete definition of either fact or opinion outlined by the Court which makes statements susceptible to the same subjective interpretation mentioned by Montpetit.[127]

Although there are few secondary sources that propose a new *Milkovich* standard, the present case of *New York Times v. Sarah Palin* supports the necessity for a new standard to be created in defamation law. In 2017, Sarah Palin filed a defamation claim against the Times due to an editorial that they had published that linked her political action committees map of electoral districts to the 2011 shooting of Representative Gabby Giffords.[128] The Times went on to correct their statements and put forth a retraction, as well as an apology.[129] The case was dismissed but has now been reconsidered by a federal appeals court.[130] The issue at hand

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[124] *See id.*

[125] *See* Sowle, supra note 118.

[126] *Id.*

[127] *Id.*

[128] *See* Oliver Darcy, *Why the Sarah Palin v. New York Times trial will be an 'excruciating experience' for the paper,* CNN (2022), https://www.cnn.com/2022/01/22/media/sarah-palin-new-york-times-trial/index.html.

[129] *Id.*

[130] *Id.*

hearkens back to the precedent set forth in *Sullivan* that requires public officials to prove actual malice in defamation claims. This precedent is now being reviewed and reconsidered. The reconsideration of this precedent and its possible overruling would ultimately affect the *Milkovich* standard and its affirmation of the First Amendment right to engage in a free, open, and robust debate on matters of public interest in the public sphere. Issues regarding the lines that media organizations cross when it comes to their right to freedom of the press are now being raised and debated. This is cause for a new standard to be created that will prevent the publishing of libelous statements being disguised as harsh opinions or judgments by the newspapers or conversely the chilling of publication of protected opinions that cause discomfort to individuals.

Conclusion

A. Overview

The validity of a libel lawsuit brought in state court was examined in *Milkovich*. The decision made in the case was to no longer allow the First Amendment to grant absolute protection to statements claimed to be opinions and established a standard that was adopted from the four-factor test used in *Ollman*. The factors provide guidelines as to whether statements have factual assertion and are thus actionable under defamation law. The *Milkovich* standard included three prongs. Under the first prong, statements are protected if they are not provable as false, meaning the language of the statement cannot be proved true or false by a core of objective evidence.[131] Under the second prong, statements will be protected if they are not assumed to be stating facts, are using hyperbolic language, or rhetoric, which means that imaginative expression remains protected as well.[132] Under the third prong, statements must be considered in the general tenor in which they are given.[133] Ultimately, the standard established a precedent that put an emphasis on acting against any statement that is likely to assume factual assertion even if it appears on its face to be an opinion.

B. Determinations

The *Milkovich* standard as used in that case is valid and sound based on the facts of the case and the availability of objective evidence to prove that the statement at issue

[131] *Milkovich,* 497 U.S. at 18.
[132] *Id.* at 20.
[133] *Id.* at 21.

contained false factual assertion. Additionally, the Court wrote in its majority opinion that the Court was balancing the protection of the First Amendment, by emphasizing the importance of allowing defamation claims only for statements that were verifiable or could be proven true or false, rather than for pure opinion statements. The protection of the First Amendment was balanced with the protection of an individual's reputation as well. The Court upheld the precedent in *Hepps* that would further protect opinion, yet the Court was not specific on what constituted pure statements of opinion. Moving forward, the discretion surrounding the determination of fact through objective evidence is not resolved by the standard established in *Milkovich* case. The uncertainty regarding what renders a statement verifiable continues to be left to speculation and would be better addressed through the consideration of the general context in which a statement is given. The Court should, at its next opportunity, announce a hard and fast standard that will better specify how context and objective evidence should be weighed and considered in determining fact versus opinion in a defamation case.

The Impact of the Right to Privacy on *Jacobson* and the Continued Debate Over Vaccine Mandates

N. Brooks Van Osterlitz

"The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State."

—Justice John Marshall Harlan, writing for the Court in Jacobson v. Massachusetts (1905)[1]

Introduction: Vaccine Mandates and the Later Evolution of Privacy Rights

Since 2019, the United States has been under siege from COVID-19, an infectious and deadly disease. It is the first pandemic in the United States of this scale—in terms of deaths—since the 1918 influenza pandemic.[2] As a result, there are now multiple vaccines available in the United States.[3] Some are fully approved by the FDA, and some are approved under an emergency use authorization, but all of them lessen an individual's risk of severe illness and illness overall.[4]

Many Americans are hesitant to get vaccinated. According to a September 2021 Gallup poll, 20 percent of the respondents claimed they had no plans to be vaccinated.[5] In addition, some individuals are expressing religious concerns about the vaccination effort and asking for religious exemptions from a vaccine mandate, confusing employers and

[1] *Jacobson v. Massachusetts,* 197 U.S. 11, 11 (1905).

[2] Center for Disease Control, *1918 Pandemic (H1N1 virus)*, Center for Disease Control (Mar. 20, 2019), https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html.

[3] Center for Disease Control, *Different COVID-19 Vaccines*, Center for Disease Control (Dec. 29, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html.

[4] U.S. Food and Drug Administration, *Vaccines Licensed for Use in the United States*, U.S. Food and Drug Administration (Jan. 31, 2022), https://www.fda.gov/vaccines-blood-biologics/vaccines/vaccines-licensed-use-united-states.

[5] Lydia Saad, *More in U.S. Vaccinated After Delta Surge, FDA Decision*, Gallup (Sept. 29, 2021), https://news.gallup.com/poll/355073/vaccinated-delta-surge-fda-decision.aspx.

employees alike.[6] As a result, President Biden issued a vaccine mandate, first to federal government workers and later to companies in the private sector with more than 100 employees, through an OSHA Emergency Temporary Standard (ETS).[7] This effort was made to increase vaccination numbers beyond the 75.1 percent of Americans who have received at least one dose of the vaccine per the Center for Disease Control.[8] These ETSs allow the Administration to impose rules under ETS posture when there is a "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."[9]

The constitutionality of using an OSHA ETS to enforce a vaccine mandate is likely to face substantial challenges because the Court issued a stay against the ETS' implementation in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration.*[10] Instead, the Court addressed whether OSHA had the authority to issue such an ETS.[11] The ruling is unlikely to revise the substantive aspects of the vaccine mandate jurisprudence. This article will look at the substantive case law on the constitutionality of vaccination mandates throughout American history and consider how modern interpretations of the Fourteenth Amendment may alter the Court's calculus.

In *Jacobson v. Massachusetts* (1905), the U.S. Supreme Court held that an individual's Fourteenth Amendment right to liberty is not absolute. The state may infringe upon individual liberty with its police power to achieve a common good.[12] The *Jacobson* holding would apply to current vaccine mandates because COVID is both infectious and potentially fatal.[13] However, the Court's rulings post-*Jacobson* allows individuals greater latitude when making medical decisions for themselves. This complicates *Jacobson* because when there is no risk to the community-at-large, there may not be a need to apply *Jacobson* at all, and the

[6] Laurel Wamsley, *Judging 'sincerely held' religious belief is tricky for employers mandating vaccines*, NPR (Oct. 4, 2021), https://www.npr.org/2021/10/04/1042577608/religious-exemptions-against-the-covid-19-vaccine-are-complicated-to-get.

[7] Katie Rogers and Sheryl Gay Stolberg, *Biden Mandates Vaccines for Workers, Saying, 'Our Patience Is Wearing Thin'*, New York Times (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/us/politics/biden-mandates-vaccines.html.

[8] Center for Disease Control, *COVID-19 Vaccinations in the United States*, Center for Disease Control (Jan. 4, 2021), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total.

[9] *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021).

[10] *National Federation of Independent Business v. Department of Labor,* Occupational Safety and Health Administration, 595 U. S. ____ (2022).

[11] *Id.* at 2.

[12] *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

[13] New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, New York Times (Jan. 4, 2021), https://www.nytimes.com/interactive/2021/us/covid-cases.html.

court can apply privacy law principles from numerous other federal cases, such as *Griswold*, *Roe*, and *Cruzan*, all of which will be discussed and explained in the below.

Since *Jacobson* established the judicial authority to review vaccination mandates, it is crucial to consider subsequent case law when reviewing a vaccine mandate for its "arbitrariness and unreasonableness," phrases written directly into the Court's holding in 1905.[14] For that reason, courts should apply an updated balancing test—with strict scrutiny as the level of review—in each vaccine mandate case because that is more in line with the text of the Constitution and the spirit of *Jacobson*. These cases involve the possible deprivation of the individual's Constitutional rights to protect the rights of the community at large. Any lower level of scrutiny would be incongruent with the finding of *Roe* and other cases. Further, courts must carefully consider an illness's infectiousness and lethality in any review.

First, this article will lay out background information on the *Jacobson* case and seek to understand its importance as one of the only cases regarding the constitutionality of compulsory vaccination. After this, there will be a discussion regarding the evolution of privacy rights since 1905, covering the seminal cases that expanded this doctrine. The second section will explore the need to update *Jacobson* and the judicial understanding of this case. Since plaintiffs can only bring cases regarding compulsory vaccination when they have standing, the current pandemic offers an excellent opportunity to expand this area of jurisprudence. The last section focuses on three cases, two of which are hypothetical vaccine mandates, to explore how testing the variables of infectiousness and lethality—in the absence of the one or the other—would lead to different conclusions when applying *Jacobson*, especially given the updated interpretation of privacy law and substantive due process.

Part I: Case Law and Background

A. Jacobson and Compulsory Vaccination Laws

Case law concerning vaccine mandates originated with a 1905 case, *Jacobson v. Massachusetts*.[15] Massachusetts passed a law that granted its municipalities the right to compel vaccination for smallpox.[16] The municipality of Cambridge passed such a law, and Pastor

[14] Jacobson v. Massachusetts, 197 U.S. 11, 27-28 (1905).

[15] *Id.*

[16] Halgren v. City of Naperville, 2021 U.S. Dist. LEXIS 241777, 30-31 (United States District Court for the Northern District of Illinois, Eastern Division, December 19, 2021, Filed).

Henning Jacobson refused to comply.[17] Jacobson was found guilty of violating this law and was sentenced to jail until he paid the five-dollar fine or received the free vaccination.[18] The Supreme Judicial Court of Massachusetts upheld the verdict, and in 1904, the United States Supreme Court heard an oral argument.[19]

Jacobson asked the Court to determine whether the city of Cambridge could require a smallpox vaccination and fine people over the age of twenty-one if they were noncompliant.[20] By a 7-2 majority, the Supreme Court held that Cambridge could require a vaccine and fine those who did not comply. The majority opinion—written by Justice Harlan—stated that:

> The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.[21]

The ruling laid the foundation for an implicit balancing test when Harlan found that a society with order and laws would not be obtainable if "real," unchecked, unlimited liberty were to exist as a God-given right to each individual.[22] Harlan further recognizes the tension between the liberty given to each person and how unchecked liberty would lead to a circumstance where no person has liberty when he quotes the Court's holding in *Crowley v. Christensen* (1890):

> The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.[23]

The *Jacobson* opinion suggests that it is within the state's power to pass a compulsory vaccination law, such as Cambridge did, and leaves it to the legislature—not the courts—to determine when compulsory vaccination is the correct mode to protect the community from the stated harm.[24] This ruling remains the central tenet of vaccine or pandemic-response

[17] *Id.*

[18] Jacobson v. Massachusetts, 197 U.S. 11, 21 (1905).

[19] Commonwealth v. Pear, 183 Mass. 242, 66 N.E. 719 (1903); Jacobson v. Massachusetts, 197 U.S. 11, 21 (1905)

[20] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[21] *Id.* at 26.

[22] *Id.*

[23] *Id.* at 26-27.

[24] *Id.* at 11-12.

jurisprudence in the United States. In many recent cases challenging pandemic response efforts by states, courts have relied upon Harlan's opinion in *Jacobson* to articulate the broad police power of states.[25]

To understand how modern courts apply *Jacobson*, it may be helpful to read Justice Gorsuch's concurrence in *Roman Catholic Diocese v. Cuomo*.[26] However, first, it may be helpful to explain the various levels of review the Court has at its disposal: rational basis review, intermediate scrutiny, and strict scrutiny.[27] In times where no "fundamental rights" are alleged to be violated, courts will apply the most deferential review to the state, rational basis review, meaning that the state need only prove that the disputed law serves a "legitimate state interest, and there must be a rational connection between the statute's/ordinance's means and goals."[28] Then, taking it a step up, if there are certain protected classifications that claim discrimination under a given law—such as the classification for which the standard was created, gender—courts apply intermediate scrutiny. [29] This standard requires that the measure must further a pressing government interest, and the method by which it does so must be "substantially related" to that interest.[30] The final standard, the least deferential to the state, is strict scrutiny, which is applied in cases alleging that the state abridged the "fundamental right" of an appellant.[31] In these cases, the state must prove a compelling state interest and that the proposed measure only addressed that interest.[32]

In *Roman Catholic Diocese v. Cuomo*, Justice Gorsuch correctly argues that the *Jacobson* decision predates modern standards of review.[33] Yet, he incorrectly states that the Court applied something close to rational basis review in *Jacobson*, as the Court would do today if the plaintiffs brought general Fourteenth Amendment claims rather than those Fourteenth

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[25] Halgren v. City of Naperville, 2021 U.S. Dist. LEXIS 241777 (United States District Court for the Northern District of Illinois, Eastern Division, December 19, 2021, Filed); Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (Supreme Court of the United States November 25, 2020, Decided).

[26] *Roman Catholic Diocese v. Cuomo,* 141 S. Ct. 63 (Supreme Court of the United States November 25, 2020, Decided).

[27] Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause* (2021), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm.

[28] *Rational Basis Test*, WEX Legal Information Institute, https://www.law.cornell.edu/wex/rational_basis_test (last visited Jan. 21, 2022)

[29] *Intermediate Scrutiny*, WEX Legal Information Institute, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Jan. 21, 2022).

[30] *Id.*

[31] Roe v. Wade, 410 U.S. 113, 155 (1973).

[32] *Id.*

[33] Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 70 (Supreme Court of the United States November 25, 2020, Decided).

Amendment rights that expressly granted higher protection in past cases.[34] In *Jacobson*, Justice Harlan recognized the right to liberty; yet he found that this right was not *absolute* and was outweighed by a vaccine mandate for a virus such as smallpox. This type of review is far more like a balancing test, despite Justice Harlan's holding that the balance favored the community rather than the individual.

The Court's standards for review created two classes of Constitutionally-protected rights: fundamental—which are protected more than others—and not fundamental, which are given lesser degrees of protection.[35] This is exemplified by *Roman Catholic Diocese v. Cuomo*. While this may seem like a small matter of rhetoric, this is an anti-textualist argument: there is no explicit hierarchy of rights in the Constitution. The United States Bill of Rights did not rank Amendments in order of importance. Similar points have been raised by dissenting voices on the Court, like Justices Marshall and William Douglas in *San Antonio Indep. Sch. Dist. v. Rodriguez* (1972) and in legal literature.[36] For that reason, the anti-textualist view that some rights in the Constitution take precedence over others and deserve greater protection should be disregarded. Instead, judges should return to the methodology used by Justice Harlan in the *Jacobson* opinion, which resembles the modern balancing test, without subjecting Constitutional rights to undue and unnecessary hierarchization.

The *Jacobson* opinion limits the police power where the state goes beyond what is reasonable to protect the community against a prevalent disease. Such unreasonable, excessive, or perhaps arbitrarily applied laws or regulations would "authorize or compel the courts to interfere for the protection of such persons."[37] The language in the *Jacobson* decision allows for the judicial review of vaccine mandates while also authorizing courts to ensure that the public health goals sought by imposing a vaccine mandate are achieved with measures no more than commensurate with the deprivation of liberty imposed by the measure.

A. Evolutions of Privacy Rights in Jurisprudence Since 1905

Although it is not as regularly cited as other opinions, the movement toward privacy rights based on the Fourteenth Amendment started with—in the view of Justice Souter[38]

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[34] *Id.*

[35] Leora Harpaz, *Due Process* Review (2018), wneclaw.com/conlaw/dueprocessreview2012.html.

[36] *San* Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 103-6 (1972); Gerald Gunther, *Constitutional Law*. 604-5 (11th ed. 1985).

[37] Jacobson v. Massachusetts, 197 U.S. 11, 27-28 (1905).

[38] Washington v. Glucksberg*,* 521 U.S. 702, 756 (1997).

and others—Justice John Marshall Harlan's dissenting opinion in *Poe v. Ullman* (1961).[39] This case concerned a group of Connecticut residents who filed suit that the state's long-standing but rarely enforced law prohibiting people from using contraceptive devices violated their Fourteenth Amendment rights.[40] A plurality of the Court dismissed the case for lack of standing because it found that none of the appellants' had been harmed under Connecticut law.[41]

In his dissenting opinion, Justice John Marshall Harlan disagreed. He found that the law violated the appellants' constitutional rights and said that: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out…."[42] This opinion sparked criticism from textualists because John Marshall Harlan's philosophy advocated for Justices to look beyond the Constitution's text and attempt to use the text as a general guide containing principles that could apply in different situations.[43] This philosophy stands in contrast with avid-textualist Justice Hugo Black, who argued that Justices should view the text of the Constitution no differently than they view a simple tax statute: only looking at the words present and unchanging unless amended.[44]

John Marshall Harlan's philosophy allowed for the expansion of protections by the Warren Court, as they applied the Due Process Clause's principles to novel situations to grant certain activities constitutional protection, as shown in the cases below. Yet, even here, John Marshall Harlan did not find these rights he found within the Due Process Clause to be absolute, saying, "[i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[45]

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[39] Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 83 (2006).
[40] Poe v. Ullman, 367 U.S. 497, 497 (1961).
[41] *Id.*
[42] *Id.* at 543.
[43] H. Jefferson Powell, *John Marshall Harlan and Constitutional Adjudication: An Anniversary Rehearing*, 9 Belmont L. Rev. 62, 75,81 (2021).
[44] *Id.* at 80-1.
[45] Poe v. Ullman, 367 U.S. 497, 543 (1961).

The central framework from *Poe* formed the basis for the decision in *Griswold v. Connecticut* (1965).[46] In the majority opinion, Justice Douglas found that a Connecticut law banning married couples from obtaining contraception was unconstitutional because it violated a right to privacy implied by the Constitution.[47] The majority observed that cases such as *Poe* "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," creating implied zones of protected privacy.[48] Yet, Justice Harlan did not fully embrace the majority's penumbra rationale. Instead, he wrote a concurring opinion that emphasized the text of the Constitution, saying that the Court should have employed his methodology from the *Poe* case and found that the Connecticut statute infringed on the petitioner's Due Process Clause rights within the Fourteenth Amendment.[49]

Textualists, like Justice Black, would likely point out that both arguments are distortions of the Constitution's text. The whole concept of penumbras is not written into the text. It seems to be a significant alteration to its meaning without going through and amending it—similarly in the case of the substantive Due Process Clause argument. Without amending the document through regular order, its interpretation should not change. Per Justice Harlan's philosophy in *Griswold* and *Poe*, the creation of substantive due process—and the subsequent expansion of the rights it supposedly protects—runs afoul of Justice Black's tax law criterion.

The rationale from *Griswold* underlies the majority opinion in *Roe v. Wade* (1973) as applied to the right to abortion. While it would be a stretch to apply *Griswold's* right to privacy in terms of contraceptives into a general privacy right for medical procedures, *Roe's* decision makes it much easier to see a right to privacy vis-à-vis vaccinations. In *Roe*, a Texas woman filed suit against the state for what she claimed to be unconstitutional state laws prohibiting her from procuring an abortion within the jurisdiction.[50] Justice Harry Blackmun, writing for the majority, discussed at length where privacy rights come from in the Constitution before asserting that:

[46] Griswold v. Connecticut, 381 U.S. 479 (1965).
[47] *Id.* at 484.
[48] *Id.*
[49] *Id.* at 500.
[50] Roe v. Wade, 410 U.S. 113, 117-119 (1973).

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.[51]

While the scope of this right was later limited by *Planned Parenthood v. Casey* (1992)[52], the Court's holdings in these matters have firmly established an individual's right to pursue an irreversible medical procedure under their right to privacy.[53] While the decision to get vaccinated may be irreversible, the decision not to do so is something that can change. However, in claiming that someone has a right to terminate a pregnancy, they are not saying that an individual must get an abortion. The current interpretation of the law allows individuals the latitude—or liberty—to make that personal decision for themselves. These circumstances are not wholly analogous to the vaccine debate because abortions do not threaten the community's right to liberty. Nevertheless, *Roe* speaks to the strength of the privacy rights in isolation from a community threat and gives life to an argument that these rights, developed after *Jacobson*, may change the weights of the items at play in that *Jacobson* balancing test.

The last two cases that may alter the *Jacobson* balancing test are *Washington v. Harper* (1990)[54] and *Cruzan v. Missouri Department of Health* (1990)[55]. The former concerned a mentally ill prisoner convicted of a violent felony who was required to take antipsychotic drugs against his will while in a special wing of a Washington state prison. This individual claimed that the forced administration of attitude-altering drugs violated the Due Process Clause of the Fourteenth Amendment. In this case, the Supreme Court found that the "Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest."[56] In undertaking this balancing test, however, the Court acknowledged, "[t]he forcible injection of medication into a nonconsenting [sic] person's

[51] *Id.* at 153.
[52] Planned Parenthood v. Casey, 505 U.S. 833 (1991).
[53] Roe v. Wade, 410 U.S. 113, 153 (1973).
[54] Washington v. Harper, 494 U.S. 210 (1990).
[55] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261(1990).
[56] *Id.* at 211.

body represents a substantial interference with that person's liberty."[57] The Court applied the Turner Test, a rational basis review for incarcerated individuals, that stated any regulation that abridged an inmate's constitutional rights must be "reasonably related to legitimate penological interests."[58] So, while the Court's statement concerning non-consensual medical injections may not be enough to overturn the rule in this instance due to the low standard applied, it may justify supporting a free person's claim that their rights were infringed. These quotes from the majority opinion are a worthwhile—albeit not perfect—comparison to the *Jacobson* decision. While the *Harper* decision also favored community rights, the weight given to the individual's rights in that balancing test seems to have increased since 1905.

In the latter case, the petitioner, Cruzan, was the victim of a car accident, leaving her in a vegetative state.[59] Her parents, as co-petitioners, sought to remove her from the artificial nutrition and hydration that was prolonging her life; the hospital employees refused this directive unless a court ordered them to do so.[60] The Court ruled that the Due Process Clause of the Fourteenth Amendment supported the right of a competent individual to refuse life-saving medical treatment as part of their right to privacy.[61] This finding reaffirms that—absent a compelling state interest, such as the threat to the community posed by a pathogen—there is, in fact, a Fourteenth Amendment right to refuse medical treatment. The need for the community to provide a compelling rationale to infringe on this Constitutional right is a vital counterweight on the other side of the scale if one chooses to use the model presented by *Jacobson* with the updated interpretation of Constitutional privacy rights. This argument would be congruent with a concurring opinion by Justice O'Connor in *Cruzan*, who said that "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause."[62] Her view that physical freedom and self-determination fall under liberty conventions and, therefore, under the Due Process Clause shows that it is possible to consider vaccination mandates—which are mandates to undergo irreversible medical procedures—in this same light. Nevertheless,

[57] Washington v. Harper, 494 U.S. 210, 229 (1990).
[58] *Id.* at 223.
[59] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 261 (1990).
[60] *Id.* at 261-262.
[61] *Id.* at 279.
[62] *Id.* at 287.

this factor would be placed in a balancing test with the community's rights—an aspect that is not present in *Cruzan*.

Part II: Updating *Jacobson*-ian Thinking About Vaccine Mandates

While the Court's holding in *Jacobson* represents a vital tool for judicial review of future vaccine mandates, current circumstances have established the need for further development in this area of jurisprudence. This is especially true because plaintiffs are not allowed to bring cases based on hypotheticals, and the fact pattern needed to rule in this area is rare in American history. The COVID-19 pandemic has produced litigation that could develop the case law and legal literature for the next public health crisis. The advancements in public health since 1905, in tandem with the lack of a cohesive understanding of how post-1905 jurisprudence should apply to a *Jacobson* balancing test, place this issue among those that need addressing. While the Court can only address the matter officially during a pandemic, Americans should consider these cases' long-term impact long after the virus dissipates.

Others also believe that *Jacobson* needs updating per the Court's move in the 20th century to protect individual privacy rights. Writing a century after *Jacobson*, Parmet et al. drew attention to Justice Harlan's comment in the *Jacobson* majority opinion that state public health laws cannot be constitutional if used in an "arbitrary and oppressive" manner.[63] They point out that this comment from the majority opinion in *Jacobson* shows that courts still see this line as a limit on state police power and have used it in recent rulings.[64] Justice Harlan's comment is partially in conflict with his earlier assertion in the same opinion that "[i]t is for the legislature, and not for the courts, to determine…whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health."[65] While there is broad agreement that debates over the merits of pursuing a policy as a *normative* matter are better suited to legislative venues, it would be wrong to think this is entirely normative and disconnected from this legal debate. Justice Harlan's "arbitrary and oppressive" criteria in the *Jacobson* holding should give pause to those that believe the Court should completely defer to the state's decision-making on this matter. It is well within the

[63] Wendy E. Parmet et al., *Individual Rights versus the Public's Health — 100 Years after Jacobson v. Massachusetts*, 352 New England Journal of Medicine 652, 653 (2005).

[64] *Id.*

[65] Jacobson v. Massachusetts, 197 U.S. 11, 11-12 (1905).

Court's jurisdiction to review vaccine mandate legislation to ensure the legislature is not arbitrary or oppressive. Additionally, there is an evident need to revisit the anti-textualist finding of fundamental and non-fundamental Constitutional rights. Given this point, the state should not be held to a lower standard simply because courts have not found that a specific claim is within the Liberty Clause of the 14th Amendment. These two points provide the necessary door for further aspects of this argument, such as the proper criteria a virus must meet before being considered a threat to the community rather than merely to the individual.

Other scholars also take issue with the current application of the *Jacobson* holding. For example, Patterson points out that:

> That the state interest in health is capable of overriding fundamental areas of liberty does not mean that it should always do so. Health-based regulations of abortion have been struck down because the infringement on the abortion right was too great. Just as a fundamental liberty should not automatically prevail over an important state interest, neither should an important state interest automatically prevail over a fundamental liberty.[66]

The development of medical privacy case law began after *Jacobson;* it is hard to argue that elements of that doctrine would not substantially alter the findings of past cases, given the deference to an individual's right to privacy. Patterson makes clear that several factors should go into this balancing test, such as the importance of the public health crisis, the effectiveness of the measure proposed, any possible alternatives to the action sought, and if the proposed measure violates any fundamental liberties, to what extent the liberty is violated, and how vital those liberties are to the nation.[67]

While the two factors that operate as necessary standards for *Jacobson* case law to outweigh the individual's right to privacy are that a pathogen is both infectious and lethal—and that the proposed vaccine mandate would substantively address these concerns—this list is essential to remember. There could very well be measures that are not considered "arbitrary and oppressive" but could be considered over-intrusive vis-a-vis which rights are abridged in times of a pandemic. Consider Patterson's above point regarding health-based regulations of abortion. One does not need to look deep into the annals of history to find cases that validate this, such as *Whole Woman's Health v. Hellerstedt* (2016).[68] In this case,

[66] Elizabeth G. Patterson, *Health Care Choice and the Constitution: Reconciling Privacy and Public Health*, 42 Rutgers L. REV. 1, 48 (1989).

[67] *Id* at 48-9.

[68] Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

abortion providers brought suit against Texas for passing a law that imposed strict criteria on who could perform abortions and where they could be done, which severely hampered Texans' right to an abortion.[69] Writing for the majority, Justice Breyer concluded that the Texas law stated benefits, while perhaps still significant, were not sufficient to justify the burden placed upon the abortion seeker.[70] Analysis such as the above is a fair way to determine if a vaccine mandate measure meets the same threshold. The benefits of a measure should exceed—and, therefore, justify—the burden placed upon the individual. One way to assure that is by using the proposed balancing test rather than rational basis review. Furthermore, Parmet et al. assert that "[t]he legal question is seldom black and white" and further that "it is critical to consider its scientific justification and the way it is undertaken."[71] Further, the various factors Patterson presented as elements of the balancing test are a strong but non-exhaustive list.

While all the above elements are essential in understanding why *Jacobson* ought to be updated in accordance with other aspects of American jurisprudence, the development and importance of substantive due process rights may be the most important. Conkle's article explains the Court's inconsistent development of these rights and their significance for cases moving forward. First, he asserts that *Roe* represented a high-water mark for substantive due process rights and that the Court applied strict scrutiny to "governmental intrusions" to protect these privacy rights.[72] Later, he explains that substantive due process was weakened in the 1990s with the *Cruzan* case because the Court did not rule under a "right to privacy" but because of the liberty interest within the Due Process Clause of the Fourteenth Amendment.[73] Further, due to this change, the Court did not apply strict scrutiny and the finding of a fundamental right, opting for a more open-ended balancing test of these rights.[74]

This change allowed the Court more flexibility to pick and choose the rights granted protection under the Due Process Clause rather than giving strict scrutiny to all those that seek redress under that rationale.[75] This flexible approach would likely allow a vaccine mandate to dodge a strict scrutiny review and receive rational basis review, provided that the

[69] *Id.* at 2296.
[70] *Id.* at 2300.
[71] Wendy E. Parmet et al., *Individual Rights versus the Public's Health — 100 Years after Jacobson v. Massachusetts*, 352 New England Journal of Medicine 652, 654 (2005).
[72] Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 72-3 (2006).
[73] *Id.* at 74.
[74] *Id.* at 76.
[75] *Id.*

plaintiffs only bring privacy-related claims. This tiering system of rights cannot be a correct solution to this problem. As previously stated, such a hierarchy is not found in the text of the Constitution and to privilege one right over others as a matter of law seems unjustified. Moreover, when applied to the above example, it would mean that even if the court ruled a vaccine mandate argument was only protected under a liberty interest within the Due Process Clause, it would be as important of an incursion into the rights of an individual as if their right to privacy proper was broached.

Finally, Mariner et al. assert that the states' police power has not changed since *Jacobson*; yet, how and when the states use their power and how the Court views individual's rights have changed in the century-plus since the ruling.[76] Justice Kennedy's comment in the majority opinion in *Washington* that "[t]he forcible injection of medication into an nonconsenting [sic] person's body represents a substantial interference with that person's liberty"[77] is emblematic of this change, even if the particular standard of review, in that case, did not allow for that substantial interference to reach an unconstitutional level. Further, Mariner et al. find that a potential vaccine mandate would fall under rational basis review under the argument that a vaccine mandate would abridge no fundamental rights.[78] It need not be repeated that the tiering system of rights is unjust. However, there is also the argument that vaccine mandates fall within the protected substantive due process rights cases around medical issues such as *Roe* and *Griswold*. While Mariner et al. view the rights coming out of those cases as discrete and unconnected, there is a strong argument that is not true. The Court's finding of a right to privacy in both cases—and in *Cruzan*—shows the applicability of this right in a medical setting.

The heart of the argument is still informative in that it raises issues such as religious exemptions, FDA approval status, and vaccine mandate criteria that state that (1) the disease must exist in a population where it can spread and cause serious injury to those infected, and (2) an effective vaccine could prevent transmission to fellow community members for something to be constitutional.[79] These criteria helped to inspire the criteria presented in the paper for when a vaccine mandate ought to outweigh an individual's right to privacy.

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[76] Wendy Mariner et al., *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law,* 95 American Journal of Public Health 581, 582 (2005).

[77] Washington v. Harper, 494 U.S. 210, 229 (1990).

[78] Wendy Mariner et al., *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law,* 95 American Journal of Public Health 581, 586 (2005).

[79] *Id.*

Mariner et al. also raise *Korematsu v. United States (1944*).[80] This case is often referred to as one of the worst decisions in the Court's history.[81] In this case, the Court upheld the internment of Japanese Americans under strict scrutiny because they were "unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area."[82] In an amicus brief for a later case, Korematsu himself wrote:

> History teaches that, in time [sic] of war, we have often sacrificed fundamental freedoms unnecessarily. The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers.[83]

It is helpful to think of pandemic response jurisprudence in the same way that one considers wartime jurisprudence. Both times share a common existential threat to the nation; this easily could lead a right-minded judge to lean towards public opinion about how the country should act. Insulation from democratic elections did not lead the Court to an objectively just ruling in *Korematsu*. While now, these crises can seem like America may fall apart if we allow individual liberty over the collective in a time of need, past jurisprudence has awarded judicial restraint and protection of individual rights. This is not to say that *Jacobson* is wrong because it protects the collective. Still, it is a cautionary tale for those who believe that the individual should always come second to the collective in American jurisprudence.

Part III: Case Studies:

The following three case studies will help illuminate the need to review the pathogens' communicability and lethality during judicial review as part of the merits of a

[80] Korematsu v. United States, 323 U.S. 214 (1944).

[81] David Savage, *How Did They Get It So Wrong? Left and Right Differ on the Decisions, but Each Side Has Its 'worst' List*, 95 A.B.A. J. 20, 20 (2009).

[82] Korematsu v. United States, 323 U.S. 214, 217-8 (1944).

[83] Fred Korematsu, *Brief Of Amicus Curiae In Support Of Petitioners in Rasul v. Bush & Al Odah v. U.S,* 29 N.Y.U. Rev. L. & Soc. Change 613, 616 (2005).

constitutionality challenge. The first, the current COVID-19 pandemic, represents a virus that is both infectious and deadly. The second, the seasonal flu, is contagious but causes fewer deaths each year. The third is a hypothetical cancer treatment by injection, as cancer is not infectious but is deadly. By manipulating the variables at play within each case, it becomes clear that only mandates for contagious *and* fatal pathogens should win out in a balancing test. However, readers should be noted here that to reach this point, it must be assumed that the vaccine indeed does prevent the pathogen's spread and, therefore, any death because of the pathogen or substantially reduce this risk. A vaccine that does not efficiently prevent the spread and death is ripe for challenges under the original *Jacobson* "arbitrary and oppressive" clause. [84] Under this example, the method of exerting police power does not solve the stated goal and therefore does not justify the given incursion on the individual's privacy rights.

Case 1: The COVID-19 Vaccine (infectious and deadly)

The current data on the COVID-19 pandemic is in flux as people continue to contract the virus daily. Therefore, the true number of positive cases will remain unknown so long as mandatory testing measures are not instituted. However, current estimates conclude that the current pandemic is infectious and lethal. The basic reproduction ratio (R_0) of COVID-19, which is "an estimate of the contagiousness that is a function of human behavior and the biological character of pathogens,"[85] provides a measure of the infectiousness of a disease. If the basic reproduction ratio is larger than one, the number of infected people will climb; if lower than one, the pathogen will eventually die out.[86] Achaiah et al. posit that the basic reproduction ratio of COVID-19 is somewhere between 1.5 and 3.5.[87] As this figure is larger than one, this pathogen is indeed considered infectious because community spread would increase caseloads.

In measuring lethality, the shortcomings of the following methods become evident. First, in using a standard calculation of the number of deaths divided by the number of cases based on the available data from Johns Hopkins and the New York Times, it must be noted that vaccinated individuals remain susceptible to contracting COVID. Since the vaccine has been proven to reduce the number of deaths associated with COVID-19, this measure

[84] Jacobson v. Massachusetts, 197 U.S. 11, 27-28 (1905).

[85] Achaiah et al., *R0 and Re of COVID-19: Can We Predict When the Pandemic Outbreak will be Contained?*, 24 Indian Journal of Critical Care Medicine 1125–1127 (2020).

[86] *Id.*

[87] *Id.*

should be seen as a conservative figure. Nevertheless, since this is considered a conservative figure, it still meets the threshold for a lethal virus, and there is little reason not to proceed. The New York Times data has the mortality rate at 1.47 percent, and Johns Hopkins has it at 1.46.[88] Given these figures, it is within reason to conclude that this pathogen is, in fact, infectious and lethal, giving the courts the ability to uphold a vaccine mandate under strict scrutiny with the *Jacobson case* as precedent.

The Court seems to agree with this position, although it may not be due to the two selected criteria. First, Justices Sotomayor and Coney Barrett denied emergency relief applications last year in vaccine mandate cases from New York and Indiana, respectively.[89] Further, the Court denied emergency review to the petitioners in *John Does 1–3, et al. v. Janet T. Mills, Governor of Maine, et al.,* with Justices Kavanaugh and Coney Barrett concurring asserting that the emergency docket is not the proper channel to resolve the merits of the petitioners' religious liberty claims against the state vaccine mandate.[90] Justices Gorsuch, Thomas, and Alito noted their dissent.[91] While not on the standard merits docket, these cases show that the Court is deferring to the states and applying *Jacobson* case law when considering the current mandates.

As aforementioned, in *Roman Catholic Diocese*, the Court continues to apply rational basis review to Fourteenth Amendment claims that do not raise a specific fundamental right complaint. For reasons stated at length above, it is wrong and anachronistic to do so. *Jacobson* came before modern standards of review. To hypothesize which model of modern review best fits within its rationale seems incorrect when the jurists in the prior case cannot refute this characterization and were not thinking about such a matter in that case. Such a faulty theory advances the theory that the subsequent rulings from the Court created tiers of Constitutional rights that are invalid on textualist grounds. The proper model would be to hold all rights equal in the balancing test, as all rights granted to the citizens of the United States deserve equal protection from government incursion.

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[88] New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, New York Times (Jan. 4, 2021), https://www.nytimes.com/interactive/2021/us/covid-cases.html; Johns Hopkins University, *COVID-19 Dashboard*, Johns Hopkins University (Jan. 4, 2021), https://coronavirus.jhu.edu/map.html.

[89] Andrew Chung, *U.S. Supreme Court's Sotomayor allows New York school vaccine mandate*, Reuters (Oct. 2, 2021), https://www.reuters.com/world/us/us-supreme-courts-sotomayor-lets-new-york-school-vaccine-mandate-remain-2021-10-01/.

[90] John Does 1–3 v. Janet T. Mills, Governor of Maine, 595 U. S. ____ (2021).

[91] *Id.*

Under this theory, it is still acceptable for a government to infringe on an individual's right insofar as the need is pressing and the method they use to infringe on an individuals' rights is narrowly tailored. The text of the *Jacobson* ruling is clear that the "Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint" and "one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State."[92] While the privacy and bodily liberty rights found in *Griswold*, *Roe*, and *Washington* are essential to consider, the balancing test has and will continue to overwhelm these rights in this pandemic. One person's right to liberty will not overcome the community's; this is the central holding of *Jacobson*.

Case 2: The Seasonal Flu Vaccine (Infectious, but far less deadly)

Returning to the same criteria as above, first, one must examine the infectiousness. For seasonal flu, the basic reproductive ratio ranges from 1.27 to 1.8.[93] Since this number exceeds one, community spread is likely without containment measures; this figure satisfies that criterion. However, answering the lethality question in the affirmative is far more complicated. In a March 2020 hearing, Dr. Anthony Fauci said that the seasonal flu mortality rate is around 0.1 percent, equal to CDC estimates.[94] Further, 2020 data from the CDC states that the number of deaths in America due to seasonal flu per 100,000 Americans is 1.8.[95] Since that figure is low, it is reasonable to classify the seasonal flu as a largely non-lethal pathogen. However, one of the benefits of the suggested balancing test approach is that one can weigh the factors of a given virus without using the binary choices commonly associated with bright-line rules. Instead of saying that the seasonal flu is not lethal, a jurist could easily say that it is *largely* not deadly and slightly alter their mental balancing test to account for the remote lethality associated with seasonal flu.

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[92] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[93] Matthew Biggerstaff et al., *Estimates of the reproduction number for seasonal, pandemic, and zoonotic influenza: A systematic review of the literature*, 14 BMC Infectious Diseases 1, 13 (2014).

[94] Lev Facher, *NIH Official Suggests Large Gatherings Should Be Canceled Due To Coronavirus Outbreak*, STAT News (Mar. 11, 2020), https://www.statnews.com/2020/03/11/fauci-recommends-against-large-crowds-coronavirus/; Center for Disease Control, *Estimated Flu-Related Illnesses, Medical visits, Hospitalizations, and Deaths in the United States — 2018–2019 Flu Season*, Center for Disease Control (Sept. 21, 2021), https://www.cdc.gov/flu/about/burden/2018-2019.html.

[95] Centers for Disease Control and Prevention, *Underlying Cause of Death 1999-2020*, National Center for Health Statistics (Jan 26, 2022), http://wonder.cdc.gov/ucd-icd10.html.

With all this said, it is much harder to apply *Jacobson* to cases regarding flu vaccine mandates, as there is little threat to the community; it would materially alter the community's side of the balancing test. Tremble's argument cites cases in which compulsory flu vaccination efforts were challenged in the healthcare setting. In both cases, a court did not reach a point where *Jacobson* applied to justify overriding an individual's right to privacy.[96] The state's interest to protect the community's liberty is lessened under *Jacobson* because the likelihood of their liberty being infringed upon is lessened. This argument does not preclude the state from bringing other arguments in addition to community protection. One possible argument from the state is the worker utility losses suffered by those who fall ill and the economic impact of the time lost due to illness. These arguments can also be factored into a balancing test but likely will not overcome the individual's fundamental right to privacy.

Case 3: A Hypothetical Cancer Vaccine (non-contagious but deadly)

Coming to the third and final case, this hypothetical treatment is meant only to draw a contrast with the two above, not to imply that it is like or similarly situated with the other classes of cases. Since cancer is not a pathogen and is not contagious, there is no risk to the community, only to the individual. However, cancer is responsible for more than 600,000 deaths per year, so there is no doubt that it remains a deadly ailment.[97]

Since cancer only poses a risk to the individual, it would be entirely improper to apply *Jacobson* in this case—not that the Court has done so. The more apt case law to apply is *Cruzan*. As a reminder, in this case, the Court held that individuals have a right to refuse life-saving medical treatment due to the Due Process Clause's privacy rights.[98] While it may seem clear that this is the proper way to handle this matter, it is vital to establish so. Without drawing this argument out, it is impossible to see that a pathogen must be both infectious and deadly for a vaccine mandate to be proper. As there is no threat to the community's liberty, *Jacobson's* balancing test is irrelevant. The hypothetical cancer vaccine would be no different from the person declining a potentially life-saving treatment when the individual is of sound body and mind. If it were to be balanced, there would be no interest in protecting the community against the robust right to privacy. Privacy would easily prevail.

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[96] Andrew H. Trimble, *The Law of Mandatory Flu Shot Requirements*, National L. Rev. (Mar. 4, 2015), https://www.natlawreview.com/article/law-mandatory-flu-shot-requirements#google_vignette.

[97] American Cancer Society, *Cancer Facts & Figures 2020*, American Cancer Society 4 (2020), https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2020/cancer-facts-and-figures-2020.pdf.

[98] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

One interesting point that comes to mind with this hypothetical is if there is a deadly infectious disease, and there is a vaccine (or multiple) available that prevents death, *but the available vaccinations do not prevent transmission of the pathogen.* Under this scenario, it could be convincingly argued that the state's only interest in imposing a prospective vaccine mandate would be preventing death within their population since the vaccination mandate would not control the spread of the virus. This situation is most analogous to case three rather than the other two above. If the mandate does not control the spread of the virus, it fails to address the communicability criterion. As a result, there would be no difference between an unvaccinated person and a vaccinated person spreading the pathogen within the community under *Jacobson*. While the outcomes of contracting the hypothetical pathogen for the unvaccinated and vaccinated individuals would vary substantially based on their vaccination status, the decision to decline potentially life-saving medical attention is established in *Cruzan*.

Conclusion

Since the Supreme court expanded the right to privacy to include abortions and contraception in *Roe* and *Griswold,* respectively, it would be illogical for other medical procedures, including, but not limited to, vaccination efforts, not to be included. To not do so would improperly create two tiers of medical privacy rights. Yet, creating anti-textualist, illogical tiers of rights is something the Court has done before—as seen with the creation of fundamental and non-fundamental rights. Further, the Court's holding in *Cruzan* allows some classes of individuals to refuse life-saving medical treatment due to this privacy right.

Since the Court decided *Jacobson* in 1905, they have installed these new privacy rights. As all rulings from the Court should be held in the same esteem until they are overturned, the Court ought properly to balance these privacy rights explicitly against the threat posed to the community. Since hypothetical cases are not allowed in U.S. court, this time represents a rare opportunity to make progress in this area of the law and legal understanding. Further, the three different cases presented all illustrated how changing the contagiousness and lethality of a disease can alter the considerations of a balancing test.

Departing with a great quote from Justice Frankfurter, "Great concepts like… 'liberty'... were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too

well that only a stagnant society remains unchanged."[99] The Court has an opportunity to develop better jurisprudence about balancing newer privacy rights with the older holding in *Jacobson*. To accept stagnation here would be improper; even if the answer is the one we all expect, future generations deserve to have our guidance. Conventional wisdom changes over time, sometimes in ways we cannot expect. Writing down the spirit of our times in this pandemic is extremely important. Until the privacy aspects of the Due Process Clause of the Fourteenth Amendment are changed—and they very well may be in the *Dobbs* case currently before the Court—we need to proceed with using a visible balancing test, however superficial it may seem, because eventually there may be a case in which it is not so superficial.

[99] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U. S. 582, 646 (1949).

The Importance of Implementing H.R. 1470: The Ending Qualified Immunity Act

Samantha Brooks

Introduction: Police Indemnification and Excessive Force

Documented police misconduct and the protection of both constitutional and civil rights have forced politicians, and those in positions of power, to confront and consider the structural and societal effects of long-standing policing practices.[1] Qualified immunity can be regarded as both structural cause and consequence of policing practices. By definition, it is a legal defense that protects officials from civil lawsuits.[2] Qualified immunity only applies to lawsuits against government officials as individuals, not municipalities.[3] The Supreme Court has stated that qualified immunity serves as a means of protection provided to "...all but the plainly incompetent or those who knowingly violate the law."[4] The Court has established guidelines to apply qualified immunity specifically to law enforcement officers.[5] Cases involving qualified immunity are often contentious and morally challenging due to a lack of cohesive case law. Consequently, officers may be shielded from liability even when they have objectively violated an individual's civil rights.

Notwithstanding the protections of qualified immunity for law enforcement officers, there have been a number of plaintiffs that have won civil suits against these officers because they have shown that the officer violated "clearly established law."[6] In these civil

[1] Steven P. Solomon, *Managing Police Use of Force and Training Issues for Administrators*, Public Administration Faculty at the University of Michigan-Flint, Univ. of Mich., 2 (Nov., 27, 2001).

[2] Cornell Law School, *Qualified Immunity*, https://www.law.cornell.edu/wex/qualified_immunity (last visited Mar. 30, 2022).

[3] *Id.*

[4] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[5] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982); Howard M. Henderson, April Frazier Camara, Joanna C Schwartz, Chris Colbert, *Panel I Discussion: The Criminal Justice System: "George Floyd Bill" & Qualified Immunity,* 6 L. and Soc. Pol., 1 (2021); Dayna Vadala, *Prosecuting the Police: How America's Criminal Justice System Has Failed Breonna Taylor and Other People of Color*, Trin. Col. Sen. Thes., 1, 32 (2021); Pearson v. Callahan 555 U.S. 223 (2009).

[6] Becky Sullivan, *The U.S. Supreme Court Rules In Favor of Officers Accused of Excessive Force,* NPR.org, (Oct. 18, 2021), https://www.npr.org/2021/10/18/1047085626/supreme-court-police-qualified-immunity-

lawsuits, plaintiffs (and their families) have been awarded monetary settlements to provide compensation for civil rights violations that are a consequence of misconduct by law enforcement officers.[7] Government expenditures are public record and the very large sums of money paid by cities to families of victims killed because of police misconduct are known.[8] Such payments are effectively taxpayer-funded. In the matter of George Floyd, for example, the family settled a lawsuit against the city of Minneapolis for $27 million, making it the largest pre-trial civil rights lawsuit in history.[9] In September of 2021, the city of Louisville, Kentucky agreed to a $12 million settlement to, in part, compensate Breonna Taylor's family for civil rights violations by the Louisville Police Department, and in part to reform police practices in the city.[10] In 2015, Freddie Gray died in custody in Baltimore.[11] Three of the six Baltimore City Police officers involved were not charged, the other three were acquitted, and the U.S. Department of Justice never brought federal civil rights charges.[12] However, Gray's family was awarded a $6.4 million settlement.[13] In Chicago a year earlier, in 2014, the family of Laquon McDonald - a 17-year-old who was shot 16 times and killed by Chicago police - reached a settlement of $5 million.[14] In Cleveland Ohio, 12-year-old Tamir Rice was playing in a park near his home when he was shot and killed in 2014 by a Cleveland patrolman who had mistaken Rice's toy gun for a real one.[15] A Grand Jury failed to indict the patrolman but Rice's family was awarded $6 million by the city.[16]

This law review article will discuss the importance of passage of The Ending Qualified Immunity Act (H.R. 1470) to reduce the use of qualified immunity as a defense.[17] There is no current legislation in place to deter the use of qualified immunity as a blanket

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cases#:~:text=Qualified%20immunity%20refers%20to%20a,accused%20of%20violating%20constitutional%20rights.

[7] *Id.*

[8] AP News, *A Look at Big Police Settlements in US Police Killings*, Mar. 12, 2021, https://apnews.com/article/shootings-police-trials-lawsuits-police-brutality-2380f38268a504ae689ad5b64b5de2e7.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] A resolution recognizing that the murder of George Floyd by officers of the Minneapolis Police Department is the result of pervasive and systemic racism that cannot be dismantled without, among other things, proper redress in the courts, S. Res. 602, 116th Cong. § 2, (2020).

defense for law enforcement officers.[18] Part one will highlight the background of the defense, including its legal precedent and its support among Supreme Court Justices. The history of qualified immunity and its application by the Supreme Court highlights the slow, but persistent, expansion of use of the defense. Part two will discuss the relationship between the Fourth Amendment and qualified immunity, proponents of qualified immunity, and the dangers of qualified immunity. Part three will explain the proper policy response to qualified immunity (The Ending Qualified Immunity Act). This article considers the viewpoints of both the proponents of qualified immunity as well as those who oppose it. It also integrates consideration of the adjacent topics of the Punitive Damages Doctrine and the Municipal Damages Doctrine.

Part I: The Background and Legal Precedent for Qualified Immunity

A. The Relevant Historical Landscape at the Time of Qualified Immunity's Origination

Qualified immunity is a unique defense, providing civil protections specifically to government officials. Proponents of it argue that it can both hold government officials accountable when they have committed unlawful acts against citizens (without "clearly established law" acting as precedent for defending their actions), and it can shield these same officials from a variety of harms including physical harm and threats, financial liability, and shame.[19]

In 1871, Qualified immunity was created by the 42nd Congress as an interpretation of 42 U.S.C. § 1983 (hereinafter, Section 1983), stating that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable… [20]

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[18] Solomon, *supra* note 1, at 147.; Henderson, Camara, Schwartz, Colbert, *supra* note 4, at 1800.
[19] Cornell Law School, *supra* note 2.
[20] 42 U.S. Code § 1983; Colin Barnacle, *The Missing Voice, Herring v. Keenaan: The Narrowing of the Tenth Circuit's Qualified Immunity Analysis*, 78 Denv. U. L. Rev., 321, 323, (2000); FindLaw, *Section 1983 and Civil Rights Lawsuits*, (Mar. 20, 2019), https://www.findlaw.com/criminal/criminal-rights/42-u-s-code-section-1983.html.

Section 1983 includes the "under color of law" clause that requires that the wrongdoer shall be regarded as representing the State when engaging in a violation of civil rights.[21] In a matter such as this, the plaintiff alleges that the defendant has violated their Constitutional rights while they were acting as a governmental agency (local, state, or federal).[22] Acts of excessive force generally fit into this category.[23] Section 1983 was one of "Enforcement Acts" and was "passed by the Reconstruction Congress as a crucial component of the 1871 Klu Klux Klan Act."[24] The 1871 Ku Klux Klan Act and complementary Enforcement Acts sought to deter lawlessness and violations of "civil rights in the post-war era," primarily in the South.[25] Scholars have debated the extent to which "officers were acting lawfully or" in "good faith."[26] Irrespective of the scope of "good faith," "modern qualified immunity" is not a defense based upon "good faith."[27] The only relevant issue with respect to this defense is, "whether a law enforcement officer blatantly violated a 'clearly established law' and whether the facts of the case" in the case being considered by the court - are similar to those of prior decisions.[28]

B. Legal Precedent for Establishing Qualified Immunity

While the focus in this article is qualified immunity as it is applied to law enforcement officers, the case precedent set involving all government officials is informative. The 1967 Supreme Court case, *Pierson v. Ray*, held that there is a "settled common law principle that a judge is immune from liability for damages for his judicial acts [were] not abolished by § 1983."[29] In this case, the Court also held that "the defense of good faith and probable cause which is available to police officers in a common law action is also available under § 1983."[30] The discussion of when damages can be awarded to a plaintiff whose Fourth Amendment rights had been violated was decided in the subsequent qualified immunity case of *Bivens v.*

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[21] 42 U.S. Code § 1983.

[22] Barnacle, *supra* note 20, at 323.

[23] S. Res. 602.

[24] Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Inst. Pol. Anl. 901, (2014), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure (last visited, Mar. 11, 2022)

[25] *Id.* at 901.

[26] Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019).

[27] *Id.;* Marylin L. Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms*, 62 Can. B. Rev., 517, 576 (1984); *City of Cleveland*, 925 F.3d 793 (6th Cir. 2019); Jones v. Clark County, No. 19-5143 (6th Cir. 2020).

[28] Karen M. Blum, *Section 1983: Qualified Immunity,* Suffolk L. Rev., 1, 114 (2018).

[29] Pierson v. Ray, 386 U.S. 547, 555-57 (1967); *Tenney v. Brandhove, 341 U.S. 367* (1951).

[30] *Pierson*, 386 U.S., at 555; *Monroe v. Pape*, 365 U.S. 167 (1961).

Six Unknown Narcotics Agents in 1971.[31] In this case the Court held that when a federal agent has violated an individual's Fourth Amendment rights, they may be held financially responsible for such action.[32] Qualified immunity was further reinforced in the 1982 Supreme Court case, *Harlow v. Fitzgerald*, "to deter undue interference" of "potentially disabling liability" for members of the government.[33] In this landmark case, the holding provided government officials with protection from liability when their actions do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[34] *Harlow* laid the groundwork for the more modern "definition of qualified immunity in 'objective terms,'" changing the previous definitional subjectivity requiring that an officer's actions be in "good faith" (as was established in *Pierson).*[35]

Trends are not without exception. The Court heard *Malley v. Briggs* in 1986, a case involving the legitimacy of an arrest warrant.[36] In *Malley* the Court issued a ruling - against the use of absolute immunity (immunity from both criminal and civil lawsuits) - identifying that the use of the defense was not limitless.[37] Under the doctrine elucidated in *Malley*, an officer may not utilize qualified immunity if the warrant application did not contain sufficient probable cause that would render it constitutional.[38] A few years later, in *Graham v. Connor* (1989), the Court held that "A claim of excessive force by law enforcement during an arrest, stop, or other seizure of an individual is subject to the objective reasonableness standard of the Fourth Amendment."[39] This ruling set the standard that "claims of excessive force used by government officials…[must be]…properly analyzed under the Fourth Amendment's 'objective reasonableness' standard," with respect to stops, arrests, and seizures.[40]

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[31] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[32] *Id.*

[33] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

[34] *Id.* at 815.

[35] Steven H. Steinglass, *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges,* Clev. State L. Art. and Ess. (1994); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, Notre Dame L. Rev., 93, 1999, 2003, (2018).

[36] Blum, *supra* note 28, at 42.

[37] MacDonald v. Town of Eastham*,* 946 F. Supp. 2d 235 (D. Mass. 2013); Malley v. Briggs, 475 U.S. 335, 106; S. Ct. 1092 (1986).

[38] Malley v. Briggs*,* 475 U.S. 335, 106 (1986).

[39] Graham v. Connor*,* 490 U.S. 386 (1989).

[40] *Id.*

In *Saucier v. Katz* in 2001, the Court held, "that the plaintiff [must] prove that the government official violated" their constitutional right at the time of the incident.[41] In this case the law enforcement officer, Saucier, was granted use of qualified immunity because he had acted as a "reasonable" officer would have at the time of the incident.[42] *Saucier* held that three things must occur in order to deny a government official protection under qualified immunity: 1) the action in question must be proven to have occurred under the color of law, 2) it must be proven that there was a constitutional violation, and 3) a court must identify that the law was "clearly established."[43] Subsequently, the Court issued a ruling in *Pearson v. Callahan* (2009).[44] The holding in *Pearson* further examined the standard of reasonableness of a government official - a concept that was introduced in *Harlow.*[45] In order to use qualified immunity, the person in question must be able to prove that they were acting in a similar fashion to the manner a reasonable person would act in at the time of the incident.[46]

Since *Pearson*, there has been a significant division between Supreme Court Justices as to how expansive qualified immunity should be. Recently, in *Daniel Rivas-Villegas v. Ramon Cortesluna* (2021), the Supreme Court doubled down on the "reasonableness" standard set forth in *Graham.*[47] In *Rivas-Villegas,* the Court granted summary judgment to the officer, Rivas-Villegas, reaffirmed use of the qualified immunity defense, and ruled in favor of granting him the protections given under the qualified immunity.[48] The cases cited above show the way in which qualified immunity has been historically applied across a broad array of cases. Taken together, it appears that the defense has become more readily accessible.

C. Justice Gorsuch and Qualified Immunity

Since the *Bivens* decision (1971), the composition of the Supreme has changed. The current makeup of the Court has produced a divided opinion on the qualified immunity

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[41] Matt Chiricosta, *Qualified Immunity Dissonance in the Sixth Circuit: Why We Must Return to Reasonableness*, 59 Clev. State L. Rev., 463, (2011); Mitchell v. Cate 2015 WL 5920755 (2015); *Saucier v. Katz*, 533 U.S. 194 (2001).; *Jones v. City of Modesto,* 408 F. Supp. 2d 935 (E.D. Cal. 2005).

[42] Saucier v. Katz, 533 U.S. 194 (2001).

[43] *Katz*, 533 U.S. 194.; Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 Vill. L. Rev., 585 (2020).

[44] Ortiz v. New Mexico, No. CIV 18-0028 JB/LF (2021).

[45] Pearson v. Callahan*,* 555 U.S. 223, 129 S. Ct. 808 (2009).

[46] *Id.*

[47] Daniel Rivas-Villegas v. Ramon Cortesluna*,* 595 U. S. ___ (2021).

[48] *Rev'd per curiam*, Daniel Rivas-Villegas v. Ramon Cortesluna*,* 595 U. S. (2021); *Melinda Petta, As Next Friend of Nikki Petta and Cavinpetta, Minors; Nikki Petta, a Minor; Cavinpetta, a Minor, Plaintiffs-appellees, v. Adrian Rivera, Individually and in His Official Capacity as Texas Department of Public Safety Highway patrolman, Defendant-appellant, and Texas Department of Public Safety, Defendant*, 133 F.3d 330 (5th Cir. 1998).

defense. For example, Justice Neil Gorsuch tends to favor qualified immunity while also being aware of its limitations and being cognizant of its implications on law enforcement practices on a day-to-day basis.[49] His awareness of the limitations of the defense was showcased in his opinion in *Blackmon v. Sutton,* in which a juvenile detention center staff member who utilized a Pro-Straint Restraining Chair - the Violent Prisoner Chair Model RC-1200LX - was not granted use of the immunity defense.[50] In *Wilson v. City of Lafayette*, parents sued an officer under Section 1983 after their son was killed by a police officer with a taser.[51.] Here, on the other hand, Justice Gorsuch, writing for the majority, granted the officer immunity and applied the qualified immunity doctrine broadly.[52] In *Cortez v. McCauley*, Justice Gorsuch used a similar expansive interpretation of qualified immunity.[53] In *Cortez*, the Tenth Circuit Court of Appeals denied an officer the ability to use the qualified immunity defense on the grounds that substantial probable cause was lacking when an arrest was made.[54] When the Supreme Court reviewed the case, Justice Gorsuch partially concurred and partially dissented, agreeing that there was not enough probable cause to make the arrest legally while also stating that the plaintiff did not sufficiently satisfy the requirement that the case-law be "clearly established."[55] Furthermore, Justice Gorsuch noted "that the Supreme Court has repeatedly warned us against 'unrealistic second-guessing' of police judgments."[56]

Justice Gorsuch showcased his support of qualified immunity again in *Kerns v. Bader*.[57] In *Kerns*, Justice Gorsuch dissented from the majority and stated that the defendant, Sheriff White, should be allowed to use the defense in response to his rights being violated as an officer.[58] On the other hand, Justices Clarence Thomas and Sonia Sotomayor, two Justices who seldom concur on these matters, stated that the qualified immunity doctrine

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[49] Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 Stan. L. Rev., 1 (2017).

[50] Blackmon v. Sutton, 734 F.3d 1237, 1239(10th Cir. 2013); Grammel*, supra* note 49, at 2.

[51] Wilson v. City of Lafayette, 510 F. App'x 775 (10th Cir. 2013).

[52] *City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013).; Cortez v. McCauley, 478 F.3d 1108 (10th Cir. 2007).

[53] Cortez v. McCauley*,* 478 F.3d 1108.

[54] Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suit*s, 53 Louis. L. Rev.,450 (1992); Grammel, *supra* note 49 at 1.

[55] Comm. v. Dunlap, N., Aplt. No. 33 EAP 2006; Amanda Peters, *The Case for Replacing the Independent Intermediary Doctrine with Proximate Cause and Fourth Amendment Review in § 1983 Civil Rights Cases*, Pep. 48 L. Rev, 1., (2021).

[56] Grammel, *supra* note 49, at 2.; *McCauley,* 478 F.3d 1138.

[57] Grammel, *supra* note 49, at 2.

[58] Blum*, supra* note 28, at 44.

requires drastic change or complete eradication.[59] With respect to her opinion on how much deference should be given to government officials requesting permission from the Court to use the qualified immunity defense, Justice Sotomayor has said that qualified immunity should protect officers only when they act reasonably, and not when they inflict deadly force on a person who is only a threat to himself. [60]

Part II: The Relationship Between the Fourth Amendment and Qualified Immunity, Proponents of Qualified Immunity, Dangers of Qualified Immunity, and State-Specific Eliminations of Qualified Immunity

A. The Fourth Amendment

The qualified immunity defense cannot be discussed without consideration of the provisions of the U.S. Constitution's Fourth Amendment. The Fourth Amendment states that all Americans have the right

> …to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[61]

Acting "unreasonably" can mean that an officer conducted "an arrest that was not supported by probable cause" or that an officer "conducted a search of a home without issuing a search warrant" or without a court determining the existence of special circumstances that justify the search.[62] To this day, law enforcement officers have been able to claim that their behavior was "objectively reasonable," as was the case in *Anderson v. Creighton*.[63] In the majority opinion, written by the late Justice Scalia, the Court held that "qualified immunity protects public officials whose unconstitutional conduct is objectively reasonable."[64] The Court held that "the language of the Fourth Amendment in proscribing 'unreasonable' searches and

[59] Debra Weiss, Q*ualified Immunity Doesn't Protect Officer Who Killed Man Threatening Only Himself, Sotomayor Says,* ABA J., 1 (2021).

[60] *Id.* at 1.

[61] U.S. Const., amend. IV; *State of Maryland v. Hussain Ali Zadeh*, No. 25, Opinion (2019).

[62] Blum, *supra* note 28 at 197.; Groh v. Ramirez, 540 U.S. 551 (2004); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, UPenn L. Rep. (1989).

[63] Anderson v. Creighton, 483 U.S. 635 (1987).

[64] *Id.* at 642.

seizures did not preclude the possibility that an officer can act in an objectively reasonable fashion, even though in violation of the Fourth Amendment."[65]

B. Defending the Qualified Immunity Doctrine and Standard

While there has been some opposition to the doctrine by members of the highest Court, there has also been broad-based support of it. In *Ashcroft v. al-Kidd*, Justice Antonin Scalia laid the groundwork for the qualified immunity defense and highlighted his support of the doctrine.[66] He suggested that the defense should be utilized by all officials, except those who are completely incompetent at doing their jobs or those who break the law, willingly and purposefully. [67] This opinion was referenced subsequently in *Helena v. Albee.*[68] Those who support an expansion of qualified immunity, those who would agree with Justice Scalia, and those who advocate for law enforcement officers to have even greater access to the qualified immunity defense, often justify support of the necessity for the defense. This is because it allows officers to make split-second decisions without fearing for their lives or livelihoods with subsequent lawsuits.[69] The Court, in more recent decisions regarding the state of the defense, has ruled "that qualified immunity achieves these policy goals [ensuring that the safety of officers is upheld and that they are not required to assume financial responsibility]," but has offered no evidence to support this claim.[70]

Since Justice Scalia's 2011 opinion, the International Association of Chiefs of Police (IACP) has indicated its strong support for the doctrine.[71] In a public statement published in 2020, the organization stated that the "qualified immunity protection is essential because it ensures officers that good faith actions, based on their understanding of the law at the time of the action, will not later be found to be unconstitutional."[72] The IACP also believes that any opposition to the defense fails to consider the important implications for law enforcement officers with respect to their safety and community trust.[73] The IACP's position

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[65] *Id.* at 643.

[66] Joanna C. Schwartz, *How Qualified Immunity Fails,* 127 Yale L. J., 1, (2017); Ashcroft v. al-Kidd, 563 U.S. 731 (2011); Ken Wallentine, Vehicle Frisk Suppression Reversed, Creating New Rule for Frisks, (Mar, 11, 2022), https://www.lexipol.com/resources/blog/vehicle-frisk-suppression-reversed-creating-new-rule-for-frisks/.

[67] *Briggs*, 475 U.S. at 341.

[68] Heleba v. Allbee, 628 A.2d 1237 (Vt. 1992).

[69] Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, Minn. L. Rev. 40, 62, 68, (2016).

[70] Joanna Schwartz, *The Case Against Qualified Immunity,* 93 ND L. Rev., 1797, (2018).

[71] George Floyd Justice In Policing Act of 2020*,* H.R. 7120, 116th Cong., (2019-2020).

[72] Jay Schweikert, *Unlawful Shield: Supreme Court Reaffirms Unwillingness to Reconsider Qualified Immunity*, (2021) https://www.unlawfulshield.com/author/jschweikert/.

[73] *Id.*

and that of its members inevitably leads to a necessary discussion about the risk associated with eliminating use of the defense on the national and local level.

C. Potential Dangers of the Defense and Implications of its Expansion

Although the qualified immunity doctrine has support from the IACP and several Supreme Court cases, the obvious dangers of its broad implementation are more than hypothetical. Between 2001 and 2016 the Court published eighteen opinions that addressed the specific question about the co-existence and preservation of constitutional rights within the context of qualified immunity (the fundamental question in cases involving this type of defense).[74] In sixteen of these cases the (law enforcement) defendants were permitted use of the defense because they were not found to have violated a legal standard that had been "clearly established."[75] The Supreme Court has recently suggested that their Court opinions may be the only means of creating "clearly established" legal standards, meaning that clearly established standards cannot come from lower courts.[76] It is likely that because the Supreme Court has so frequently ruled in favor of cases granting use of the qualified immunity defense, this will have a chilling effect on lower court matters because they are required to use these cases as precedent. This could also lead to an expanded application of the defense.[77]

The Court's recent increasingly expansive characterization of the scope of qualified immunity is likely to have removed the deterrent value of the risk of liability. It has not reduced the egregiousness of the acts for which police officers receive qualified immunity. These are the subject of large taxpayer-funded civil settlements.[78] The Municipal Damages Doctrine requires the municipality, of which the officer is a part, to assume responsibility, thus binding them by law to pay for settlements in which misconduct has been found out of

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[74] Blum, *supra* note 28.

[75] Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam); Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015) (per curiam); City and Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1778 (2015); Carroll v. Carman, 135 S. Ct. 348, 352 (2014) (per curiam); Lane v. Franks, 134 S. Ct. 2369, 2383 (2014); Wood v. Moss, 134 S. Ct. 2056, 2068–69 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012, 2024 (2014); Stanton v. Sims, 134 S. Ct. 3, 7 (2013) (per curiam); Reichle v. Howards, 132 S. Ct. 2088, 2096–97 (2012); Messerschmidt v. Millender, 132 S. Ct. 1235, 1250 (2012); Ryburn v. Huff, 132 S. Ct. 987, 992 (2012) (per curiam); Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 378–79 (2009); Pearson v. Callahan, 555 U.S. at 243; Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam); Katz, 533 U.S. 194, 209 (2001); Sluman v. State, 418 p.3d 125.

[76] Kinports, *supra* note 69, at 62.

[77] Sup. Ct. R. 10 (noting that the Court grants cert "only for compelling reasons" and listing conflicts in the lower courts among "the character of the reasons the Court considers").

[78] Aaron L. Nielson and Christopher J. Walker, *Qualified Immunity and Federalism*, Georgetown L. J., 229, (2020).; Marshall Miller, *Police Brutality*, Yale Law & Policy Review, 17, 152, (1999).

departmental funds. [79] Additionally, several scholars argue that the police unions, themselves, should bear some responsibility for shouldering the costs for such settlements.[80] While police misconduct settlements provide the families of victims with monetary compensation for harm done, there are two fundamental shortcomings of municipal liability. The first being that most police chiefs believe that the cost of liability is a business deal and losing that "deal" does not have an impact on the operations or modus operandi of the individual departments.[81] The second is that if changes in law enforcement policies are required by departments, "the policy implications are rarely, if ever, acted upon" by individual officers.[82] In *Smith v. Wade*, the Court issued a ruling that emphasized that requiring "taxpayers to satisfy punitive damages awards would be unjust."[83] This Punitive Damages Doctrine relies on the premise that innocent and law abiding taxpayers should not have to pay for the incompetence of trained government officials.[84] Additionally, this doctrine takes the Municipal Damages Doctrine a step farther, requiring that individual officers found liable for misconduct assume financial responsibility when they have had, "…reckless or callous indifference to [the plaintiff's] federally protected rights."[85] Under this doctrine, the facts of the case must also demonstrate to the court that the government official had intent when they acted wrongfully.[86] Both individual liability and municipal liability are crucial in order to fully hold officers accountable and to deter the disregard for violations of citizens' civil and constitutional rights.

D. State-Specific Examples of Qualified Immunity Defense Restrictions

Colorado and New Mexico have limited the use of the defense by use of state-specific laws.[87] These laws have the ultimate purpose of increasing trust between law enforcement and members of the community.[88] As such, these two states have provided citizens with the opportunity to file suit in court claiming that their state civil rights were

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[79] Schwartz, *supra* note 66, at 895.

[80] Adam Serwer, *The Authoritarian Instincts of Police Unions,* TheAtlantic.Com, (June 22, 2021), https://www.theatlantic.com/magazine/archive/2021/07/bust-the-police-unions/619006/.

[81] James Fyfe, *Police Practices Briefing Transcript*, U.S. Comm. on Civ. Rights, 1, 94. (2000).

[82] *Id.* at 77.

[83] Schwartz, *supra* note 66, at 918; *Bell v. City of Milwaukee*, 746f. 2d 1205 (1984).

[84] Schwartz, *supra* note 66, at 918; *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625 (1983).

[85] Schwartz, *supra* note 66, at 888.; *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625 (1983); *Milwaukee v. Grady*, 746 F.2d 1205 (2015).

[86] Schwartz, *supra* note 66, at 888; S*mith v. Wade*, 461 U.S. 30; 103 S. Ct. 1625 (1983); *Bell v. City of Milwaukee*, 746f. 2d 1205 (1984).

[87] New Mexico Civil Rights Act, HB 4, 117th Cong. (2021).

[88] The George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong., § 2 (2020).

violated during encounters with law enforcement officers who used excessive force. Both Colorado and New Mexico also took measures to completely eradicate the use of the defense in state court. [89] The implications of the Colorado senate bill, SB217, Enhance Law Enforcement Integrity, has allowed Colorado citizens to file lawsuits against individual Colorado police officers alleging civil rights violations.[90] Notably, there is a $25,000 cap on such judgements against law enforcement officers.[91] A seemingly low monetary amount (in comparison to publicized suits), this price point is not so high that it makes the assumption by officers of individual financial responsibility unrealistic, while preserving the deterrent value. While these are beneficial measures to reduce the use of the qualified immunity defense on a state-level, they are not a panacea. A patchwork of state regulations will do little to change the dynamic nature of what is clearly a national issue.

Part III: The Proper Policy Response to Qualified Immunity

A. Necessity of Passing The Ending Qualified Immunity Act

The Ending Qualified Immunity Act, H.R. 1470, was first introduced in 2020 by Michigan Representative, Justin Amash and Massachusetts Representative, Ayanna Pressley.[92] The purpose of the bill is to remove the qualified immunity defense:

> Section 1979 of the Revised Statutes (42 U.S.C. 5 1983) is amended by adding at the end the following: It shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[93]

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[89] Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 Vill. L. Rev., 585, 630 (2020).

[90] Newsy Staff, *An Inside Look at Colorado's Year-Old Qualified Immunity Ban*, KXLF.com, (Jul. 22, 2021), https://www.kxlf.com/news/national/an-inside-look-at-colorados-year-old-qualified-immunity-ban#:~:text=The%20qualified%20immunity%20ban%20allows,qualified%20immunity%20ban%20took%20effect.

[91] *Id.*

[92] The Ending Qualified Immunity Act of 2021, H.R. 1470, 117th Cong. § 2 (2021) (*prev.* S. 4142, A bill to amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes, (2020)).

[93] *Id.*

As of this writing (March 2022), The Ending Qualified Immunity Act, H.R. 1470, has been introduced in the House and is waiting for subcommittee review.[94]

H.R. 1470 would significantly restrict the ability of law enforcement offices to utilize the qualified immunity defense after police misconduct has occurred.[95] However, the Act would be further enhanced by the addition of preventative measures. The primary preventative measure that should be considered for inclusion is the addition of explicit, uniform, and widespread police training on a national level. For example, procedural justice policing, and improved police training (emphasizing transparency, responding to community concerns, and allowing for citizens to express concerns about their interactions with law enforcement in an open forum) has been shown to reduce citizens' distrust of law enforcement and reduce the number of interactions that lead to the use of force.[96]

B. Opposition to the Ending Qualified Immunity Act

Unsurprisingly, there is opposition to H.R. 1470, most notably coming from police unions. Members of police unions and affiliated organizations have expressed concern for the safety of law enforcement officers, as well as the likelihood of, "plaintiffs [being]... more willing to file cases alleging novel constitutional claims."[97] These groups suggest that this would likely have implications on officers' ability to perform and maintain their jobs.[98] The Court sided with this opposition by the expansion of the use of the defense in *Harlow*, citing the potential for increased lawsuits that would ultimately taint the law enforcement profession if qualified immunity was not available.[99] Even though there are different policy mechanisms in place in different jurisdictions–some require officers to be indemnified under their state-specific case law, some may indemnify officers, but are not required to under their state-specific case law, and others prohibit indemnification altogether–the outcome almost always remains the same.[100] Data shows that officers rarely, if ever, assume financial

[94] *Id.*

[95] *Id.*

[96] George Woods, Tom R. Tyler, and Andrew V. Papachristos, *Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*, Northwestern Inst. for Pol. Res., Yale Law School, North. Dept. of Soc., 3 (2020).

[97] Joanna Schwartz, *After Qualified Immunity*, Columbia L. Rev., 309, 325, (2016).

[98] *Id.* at 325.

[99] *Id.* at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[100] Schwartz, *supra* note 70, at 1806.

responsibility in claims of police misconduct.[101] In turn they are also rarely publicly accountable for acts of police misconduct ("mistakes or moments of bad judgment").[102]

Another reason for opposition to the proposed legislation is the existence of state-specific immunity policies and an interest in managing police officer liability at the state as opposed to the federal level. While "some jurisdictions are statutorily committed to indemnifying officers for suits arising out of their employment"[103] others "limit indemnification to cases in which the officer was not acting maliciously or in violation of certain policies."[104] Practically, however, the interaction between citizens and the police does not stop at state lines.

Conclusion

A. Why the Passing of The Ending Qualified Immunity Act Matters Now

In 2016 Justice Kennedy said that the re-examination of a law or standard does not showcase weakness because it is an obligation within a judge's oath.[105] The iterative re-examination of qualified immunity should never be considered disrespectful of law enforcement individuals or of the challenges of the job they do. Instead, it should be considered a constitutional and moral duty of legislators, holders of office, and members of the judiciary, and maybe of the citizenry as well.

The persistent police misconduct, mistrust of the police, the ongoing reliance on qualified immunity, and the profound effect that these components have had on America in 2022 make discussion of legislative remedies highly relevant today.[106] The Ending Qualified Immunity Act ends ambiguity and reliance on subjective or politicized concepts of "reasonableness."[107] The implementation of this bill will deter the use of excessive force by using the deterrent value of personal liability. The reduction of harms that are the basis for large taxpayer-funded civil settlements for these cases of police misconduct will allow the use of funds for other purposes. In turn, the government would be able to appropriately channel resources into education for the police and for the community. Neither calls to

[101] *Id.* at 1806.
[102] *Id.* at 1848.
[103] *Id.* at 918.
[104] *Id.* at 918.
[105] Schwartz, *supra* note 66, at 1839.
[106] Blum, *supra* note 28 at 91, 360.
[107] The Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021).

"defund the police," nor is the passage of the Ending Qualified Immunity Act a panacea for a flawed system. The issues at stake are not solved by less funding, but rather by more accountability and training. This bill is important to place accountability where it belongs and to re-establish trust. Passage of this legislation is an essential element of a multicomponent plan that must include increased and universal police training to evidence-based standards and the ubiquitous use of body cameras. Taken together, these components can become the foundational package of criminal justice reform in the United States.

Legally Invisible: The Role of Health Law in Addressing Black America's Health Disparities

Evelyn Boateng-Ade

"…they were powerless and legally invisible; the courts were almost completely uninterested in the safety and health rights of the enslaved." – Harriet Washington, Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present

Introduction: Health Disparities Today

The United States is strides behind other developed nations in terms of health outcomes.[1] A 2013 study that compared seventeen countries found that, "Americans live sicker and die younger than similarly situated people residing in every other developed nation."[2] Health quality statistics compiled by the Organization for Economic Co-operation and Development confirm that after almost 10 years, these conclusions are still the same.[3] The leading causes of death that contribute to the United States' poor health status are heart disease, cancer, diabetes, and unintentional injuries, such as death from gun violence and drug overdoses.[4] In addition to poor health outcomes,[5] the United States also spends exponentially more on healthcare compared to other similarly situated developed nations, primarily due to the cost of U.S. healthcare services.[6]

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[1] Judith Daar*, The New Eugenics: Selective Breeding in an Era of Reproductive Technologies* 78-103 (2017).

[2] *Id.* at 78.

[3] Nisha Kurani & Emma Wager, *How Does the Quality of the U.S. Health System Compare to Other Countries*, Peterson-KFF Health System Tracker (2021), https://www.healthsystemtracker.org/chart-collection/quality-u-s-healthcare-system-compare-countries/.

[4] *Leading Causes of Death*, Centers for Disease Control and Prevention (2021), https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm.

[5] *OECD Health Statistics 2020,* Organization for Economic Co-operation and Development (July 2020). https://www.oecd.org/els/health-systems/Table-of-Content-Metadata-OECD-Health-Statistics-2020.pdf.

[6] *Id.*

Health disparities have come to the forefront of media attention in the United States due to the COVID-19 pandemic.[7] The disproportionate impact that COVID-19 has had on certain populations, like Black and brown communities, has become glaringly clear to policy makers and activists.[8] Unfortunately, the reality is that health disparities are not distinct to the COVID-19 pandemic. Health disparities have existed all throughout the history of the United States and continue to prevail today. According to the Center for Disease Control, health disparities can be defined as, "preventable differences in the burden of disease, injury, violence, or opportunities to achieve optimal health that are experienced by socially disadvantaged populations."[9] Social disadvantage stems from poverty, education level, access to healthcare, and other social determinants of health.[10] Further, a major aspect of health disparities, the social determinants of health, is the "the conditions in which people are born, grow, live, work, and age that shape health."[11] The National Community Reinvestment Coalition reported that "60% of your health is determined solely by your zip code."[12] Ultimately, race and racism are a major social determinant of health in the United States and influence all of the social factors that play a role in an individual's state of health.[13]

Race and racism are embedded throughout the institutional systems and structures in the United States, leading to the rise of institutionalized racism.[14] Senior Director of the American Public Health Association Angela McGowan defines institutionalized racism as "differential access to the goods, services, and opportunities of society by race… and is codified into laws and practices… in the everyday conditions and structures of life as well as in the agency and access to power."[15] For Black people in the United States, racism is an

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[7] *Health Equity Considerations and Racial and Ethnic Minority Groups*, Centers for Disease Control and Prevention (2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

[8] Nambi Ndugga, *Disparities in Health and Health Care: 5 Key Questions and Answers*, Kaiser Family Foundation (May 11, 2021), https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/.

[9] *Health Disparities*, Centers for Disease Control and Prevention: Division of Adolescent and School Health, https://www.cdc.gov/healthyyouth/disparities/index.htm (Nov. 24, 2020).

[10] *Id.*

[11] Ndugga, *supra* note 8.

[12] Emily Orminski, *Your ZIP Code is More Important Than Your Genetic Code*, National Community Reinvestment Coalition (June 30, 2021), https://ncrc.org/your-zip-code-is-more-important-than-your-genetic-code/.

[13] Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE (Sept. 23, 2015), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0138511.

[14] Monica E. Peek et al., *Racism in Healthcare: Its Relationship to Shared Decision-Making and Health Disparities: A Response to Bradby*, Soc. Sci. & Med., July 2010, 13.

[15] Angela K. McGowan et al., *Civil Rights Laws as Tools to Advance Health in the Twenty First Century*, 37 Ann. Rev. Pub. Health 185 (2016).

impediment that derails any attempt of progress, especially in healthcare. Dr. Jameta Barlow accurately argues that, "Living while Black in the U.S. is a major social determinant of health."[16] As such, Black Americans face disparate outcomes in all of the leading causes of death in this country.[17] For example, Black Americans face a greater risk for heart disease, stroke, cancer, asthma, influenza, diabetes, and HIV/AIDS.[18] The National Kidney Foundation reports that Black Americans suffer from renal disease at three times the rate of their white counterparts.[19] The American Cancer Society also reports that, "Black Americans have the highest death rate and shortest survival rate for most cancers."[20] There is a life expectancy gap of about four years between Black Americans and whites in the United States, and this rate varies widely in different populations across the country.[21] Nevertheless, arguably, the most pressing of the health disparities is maternal mortality.[22] Today, "Black women die during childbirth at three times the rate of white women."[23] Accounting for the education level, income, marital status, and every other confounder in Black women's lived experiences, the rates remain the same.[24] The health disparities ravaging the Black American community are clear.

Alleviating health disparities is key to bridging the gap between the United States and other developed nations in healthcare outcomes and costs. Black Americans face societal discrimination that directly impacts their physical and mental health.[25] The health implications of discrimination and racism are so widespread that the law must be an equalizer to ensure the health and safety of all. The Biden administration has claimed to have immediate priorities in racial equity, the improvement of access to healthcare, and the mitigation of the disparate impact that Black and brown communities face in health

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[16] Jameta Nicole Barlow, *Restoring Optimal Black Mental Health and Reversing Intergenerational Trauma in an Era of Black Lives Matter*, 41 Biography 895 (2018).

[17] Rachel Lutz, *Health Disparities Among African-Americans*, Pfizer (2021), https://www.pfizer.com/news/articles/health_disparities_among_african_americans.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Maria Maribito, *Life Expectancy Gap Between Black and White Americans Diminishes by 48.9%*, Healio (Oct. 3, 2021), https://www.healio.com/news/primary-care/20211011/life-expectancy-gap-between-black-and-white-americans-diminishes-by-489.

[22] Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why*, Nat'l Pub. Radio (Dec. 7, 2017), https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why.

[23] *Id.*

[24] *Id.*

[25] Barlow, *supra* note 16.

outcomes.[26] Yet, the extent to which the administration's attempts will be fruitful is yet to be determined. The COVID-19 pandemic exposed inequities on multiple fronts for Black Americans and other minority groups.[27] The period immediately following this global catastrophe can be a catalyst for improving the health of minorities through the legislative process.

This law review will evaluate the extent to which the current legal landscape in the United States acts as an equalizer for Black Americans' health outcomes. First, the historical roots of medical neglect of Black Americans in the United States will be explored. Then, there will be an analysis of the role of law in addressing health disparities from the past and present. Finally, this law review will conclude with a proposal to implement a health equity framework to the legislative process of health law to move past inequality and create a path forward to health equity.

Part I. A History of Neglect: The Deep-Rooted History of Racism and Health in America

A. The History of Health Reform

In the United States, there is no constitutional right to healthcare. Despite this, the federal government has still taken the role of protecting public health and ensuring that citizens have access to healthcare. This dates as far back to the 19th century when Congress passed a law giving the federal government the requirement of dispersing the cowpox vaccine to all citizens.[28] The federal government then took a backseat role in healthcare provision until the cholera outbreak of the late 1800s.[29] The cholera epidemic sparked a debate on states' rights and the powers of the federal government in setting quarantine measures. This led to Congress taking action in 1893 to give the federal government the authority to establish quarantine measures based on the federal government's power to regulate commerce.[30] This law is still standing today.

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[26] *The Biden-Harris Administration Immediate Priorities*, The White House, https://www.whitehouse.gov/priorities/ (last visited Nov. 3, 2021).

[27] Ndugga, *supra* note 8.

[28] Carleton B. Chapman & John M. Talmadge, *Historical and Political Background of Federal Health Care Legislation*, Duke Law Journal, 335 (1970). https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3291&context=lcp.

[29] *Id.* at 339-40.

[30] *Id.*

The progressive era of the early 1900s sparked a wave of attempts to create major health reform in this country.[31] Beyond the quarantine and vaccination efforts of the law up to this point in history, little was done to improve the quality of healthcare. Former Dean of Dartmouth Medical School Dr. Chapman, along with Dr. Talmadge, describes that during this period of time, "From Harding to Hoover, the federal government showed little interest in health except that of veterans."[32] Advocates like the American Association for Labor Legislation and state legislators called for the creation of a national health insurance program to reshape healthcare in the United States for all citizens.[33] Unfortunately, their efforts came to naught due to major opposition from rich and powerful corporations, conservative legislators, and other opponents of transformative health reform. [34] The Great Depression led the American public to demand for health reform.[35] The economic crisis created a shift in the public opinion of the American population, which resulted in the passing of the Social Security Act of 1935, which was a social insurance program for retired Americans.[36] This legislation was a catalyst for the creation of social welfare initiatives in the United States. This movement for social welfare initiatives continued into 1965 when the Medicare and Medicaid Act was passed.[37] This groundbreaking legislation created a federal health insurance program for vulnerable low-income and elderly communities.[38] It addressed the growing debates of states' rights and federal rights in the provision of healthcare by creating a division of power between both levels of government. [39] After the passage of the Medicare and Medicaid Act, health reform came to a standstill for almost 50 years. Nevertheless, there have been several attempts on the executive level to create health reform throughout history. These attempts were centered around creating national health insurance reform.[40] As such, from former

[31] *Id.*
[32] *Id.* at 341.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 342.
[36] *Id.* at 343.
[37] *CMS' Program History*, Centers for Medicare and Medicaid Services (last visited Apr. 7 2022). https://www.cms.gov/About-CMS/Agency-Information/History.
[38] *Id.*
[39] *Id.*
[40] Jonathan Oberlander, *Unfinished Journey-A Century of Health Insurance Reform in the United States,* New England Journal of Medicine (2012), http://dx.doi.org/10.1056/NEJMp1202111.

President Franklin Roosevelt to President Bill Clinton, health insurance reform varied, but no legislation was passed, for various reasons.[41]

The Patient Protection and Affordable Care Act is a massive step towards achieving health reform. This legislation, passed by the Obama administration, involves a multifaceted approach targeted at eliminating health disparities by improving access to and the quality of healthcare.[42] The Act indirectly addresses issues that contribute to health disparities across the country by implementing measures to increase access to quality and affordable health care.[43] These measures include, "the expansion of Medicaid and the Children's Health Insurance Program… the establishment of state insurance exchanges…[and] tax credits to middle-class families."[44] The Affordable Care Act also includes measures that explicitly address health disparities.[45] For example, "Section 1557 of the Affordable Care Act upholds Title VI of the Civil Rights Act of 1964… extends the prohibition of discrimination to the protected classes of gender, disability, and age…and creates enforcement mechanisms [to prevent both intentional and disparate impact discrimination]."[46] Title VI of the Civil Rights Act of 1964 constitutes a key step in the fight towards health reform in the United States, as it led to the desegregation of hospitals throughout the country.[47] Upholding Title VI in The Affordable Care Act is a clear signal that discrimination is still an issue in this country, and that the Affordable Care Act intends to address it. Further, the Affordable Care Act also includes measures to diversify the healthcare workforce, creates funding for the Department of Health and Human Services' Office of Minority Health, requires demographic based data collection, and establishes the Patient-Centered Outcomes Research Institute to research "potential differences in prevention, diagnosis, or treatment effectiveness" across different populations.[48] Ultimately, the measures implemented in the Affordable Care Act have revitalized the state of healthcare in the United States. The most drastic effects are that "the Affordable Care

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[41] *Id.*

[42] Daryll C Dykes, *Health Injustice and Justice in Health: The Role of Law and Public Policy in Generating, Perpetuating, and Responding to Racial and Ethnic Health Disparities Before and After the Affordable Care Act,* William Mitchell Law Review, 1196-98 (2015). https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=2900&context=wmlr.

[43] *Id.*.

[44] *Id.* at 1197.

[45] *Id.*

[46] *Id.* at 1198-99.

[47] Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

[48] Dykes, supra note 42 at 1197.

Act has provided health insurance to 31 million people" since its passage, drastically reducing the population of uninsured individuals.[49]

B. The Neglect of Black Americans in Health Law

Racism in healthcare is a phenomenon that precedes the United States itself. This phenomenon stems from the institution of slavery, which existed in the United States for a period of over 200 years. Slaves were viewed legally as mere property; a good to be exchanged and sold at the owner's will. This was enforced by the Fugitive Act of 1850,[50] and the subsequent Dread Scott ruling in 1857.[51] These infamous acts by the United States legislature and judiciary, respectively, reflect a systematic attempt to subjugate Black Americans to a life of servitude. The novel, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* by medical ethicist Harriet A. Washington explores this medical mistreatment of Black America.[52] The text argues that "Enslavement could not have existed and certainly could not have persisted without medical science."[53] Slave owners' goals were only to keep slaves healthy enough to work.[54] The slave owner had complete control over when a slave required medical attention and what kind of care the slave received.[55] In return for protecting the property of slave owners, physicians also received a never-ending supply of medical subjects to experiment on and received financial incentives.[56] In the words of Dr. Harry Bailey, a psychiatrist and hospital administrator known for his clandestine deep sleep experiments, "... it was cheaper to use niggers than cats, because they were everywhere and cheap experimental animals."[57] A prolific example of this is the experiments done by Dr. J Marion Sims, the so-called father of gynecology. Dr. Sims is known for pioneering surgical cures for many diseases afflicting women in the 19th century.[58] His methodology included experimenting on slave women without anesthesia or informed consent.[59] Supporters of Dr. Sims' methods cite the

[49] *New HHS Data Show More Americans than Ever Have Health Coverage through the Affordable Care Act*. U.S. Health and Human Services (June 2021). https://www.hhs.gov/about/news/2021/06/05/new-hhs-data-show-more-americans-than-ever-have-health-coverage-through-affordable-care-act.html

[50] *United States Fugitive Slave Law*, Library of Congress (1850), https://www.loc.gov/item/98101767/.

[51] Scott v. Sandford, 60 U.S. 393 (1856).

[52] Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans From Colonial Times to the Present*, 39 (2010).

[53] *Id.*

[54] *Id.* at 43.

[55] *Id.*

[56] *Id.* at 44.

[57] *Id.*

[58] Jeffery S. Sartin, *J. Marion Sims, the Father of Gynecology: Hero or Villain?*, 97 S. Med. J. 500 (2004).

[59] *Id.*

dominant moral beliefs of the time period and the horrid conditions slaves who suffered from these afflictions faced with their disease as justification for his actions.[60] However, Dr. Sims' set a precedent for scientific racism that still exists today. The Tuskegee Study of Untreated Syphilis in the Negro Male, a federally funded observational research study where Black Americans were denied treatment for their syphilis for decades in order for scientists to study the progression of the disease to death, is an infamous example of the public health system in America failing and exploiting Black Americans.[61] Similarly, the current racial bias in pain assessment, where medical students are falsely taught misconceptions about treatment of Black Americans for pain, exemplifies the remnants of scientific racism throughout the United States.[62]

Similarly, the eugenics movement in the United States amplified the role of racism in healthcare. Born from the idea of Social Darwinism, Francis Galton coined the term eugenics in the mid 19th century to describe his aim of "selective procreation to refine the human race while conquering social dysfunction."[63] On its face, the movement sought to isolate 'unwanted' genes to promote the birth of healthy children. But, in essence, the creation of a "science" that sought to eliminate of 'unwanted' genes was a way to justify a discriminatory, ableist, and racist agenda. The eugenics movement was also used to support scientific racism, which is a pseudoscience with the goal of finding empirical evidence of Black inferiority.[64] The pseudoscience of eugenics transcended through time. In the early 20th century, reproductive rights activist Margaret Sanger supported the eugenics movement and used its ideology to advocate for increased of abortion access.[65] When reproductive preventative resources, like the abortion pill and intrauterine devices, were first made available to the public, they were marketed directly to poor Black women.[66] Evidence shows that "clinics statistically [have] given intrauterine devices, IUDs, more to Black women than white women."[67] The overuse of reproductive control devices on Black women subversively

[60] L. Lewis Wall, *The Medical Ethics of Dr J Marion Sims: A Fresh Look at The Historical Record*, 32 J. Med. Ethics 346 (2006).

[61] Marcella Aslan & Marianne Wanamaker, *Tuskegee and The Health of Black Men*, 133 Q.J. Econ. 407 (2017).

[62] Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 Proc. Nat'l Acad. Sci. 4296 (2016).

[63] Washington, *supra* note 52.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

aided in the promotion of the goals of the eugenics movement. Besides influencing social movements, the eugenics movement also influenced health law and further exacerbated health disparities across the country.

Furthermore, the practice of over policing Black women's reproductive rights traces back to the history of forced sterilization in the United States. In the 20th century, "60,000 people were sterilized in 32 states across the country" due to the eugenics movement.[68] Eugenics sterilizations targeted disadvantaged groups, such as "immigrants, Blacks, Indigenous people, poor whites, and people with disabilities.[69] Sterilizations were sanctioned by states and the federal government, in an effort to eliminate 'unwanted' genes from society.[70] The Supreme Court upheld that it is a state right to forcibly sterilize individuals deemed "unfit to procreate" in a landmark 1927 decision by an 8-1 vote in the case *Buck v. Bell.*[71] This case centered around the question of whether "states may sterilize inmates of public institutions. The Court argued that imbecility, epilepsy, and feeblemindedness are hereditary, and that inmates should be prevented from passing these defects to the next generation."[72] In the majority opinion of the court, Justice Holmes stated:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. Three generations of imbeciles are enough.[73]

The beginnings of legalized forced sterilization was centered around ability, namely targeting people with intellectual disabilities and hereditary disease.[74] After the process of desegregation began in the 1950s, due the Supreme Court decision made in *Brown v. Board of Education*, the focus of forced sterilization shifted to controlling Black reproduction.[75] The sterilization rates for Black women skyrocketed.[76] Colloquially known as the 'Mississippi Appendectomy,' the rates of Black women being forcibly sterilized without their consent,

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[68] Alexandra Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, U. Mich. Inst. for Healthcare Pol'y & Innovation (Sept. 23, 2020), https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasted-21st.

[69] *Id.*

[70] *Id.*

[71] Buck v. Bell, 274 U.S. 200, 207 (1927).

[72] Nathalie Antonios, *Buck v. Bell (1927),* (2012) https://embryo.asu.edu/pages/buck-v-bell-1927.

[73] *Id.*

[74] Stern, *supra* note 68.

[75] *Id.*

[76] *Id.*

during routine procedures, with no legal oversight, was unprecedented.[77] This is not just a remnant of the past. As recently as 2010, up to 1,400 incarcerated women in California were forcibly sterilized under the same rationale as the eugenics movement.[78] The legal precedent for current forced sterilization practices of incarcerated women stems from the precedent set by the Supreme Court in *Buck v. Bell*, which after almost a century, has not been overturned.[79] California was the third state in the United States to pass a sterilization law, Chapter 720 of the Statutes of 1909, which stated:

> Medical superintendents in state homes and state hospitals to perform 'asexualization' on patients…identified as 'afflicted with mental disease which may have been inherited and is likely to be transmitted to descendants, the various grades of feeblemindedness, those suffering from perversion or marked departures from normal mentality or from disease of a syphilitic nature.'[80]

With the passage of the Eugenics Sterilization Compensation Program in 2017, California repealed Chapter 720 and paid reparations to living victims of forced sterilization.[81]

The vestiges of slavery are ever present in the history of healthcare, and healthcare today. Harriet Washington proclaims, "The records reveal that slaves were both medically neglected and abused because they were powerless and legally invisible; the courts were almost completely uninterested in the safety and health rights of the enslaved."[82] To date, the medical history of slaves is actively being neglected, ignored, and suppressed.[83] Society may never know the full scope of medical experimentation/torture enslaved Blacks endured in the United States because records were either not kept or destroyed.[84] The neglect of slaves closely mirrors the neglect of Black Americans in health law. Black Americans' health was predetermined by the history of America, and the laws. The next section will uncover this neglect and the legal attempts in the past and present at addressing health disparities.

Part II. The Law: The Greatest Equalizer or the Worst Perpetrator

[77] Tina K. Sacks, *Invisible Visits: Black Middle-Class Women in the American Healthcare System*, 93-107 (2019).

[78] Stern, *supra* note 68.

[79] Buck v. Bell, 274 U.S. 200, 207 (1927).

[80] Ca. Health and Saf. Code § 24210

[81] *Id.*

[82] Washington, *supra* note 52, at 44.

[83] *Id.*

[84] *Id.* at 48.

Historically, the law has played a twofold role in addressing health disparities. On the one hand, the Constitution has perpetuated and enabled health disparities and inequities.[85] While the Constitution itself does not create health disparities, between the ratification of the Constitution in 1788[86] and the passage of the 13th Amendment in 1865,[87] the Constitution essentially legalized racism and racial discrimination through its explicit protection of the institution of slavery.[88] Slavery deprived Black people in the United States of autonomy over their bodies and subjected them to a life of servitude as property of the white slaveowner. The almost 80 years that the Constitution upheld the system of slavery, and the following century of segregationist laws, were the breeding grounds for the health disparities seen today.[89] Until the passage of the Civil Rights Act of 1964, discrimination was state sanctioned and widely prevalent throughout the country, and throughout the healthcare field.[90] As such, Black Americans were excluded from providing and receiving healthcare services in the same facilities as White Americans.[91]

On the other hand, the law has opened avenues for promoting equality in healthcare. The prime example of this is the Equal Protection Clause of the Fourteenth Amendment.[92] The Equal Protection clause ensured that states must provide equal protection of the laws to everyone within the state, essentially prohibiting discrimination based on race.[93] A shortcoming of the Equal Protection clause is that only discrimination committed by government actors is prohibited.[94] The passage of the Civil Rights Act of 1964[95] directly addressed some of the shortcomings of the Equal Protection clause. Title VI of the Civil Rights Act states that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

[85] Dykes, *supra* note 42, 1147.
[86] U.S. Const.
[87] *Id.* at amend. XIII.
[88] Dykes, *supra* note 42, at 1147-48.
[89] *Id.*
[90] Pub L. No. 88-353, 78 Stat. 241 (1964).
[91] P. Preston Reynolds, *Professional and Hospital Discrimination and the US Court of Appeals Fourth Circuit 1956-1967*, 94 Am. J. Pub. Health 710 (2004).
[92] U.S. Const. amend. XIV, § 2.
[93] Dykes, *supra* note 42, at 1150.
[94] *Id.*
[95] Pub. L. No. 88-353, 78 Stat. 241 (1964).

assistance."[96] Title VI also incorporates compliance methods to ensure all federally funded programs are abiding by the regulations of the Equal Protection clause.[97]

While progress has been made in the fight to end health disparities in the United States, the law has not done enough. On its face, Title VI should be a piece of landmark legislation in the fight to end health disparities. And in some ways, it is.[98] Title VI compelled the integration of all hospitals and organizations receiving federal funding or risk losing funding, which essentially desegregated all of the hospitals in the blink of an eye.[99] But in more ways than not, it has fallen short of ending health disparities.[100] Integration did not end racial disparities, and ensuing policies exacerbated access and equality injustices that Title VI was meant to alleviate.[101] The cases of *Bryan v. Koch*[102] and *Linton v. Commissioner of Health and Environment United States* exemplify the beneficial impact that Title VI had.[103] In *Bryan v. Koch*, the courts ruled that the closure of the only hospital in a predominantly minority low-income community in New York City had a disparate impact and violated Title VI.[104] Similarly, the court came to the same conclusion in *Linton v. Commissioner of Health and Environment United States* regarding Tennessee's limited bed certification policy of nursing homes.[105] In these instances, Title VI was a champion of health rights for Black Americans. But this was not always the case.

Nevertheless, instead of eliminating all forms of discrimination and inequality in healthcare, Title VI just shifted the form of discrimination from overt discrimination to covert discrimination.[106] This covert discrimination can be seen in multiple ways, from private hospital closures in predominantly Black neighborhoods, to bias in the training of healthcare professionals, and more.[107] Covert discrimination is rampant in the healthcare field today.[108]

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[96] 42 U.S.C. § 2000d.
[97] Dykes, *supra* note 42, at 1167.
[98] *Id.*
[99] *Id.*
[100] Kay Van Wey, *Unequal Access to Healthcare: The More Things Change, the More Things Stay the Same*, Nat'l L. Rev. (Aug. 11, 2020), https://www.natlawreview.com/article/unequal-access-to-healthcare-more-things-change-more-things-stay-same.
[101] *Id.*
[102] 627 F.2d 612 (2d Cir. 1980).
[103] 65 F.3d 508 (6th Cir. 1995).
[104] 627 F.2d 612 (2d Cir. 1980).
[105] 65 F.3d 508 (6th Cir. 1995).
[106] *Id.*
[107] 65 F.3d 508 (6th Cir. 1995).
[108] *Id.*

An illustration of this covert discrimination in action is *Alexander v. Choate* - a Supreme Court decision that established that Title VI only applies to discrimination that is proven intentional.[109] Therefore, plaintiffs bringing Title VI violations to a court must prove that the alleged disparate impact was intentionally inflicted.[110] This was coined the doctrine of discriminatory purpose.[111] This limitation on Title VI violation claims "requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration,"[112] and was based on the ruling in *Washington v. Davis.*[113] Additionally, there must be direct evidence of discriminatory intent to prove a claim based on Title VI.[114] In *Coghlan v. Am. Seafoods Co.*, the court set the precedent that discriminatory intent must be proven "…without inference or presumption."[115] This is a major shortcoming of Title VI. Instead of protecting against all forms of discrimination, the doctrine of discriminatory purpose limits what type of discrimination violates the law. This shortcoming is best illustrated in the case of *NAACP v. The Medical Center.*[116] In this case, the National Association for the Advancement of Colored People sued the Wilmington Medical Center to stop them from closing the only hospital in a majority minority community.[117] The defendants argued that while there may be disparate impacts, these impacts were an unavoidable, necessary evil for the progression of their business.[118] The court ruled that this instance of moving medical services provided by the defendants from a low income inner-city community to the suburbs did not violate Title VI on the basis that the argument lacked evidence of intentional discrimination.[119] Here, the court prioritized the business interests of the Wilmington Medical Center over the health of the population. The Wilmington Medical Center's decision to move the hospital allegedly stems from the financial losses they were facing due to the population they were serving, which was a predominantly Black, low-income community.[120] The doctrine of discriminatory

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[109] 469 U.S. 287 (1985).
[110] Van Wey, *supra* note 100.
[111] Dykes, *supra* note 42, at 1168.
[112] *Id.* at 1153.
[113] Washington v. Davis, 426 U.S. 229 (1976).
[114] *Title VI Legal Manual*, The United States Department of Justice. (last visited Apr. 7 2022). https://www.justice.gov/crt/fcs/T6Manual6#DD.
[115] 413 F.3d 1090, 1095 (9th Cir. 2005).
[116] 657 F.2d 1322 (3d Cir. 1981).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] 657 F.2d 1322 (3d Cir. 1981).

purpose limits the court's ability to apply Title VI to a major issue impacting Black Americans' access to healthcare: hospital closures. This precedent allows hospitals to close in low-income minority communities to move to white affluent communities, if their outward intentions are not based on race, but rather profits. It could be disputed whether hospital closures directly play a role in health disparities, but studies show that mass hospital closures in minority communities has led to "healthcare deserts."[121] Studies show that, "25.6 percent of Blacks and 24.3 of Hispanics lived in zip codes with few or no primary care physicians, compared to that of 9.6 percent of Asian and 13.2 percent of whites."[122] If Title VI cannot address this injustice that is depriving Black Americans of access to healthcare, then it is exacerbating, rather than solving, health disparities.

Further, over a decade after the passage of the Affordable Care Act, unfortunately, health disparities still exist, and are increasing.[123] Consequently, the question then is whether this monumental piece of legislation was a failure, or just short sighted. The answer is, to an extent, both.

The passage of the Affordable Care Act was unique in comparison to health reform attempts made by previous presidential administrations in the past 70 years.[124] The Obama administration's prioritization of health reform amidst the global 2008 economic crisis, the administration's approach of allowing Congress to draft the legislation themselves, and the administration's overall determination led to the passage of this unprecedented health reform bill.[125] After 10 years since its implementation, the variety of opinions surrounding the Affordable Care Act's effectiveness are abundant, but the consensus is clear: there is still more to be done.[126] For example, *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services et al.* weakened the Affordable Care Act by dismantling the rule that states must either adopt Medicaid expansion or risk losing federal Medicaid

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[121] *Where are the "Healthcare Deserts" Located?,* Beckers Hospital Review, (2012). https://www.beckershospitalreview.com/quality/where-are-the-qhealthcare-desertsq-located.html

[122] *Id.*

[123] Frederick J. Zimmerman & Nathaniel W. Anderson, *Trends in Health Equity in the United States by Race/Ethnicity, Sex, and Income, 1993-2017,* JAMA Network, (2019). doi:10.1001/jamanetworkopen.2019.6386.

[124] Carol S. Weissert & William G. Weissert, *Governing Health: The Politics of Health Policy,* Journal of Politics, 1 (2d ed. 2002). http://proxygw.wrlc.org/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=88799630&site=ehost-live.

[125] *Id.*

[126] Lazmaiah Manchikanti et al., *A Critical Analysis of Obamacare: Affordable Care or Insurance for Many and Coverage for Few?*, Pain Physician, Mar. 2017, 111, Dykes, *supra* note 42, at 1215.

funds and it dissolved the individual mandate.[127] This ruling has stalled the positive impacts Medicaid expansion could have on decreasing the uninsured rate and increasing access to healthcare.[128] Currently, twelve states have opted to not expand Medicaid.[129] These states, coincidentally, also have the highest uninsured populations.[130] Additionally, studies have shown that while the uninsured rate has decreased for all racial demographics, the uninsured rate for Black Americans is still disproportionately higher.[131] This shows that increasing access does not directly address the gaps along racial demographics. There must be a need not being addressed by current legislation, and that need is a health equity framework.

Arguments about the extent of progress in access and affordability in the healthcare system created by the Affordable Care Act, the lack of acknowledgement of historical trauma, and the systemic issues derived from institutionalized racism are common critiques of the Affordable Care Act.[132,] The Affordable Care Act was not able to close the racial gap in uninsured rates, despite the fact that it lowered the uninsured population by as much as 40%.[133] Further, the quantifiable measures of the Affordable Care Act's success being advertised by the Biden administration revolve around increases in health insurance coverage, and not on reducing health disparities.[134] This shows that the set goals of the Affordable Care Act were not in fact to directly address health disparities, but rather to address access to health insurance. The presumption that increasing access to healthcare would create a snowball effect on health disparities is a major shortcoming of the Affordable Care Act. Further, the Affordable Care Act's upholding Title VI of the Civil Rights Act of 1964 is not enough to tackle health disparities because Title VI itself is not revolutionary enough to tackle health disparities. Dr. Daryll C. Dykes summarized it best by stating:

While health disparities largely result from past and present social, cultural, economic, political, and medical issues, all facets of law-international covenants; federal and state

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[127] Nat'l Fed'n of Indep. Bus. et al. v. Sebelius*,* 132 S. Ct. 2566, 567 U.S. 519, (2012).

[128] *Id.*

[129] *Id.*

[130] *New HHS Report Highlights 40 Percent Decline in Uninsured Rate Among Black Americans Since Implementation of the Affordable Care Act.* U.S. Department of Health and Human Services, February 2022. https://www.hhs.gov/about/news/2022/02/23/new-hhs-report-highlights-40-percent-decline-in-uninsured-rate-among-black-americans-since-implementation-affordable-care-act.html

[131] *Id.*

[132] Manchikanti et al., *supra* note 126, *7 Legislative Actions to Reduce Health*, *in* How Far Have We Come in Reducing Health Disparities? Progress Since 2000: Workshop Summary, Nat'l Acads. Press (2012).

[133] *New HHS Report Highlights 40 Percent Decline in Uninsured Rate Among Black Americans Since Implementation of the Affordable Care Act, supra* note 130.

[134] *Id.*

constituents; federal, state, and local statutes; agency regulations; executive orders; and judicial rulings- have helped shape health injustice as it exists today. More importantly, the law will remain both a formidable hurdle and an indispensable resource in our national drive toward true justice in health: health equity for all Americans. Although substantial challenges remain, passage of the Patient Protection and Affordable Care Act of 2010 is a monumental and unprecedented leap toward the goal.[135]

All in all, the Affordable Care Act paved the way for health reform. Nevertheless, it should not be considered the end, but rather the beginning of health reform in the United States.

Part III. How to Live: Creating a Path Forward

Now that the process of health reform has begun in this country, what is next? The disparate impacts that the SARS-CoV-2 virus and the ensuing lockdown have had on vulnerable populations like people of color, women, the LGBTQ+ community, and more, has catalyzed a push for legislative action to address health disparities.[136] This legislative action requires a health equity framework driven by the needs and experiences of Black populations during the drafting of legislation. The starting point of this framework is described throughout this concluding section. A health equity framework must continuously be adaptive and inclusive, and thus a complete framework would only limit the efficacy of the proposal. For any legislative action to be effective in curbing the rates of health disparities, it must meet certain criteria. These criteria will make up the beginnings of a framework to evaluate health law for the extent to which it can impact health disparities.

To start, any legislative actions must begin with the end in mind. One should ask: what does ending health disparities look like? What qualitative and quantitative measures will quantify the progress made over time? These questions, and others, must be taken into consideration in the beginning phases of any design drafting. Legal scholars Angela P. Harris and Aysha Pamukcu suggest:

> Eliminating disparities means: (1) eliminating discrimination against stigmatized groups; (2) changing the spatial distribution of healthy environments, economic resources, and opportunity; and (3) equally distributing the power to affect the conditions of one's life.[137]

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[135] Dykes, *supra* note 42, at 1215.

[136] *Id.*

[137] Angela P. Harris & Aysha Pamukcu, *The Civil Rights Of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. Rev. 758 (2021).

Any legislation needs to determine specific definitions and end goals to adequately evaluate effectiveness. The failures of Title VI in ending health disparities, for example, are tied to the fact that the purpose of Title VI was not to end health disparities.[138] Rather, Title VI was meant to address segregated health facilities that received funding from the federal government.[139] Title VI had a very narrow and targeted focus, and so it is not a surprise that it achieved narrow results.

Another key aspect of addressing health disparities is the understanding of the distinction between health equity and health equality. The Center for Disease Control defines health equity as achieving "full health potential [when] no one is hampered by social position or circumstance."[140] Health equity should take precedence over health equality for health disparities to be fully addressed. In other words, health disparities do not disparage communities equally, so they should not be addressed equally. There are always questions of concern when moving beyond equality to equity, due to the fear of excluding certain groups of people. But addressing health disparities calls for a movement against the status quo to prioritize the lives of those most in danger. This prioritization entails an evidence based, community-oriented approach. The Black Feminist and Womanist Analytical Path to Health Equity, coined by feminist scholars Dr. Jameta Barlow and Breya Johnson, is an illuminating model for using an evidence-based approach to creating health equity for a target community.[141] Their policy analysis incorporates defining the goals of the intervention, identifying multifaceted barriers, and outlining action steps and recommendations, all while engaging in dialogue and assembling narratives throughout the process.[142] Equity also entails a prioritization of diversity and inclusion. Studies show that having a healthcare workforce that looks like the community- in terms of race, gender, sexual orientation, physical disability status, socioeconomic status, etc.- improves the level of care for diverse populations.[143] The federal government can improve diversity and inclusion of the healthcare workforce by eliminating the systemic roadblocks that people of color face entering these professions. One

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[138] Barry R. Furrow et al., *Health Law: Cases, Materials, and Problems* (8th ed. 2018).

[139] *Id.*

[140] Lisa Guerin, *Federal Antidiscrimination Laws*, NOLO, https://www.nolo.com/legal-encyclopedia/federal-antidiscrimination-laws-29451.html (last visited Nov. 2, 2021).

[141] Jameta N. Barlow & Breya M. Johnson, *Listen To Black Women: Do Black Feminist and Womanist Health Policy Analyses*, 31 Women's Health Issues 91 (2021).

[142] *Id.*

[143] Fatima Cody Stanford, *The Importance of Diversity and Inclusion in the Healthcare Workforce*, 112 J. Nat'l Med. Assoc. 247 (2020).

method that has proven effective for the teaching profession is forgiving student loan debt.[144] Equity, as of now, is an ideal that has not yet been achieved. The means of creating it and sustaining it are unknown. Either way, diversity and inclusion play a key role in the image of an equitable state.

The vitality of a social determinants of health focused approach and an intersectional approach in legislative attempts to improve health disparities should also be taken into consideration. According to the National Academy for State Health Policy, "Despite its high price tag, the majority of health care spending ignores critical determinants of health, including social and economic factors, the environment, and health behaviors."[145] The social determinants of health are missing in the current healthcare laws, despite the fact that they play a large role in health outcomes.[146] Ensuring citizens have access to healthy food, clean water, a safe living environment, and more social determinants of health will prevent poor health outcomes before they even arise. Nevertheless, current health legislation erroneously neglects this.[147] The inclusion of Kimberlé Crenshaw's theory of intersectionality, drafted to address how the law has neglected the multiplicity of Black women's identity and how the extrapolation of discrimination affects marginalized communities, is necessary in the discussion of addressing health disparities because health disparities are an intersectional issue.[148] Crenshaw shows in her revolutionary law review, *Mapping the Margins*, the impacts of using an intersectional lens, and the impacts of not using an intersectional lens has on the creation of law.[149] The law must be intentional about addressing the duplicitous layers of discrimination that communities of color face to truly be intersectional. The discrimination and biases that lead to health disparities are intersectional and should be addressed through an intersectional lens to exact legitimate change.

Another important approach that should be considered stems from Dr. Jameta Barlow's decolonizing method. This methodology, based on Black women's lived experiences, is a lens to analyze and approach a problem in a way that pushes against the

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[144] Bayliss Fiddiman, *To Attract Racially Diverse Teachers, Reduce Student Loan Debt,* ASCD (2020). https://www.ascd.org/el/articles/to-attract-racially-diverse-teachers-reduce-student-loan-debt.

[145] *Resources For States To Address Health Equity And Disparities*, Nat'l Acad. for State Health Pol'y, https://www.nashp.org/resources-for-states-to-address-health-equity-and-disparities/ (last updated Mar. 31, 2021).

[146] Ndugga, *supra* note 8.

[147] *Id.*

[148] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

[149] *Id.*

patriarchal, imperialist, and capitalist status quo.[150] Dr. Barlow's approach calls for a decolonization of science and health and a break against the normative systems that promote systems of oppression.[151] Decolonizing health law requires "the interrogation of research, clinical practices, and/or approaches to transform knowledge production" to address the implicit biases and racist practices embedded throughout the healthcare system, and the country as a whole.[152] An inherent issue in the current health laws is that they lack a method of addressing systemic oppression. Drafting legislation from a decolonizing method allows the law to work against systemic oppression from within the system, and eventually undo it. Health law must be direct at acknowledging that race and racism are a social determinant of health. Drafting legislation from the mindset that institutionalized racism exists and is playing a detrimental role on the health of Black Americans will initiate the decolonization of health law and lead to solutions that create true health equity.

To demonstrate the health equity framework in action, there will be an evaluation of The Health Equity and Accountability Act utilizing the framework. The Health Equity and Accountability Act of 2020, H.R. 6637, was proposed to the House of Representatives by the Democratic Caucus with the Congressional Hispanic Caucus, Congressional Black Caucus, and the Congressional Asian Pacific American Caucus.[153] The first step of the aforementioned proposed framework is to identify whether there are clear goals to this legislation. The bill states that the goal is "to improve the health of minority individuals."[154] Nevertheless, while this goal identifies a specific population, which is a good step, it does not distinctly define what improving the health of minority individuals looks like. The next step in the framework is to evaluate whether this bill can lead to health equity. Utilizing the four steps in The Black Feminist and Womanist Analytical Path to Health Equity will reveal the extent this legislation can lead to health equity.[155] H.R. 6637 clearly defines potential barriers to health equity, like immigration status, addressing co-morbidities, and decreasing barriers to entering the healthcare workforce.[156] There are also measures to improve the diversity of the healthcare workforce, like the staff in Medicaid and Medicare provision

[150] Barlow & Breya Johnson, *supra* note 141.
[151] *Id.*
[152] *Id.*
[153] H.R. 6637, 116th Congress (2019-2020).
[154] *Id.*
[155] Barlow & Breya Johnson, *supra* note 141.
[156] H.R. 6637, 116th Congress, Sections 402, 701-737, and 3, (2019-2020).

centers, and provide grants to private organizations to improve diversity. [157] The text of the bill outlines hundreds of recommendations to achieve health equity.[158] It is proposing a multifaceted approach to target the health of various minority populations and their individual needs.[159] One of the aspects that stand out in this bill is the inclusion of a social determinants of health approach. The bill states:

> Health disparities are a function of not only access to health care, but also the social determinants of health- including the environment, the physical structure of communities, nutrition and food options, educational attainment, employment, race, ethnicity, sex, geography, language preference, immigrant or citizenship status, sexual orientation, gender identity, socioeconomic status, or disability status-that directly and indirectly affect the health, health care, and wellness of individuals and communities.[160]

The inclusion of a social determinants of health approach challenges the existing systems that are deeply rooted in racism. In today's society, the act of asserting that identity, class, and other non-modifiable factors influence the state of your health in the United States challenges the existing systems entrenched in systematic oppression.[161]

The marked difference between the Affordable Care Act and the Health Equity and Accountability Act are the goals of each of the bills. Evaluating the text of the Affordable Care Act, the goal of this legislation is to improve access to health insurance for all Americans.[162] But, the goals of the Health Equity and Accountability Act are completely different. While the Health Equity Act addresses access to health insurance, this legislation is seeking to directly impact the health of minority communities.[163] This bill directly proposes solutions unique to this underserved community. Besides this, both the Affordable Care Act and the Health Equity and Accountability Act include measures to diversify the workforce, and create institutions dedicated to continued research and development.[164] However, neither the Affordable Care Act nor the Health Equity and Accountability Act include clear provisions to ensure that intersectional forms of discrimination are being addressed.[165] The

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[157] *Id.* at Sections 444, 522, and 201.
[158] *Id.*
[159] *Id.*
[160] H.R. 6637, 116th Congress (2019-2020).
[161] Barlow & Breya Johnson, *supra* note 141.
[162] H.R.3590, 111th Congress (2009-2010).
[163] H.R. 6637, 116th Congress (2019-2020).
[164] *Id.*; H.R.3590, 111th Congress (2009-2010).
[165] *Id.*

Health Equity and Accountability Act most closely aligns with the health equity framework than the Affordable Care Act, but neither are perfect.

This framework is just the starting place for evaluating the effectiveness of health law on achieving health equity. A main tenant of achieving health equity is being collaborative and inclusive of methods and goals.[166] A single framework cannot encapsulate the perfect way to achieve health equity. Still, improving the bill with the proposed framework can turn this legislation into a groundbreaking triumph towards health equity.

Conclusion: To Be Legally Invisible

To be legally invisible is to be defenseless. Legal invisibility leaves one defenseless against rampant injustice and discrimination. It exposes one to the dangers that the law is meant to protect against. Black Americans are defenseless to the dangers of health inequity. No matter how much money, education, or status a Black American has in this country, there is still a three times greater risk of dying during childbirth,[167] having the shortest survival rate for most cancers,[168] and dying four years earlier than the rest of the population.[169] To be Black in America is to be defenseless against death and disease from all angles.

There is no single right answer for how legislation could end health disparities in the United States. However, there are right and wrong ways to get to the desired answers. Firstly, the right questions must be asked. Legislation to address the health disparities that Black Americans face must first account for the historical trauma that impacts this population's health. It must also be driven by a social determinant of health-based approach. Finally, the legislation must be evaluated through an intersectional decolonial lens. This is not an exhaustive list, and further research is needed to explore the legislative solutions to address health disparities.

The health disparities faced by Black Americans are distinct from those faced by other minority populations due to the unique history of slavery and oppression Black Americans have endured in the United States and its intrinsic link to the historical and current health state of Black Americans. However, the tools proposed can create a model of

[166] Barlow & Breya Johnson, *supra* note 141.
[167] Martin & Montagne, *supra* note 22.
[168] Lutz, *supra* note 17.
[169] Ndugga, *supra* note 8.

change for other minority populations. Our collective invisibility has never been more apparently glaring as it is today. There is a problem with health disparities in the United States, and it can no longer be ignored.

Effectiveness of the Fair Housing Act of 1968 in Resolving Contemporary Housing Discrimination

Puja Samant

Introduction: Relevance of Housing Discrimination in America and Background

There are still persistent inequities in the housing market in the United States concerning the ownership and rental of homes. An analysis of the 1989 American Housing Survey reveals that there are statistically significant differences in the probability of a Black household owning a home as compared to a White household.[1] Additionally, data indicates that the homeownership rates for White and Black households were 69.1% and 43.4% respectively in 1990.[2] In the past three decades, the gap in homeownership based on race has been growing.[3] In more recent years, the home ownership rates for White and Black households have been 71.9% and 41.8%.[4] Homeownership disparities also continue to worsen in household wealth; the difference between Black and White households being $48,805.[5] The consequences of racial disparities in housing are also manifest in differences in the quality of housing and neighborhood conditions individuals inhabit.[6]

The creation of the Fair Housing Act of 1968 (FHA) responded to heightened calls for racial justice in more spheres than simply citizenship and voting.[7] In 1967, during race riots in Newark and Detroit, racial minorities sought economic and social justice.[8] Before

[1] Susan Wachter and Isaac Megbolugbe, *Impacts of Housing and Mortgage Market Discrimination Racial and Ethnic Disparities in Homeownership*, 3 Housing Policy Debate 332, 332-370 (1992) (differences in likelihood of a black household owning a home versus a white household).

[2] John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*, 26 Russell Sage Foundation 452, 1-464 (1997) (differences in homeownership rates for black and white households in 1990).

[3] *Id.* at 452.

[4] Jung Hyun Choi, *Breaking down the Black-White Homeownership Gap*, Urban Institute, (Feb. 21, 2020), https://www.urban.org/urban-wire/breaking-down-black-white-homeownership-gap.

[5] Yinger, *supra* note 2, at 452.

[6] *Id.*

[7] *Report of the National Advisory Commission on Civil Disorders,* Eisenhower Foundation, 1 (Mar. 1, 1986), http://www.eisenhowerfoundation.org/docs/kerner.pdf.

[8] *Id.* at 3.

these protests, historically entrenched inequities took the form of financial disinvestment and redlining.[9] During the 1930s, the Home Owners' Loan Corporation (HOLC) developed residential security maps that delineated some communities as riskier than others for banks to provide housing mortgages to.[10] The HOLC did so through the appointment of examiners who categorized various neighborhoods throughout the country according to the risk of lending to the homeowners who resided there.[11] By adopting these systems, banks mainly redlined communities of color and contributed to financial disinvestment by marking them as unsafe for mortgages.[12] Redlining practices constitute unfair lending laws and prevent financial institutions from providing equal access to credit.[13] Such practices create lasting consequences for communities of color in particular by continuing to deny them the chance to rebuild and strengthen themselves.

This article will examine the most prevalent contemporary challenges related to housing discrimination, and it will explore the efficacy of the Fair Housing Act of 1968 in resolving these challenges as they have evolved from the past to the present. Considering the differences between de facto and de jure aspects of housing discrimination legislation, the article will explore ways to improve the effectiveness of the FHA in practice. As the enforcement of the FHA is a crucial aspect of the effectiveness of the Act, this paper will also examine the enforcement of the FHA's dual mandate by the Department of Housing and Urban Development (HUD). Furthermore, this article will likewise explore the accountability mechanisms of the HUD as well as its capacity to collect data on the effectiveness of housing discrimination interventions. After examining these issues, the paper concludes that the content and enforcement of the FHA must be revised. The definition of discrimination in the current FHA must be expanded to include factors such as sexual orientation, gender identity, and domestic violence survivor status. As for the role of the HUD in enforcing the FHA, there is a need for research on the effectiveness of FHA-related interventions for evaluative purposes done by a third party, and there is a need for greater oversight of the Secretary of the HUD.

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[9] Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 Urban, Community and Regional Planning Commons 394, 394-420 (2003) (Financial disinvestment and redlining prior to race riots).

[10] *Id.* at 394.

[11] Bruce Mitchell, *Holc 'Redlining' Maps: The Persistent Structure of Segregation and Economic Inequality,* 1 NCRC 10, 1-28 (2021).

[12] Hillier, *supra* note 9, at 395.

[13] Mitchell, *supra* note 11, at 5.

I. Background of Civil Rights Legislation and Housing Discrimination Legislation in the Context of Case Law

A. Civil Rights Legislation in the Context of Housing Discrimination and Housing Rights

Several pieces of civil rights legislation preceded the FHA, which intend to protect individuals against discrimination pertaining to housing law. The Civil Rights Act of 1866 provided citizenship to all individuals born in the U.S. regardless of race and color.[14] The Act also provided citizens with equal opportunities to enter legal contracts for the purchase and sale of property; additionally, it provided equal guarantee to all citizens of facing a common standard of consequences under the law.[15] In reality, however, these legal privileges granted to all were only enjoyed by some; historical developments such as the Home Owners' Loan Corporation's redlining practices created systemic racial inequities that led to the violation of the preceding right in practice.[16] The Civil Rights Act of 1866 set a precedent for distinctions between de facto and de jure applications of the law.[17] De jure refers to written rule of law, and de facto refers to the actual practice of law.[18] Such distinctions between de facto and de jure applications of the law threaten the validity of the legal system because they allow practices to differ from what is sanctioned by law.

The Civil Rights Act of 1964 was a subsequent piece of civil rights legislation that strengthened the right to vote for all citizens by removing hurdles to voting for minorities.[19] In particular, this Act removed voting qualifications and literacy tests as preconditions for voting in order to increase voter registration.[20] The Act also strengthened the capacities of U.S. district courts to fight discrimination.[21] It facilitated their extension of equal access to goods, services, and facilities; it also made more feasible the implementation of stronger regulations for private establishments.[22] And it established a Commission on Equal Employment Opportunity to expand opportunities for economic equity.[23] The Commission

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[14] Civil Rights Act of 1866, 14 U.S.C. § § 27-30 (1870).

[15] *Id.* at 1.

[16] Hillier, *supra* note 9, at 395.

[17] Civil Rights Act of 1866, 14 U.S.C. § § 27-30 (1870).

[18] *Legal English: 'De Facto/De Jure,'* Washington University in St. Louis School of Law (Dec. 12, 2012), https://onlinelaw.wustl.edu/blog/legal-english-de-factode-jure/#:~:text=De%20facto%20means%20a%20state,i.e.%20that%20is%20officially%20sanctioned.

[19] Civil Rights Act of 1964, 6 U.S.C. § § 42 (1964).

[20] *Id.* at 33.

[21] *Id.* at 31.

[22] *Id.* at 2.

[23] *Id.* at 10.

has been effective in enforcing consequences for various forms of workplace discrimination.[24] In line with earlier civil rights legislation, there have been de facto and de jure differences in terms of disparities between the act's content and its enforcement.

The Fair Housing Act of 1968 was the next piece of influential legislation that advanced civil rights in the area of housing. It created prohibitions on discriminating against individuals in the sale or rental of housing.[25] This Act pertained to a definition of housing as properties owned by the federal government, those owned by any public agency that received aid from the federal government, and those obtained with help from federal government loans.[26] In terms of its relationship to prior civil rights legislation, the FHA is an extension of such legislation as it widened the scope to address housing rights and housing discrimination.[27] The content of the FHA has also broadened the definition of discrimination prohibited by law; beyond discrimination in citizenship and voting, the FHA has applied discrimination to the sale and rental of properties.[28]

In contemporary politics, the role of the FHA has been recently altered and stands to be transformed in coming years. Under the Trump administration, certain fair housing rules were revoked. For instance, funding for Section 8 vouchers fell.[29] The Section 8 housing program, or the Housing Community Development Act of 1974, grants subsidies to certain recipients in government allocated residential properties.[30] The current Biden administration plans to reinstate several housing discrimination rules.[31] These rules would reinstate a previous legal standard called "disparate impact" that has unintentionally discriminatory consequences for certain groups.[32] Another rule would threaten withholding funding from communities that fail to successfully identify and destruct racially discriminatory practices in housing.[33]

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[24] *Laws & Guidance,* U.S. Equal Employment Opportunity Commission (2021), https://www.eeoc.gov/laws-guidance-0.

[25] Fair Housing Act of 1968, 42 U.S.C. § § 3601-3619 (1968).

[26] *Id.* at 20.

[27] *Id.* at 1.

[28] *Id.* at 21.

[29] Tracy Jan, *Trump Gutted Obama-Era Housing Discrimination Rules. Biden's Bringing Them Back,* The Washington Post (2021), https://www.washingtonpost.com/us-policy/2021/04/13/hud-biden-fair-housing-rules/.

[30] *The History of Section 8 Housing,* Section 8 Information (Mar. 2020), https://section8-information.org/section-8-history/.

[31] Jan, *supra* note 29.

[32] *Id.*

[33] *Id.*

The U.S. Department of Housing and Urban Development (HUD) is the entity responsible for the regulation and enforcement of the Fair Housing Act of 1968.[34] The HUD has legislative authority, and the Secretary of the HUD is empowered to make the rules and regulations necessary for carrying out the organization's functions.[35] In addressing housing discrimination, the HUD has the right to initiate legislative rulemaking.[36] Additionally, the HUD's Office of Fair Housing and Equal Opportunity is responsible for the enforcement of laws preventing housing discrimination and for investigating related violations.[37] As to the HUD's current procedures for evaluating interventions to combat housing discrimination, evaluative investigations often do not occur following an intervention. Now, evaluative processes are only in place during an investigation.

B. Breaking Down the Difference between De Facto and De Jure

A key to exploring why disparities exist between rules prohibiting housing discrimination and actual housing discrimination practices is the difference between de facto and de jure. De facto refers to the state of true affairs, and de jure refers to a theoretical state of affairs sanctioned by law.[38] In terms of civil rights legislation, there are inherent distinctions between de facto and de jure. Disparities still exist between what is sanctioned by law and the state of true affairs. Discriminatory practices in housing, at multiple levels, continue to endure despite their illegality.

The de facto aspect of housing discrimination is encompassed by the rules connected to housing discrimination that were established in civil rights legislation.[39] The FHA prohibits housing discrimination on the basis of "race, color, national origin, religion, sex, familial status, and disability."[40] It also restricts the specific discriminatory actions of refusal to negotiate, rent, or sell housing, to set discriminatory terms on the sale of rental of housing, or to provide discriminatory housing services.[41] In terms of mortgage lending, prohibited discriminatory practices entail the refusal to make a mortgage loan, refusal to provide related information, and/or setting differential terms on loans based on forms of

[34] *HUD Rulemaking,* U.S. Department of Housing and Urban Development (2021), https://www.hud.gov/program_offices/general_counsel/HUD-Rulemaking.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Legal English: 'De Facto/De Jure,' supra* note 18.

[39] *Id.*

[40] Fair Housing Act of 1968, 42 U.S.C. § § 3601-3619 (2020).

[41] *Id.* at 22.

discrimination described earlier.[42] The following cases illustrate deviations from laws outlining housing discrimination; the cases emphasize a need to recognize that de facto practices can vary from de jure rules.

C. Case Law: Various Forms of Housing Discrimination Over Time in U.S. Legal History and Legal Precedents in Housing Discrimination Cases

Besides recognizing racial discrimination, the FHA also recognizes discrimination on the basis of disability status as a major concern. In *Community for Permanent Supported Housing et al. v. Housing Authority of the City of Dallas*, the rights of disabled individuals were protected.[43] The Housing Authority of the City of Dallas refused to provide independent housing for people with disabilities although the HUD made affordable housing available for these individuals.[44] Following its refusal to extend the HUD's voucher rent subsidy program based on disabled status, The Housing Authority of the City of Dallas was challenged.[45] As a consequence of the court ruling, individuals with disabilities were granted the right to reside in housing integrated into an actual community rather than an institutionalized setting.[46] The case set a precedent for extending the definition of discrimination to include those with a disabled status; it set an example for future cases to broaden the definition of housing discrimination further to include additional marginalized groups.

In the case *Alexander v. Riga*, housing discrimination on the basis of race occurred when an African American couple in Pittsburgh, PA experienced deception regarding the availability of property.[47] This case set a precedent for offering punitive damages to plaintiffs for housing discrimination on the basis of race. In another case, *Block v. Frischholz*, a Jewish family filed a FHA suit against a condominium board that prevented the family from placing a Jewish religious symbol on their door frame.[48] This case of housing discrimination on the basis of religion established a precedent about making post-acquisition discrimination

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[42] *Id.* at 20.

[43] Community for Permanent Supported Housing v. Housing Authority of the City of Dallas, 19 F.3d 8, 8-37 (5th Cir. 2019) (individuals with intellectual disabilities granted the right to reside in community-integrated housing rather than institutionalized settings).

[44] *Id.* at 10.

[45] *Id.*

[46] *Id.* at 30.

[47] Alexander v. Riga, 208 F.3d 419, 1-24 (3rd Cir. 2000) (punitive damages awarded to plaintiff on the basis of race).

[48] Bloch v. Frischholz, 587 F.3d 771, 1-45 (7th Cir. 2009) (precedent for making post acquisition discrimination eligible for protection under the FHA).

eligible for protection under the FHA.[49] In both *Alexander v. Riga* and *Block v. Frischholz*, forms of discrimination covered by the existing FHA were ruled against, yet both cases involved a revision of either retributions following housing discrimination or the timing of discrimination in either the rental or sale of property.

On the basis of redlining, the Court ruled against housing discrimination in *Consumer Financial Protection Bureau and United States v. Hudson City Savings Bank*.[50] The Court found that as a result of redlining, the Hudson City Savings Bank was inequitable in its provision of home mortgage lending services to members of different races.[51] Consequently, mostly Black and Hispanic communities faced the negative consequences of redlining.[52] These communities faced discrimination by lending institutions in the form of disinvestment.[53] Hudson City Savings Bank was ordered to supply $25 million in a loan subsidy fund to aid neighborhoods that were previously redlined.[54] The case set a precedent of compensating communities affected by the systemic disinvestment fueled by redlining practices.[55] With the dual mandate of the FHA, this case set an example for working toward reversing historical practices of housing discrimination and their enduring effects.

II. Evaluating the Effectiveness of the Fair Housing Act in Relation to Contemporary Legal Challenges

A. Issues Present in the FHA

In its current state, the Fair Housing Act is only somewhat effective in its capacity to overcome contemporary legal challenges in housing.[56] Current forms of housing discrimination span a broad scope of forms, many of which the FHA fails to address.[57] For instance, the FHA fails to recognize factors such as sexual orientation, gender identity, and domestic violence survivor status as grounds constituting discrimination. Now, the FHA

[49] *Id.* at 2.

[50] *Fair Housing Act Overview and Challenges*, National Low Income Housing Coalition (Oct. 2018), https://nlihc.org/resource/fair-housing-act-overview-and-challenges.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] 42 U.S.C. § § 3601-3619 (1968).

[57] *Id.* at 21.

prohibits housing discrimination based on only "race, color, religion, sex, familial status, or national origin."[58]

The discriminatory acts that are currently prohibited by the Act include refusing to sell or rent a property, refusing to provide housing related services and facilities, printing and publishing an advertisement about the rental or sale of a dwelling that suggests discriminatory preference for tenants, and compelling an individual to sell or rent a dwelling based on discriminatory motives.[59] These forms of discrimination do cover a wide scope of acts, but there is room for addressing acts of discrimination post acquisition.[60] Such protections are crucial to upholding the interests of homeowners and renters not only at the start of the home acquisition process, but throughout each stage of being a homeowner or renter.[61] Acts of discrimination post acquisition range from prohibiting a tenant to place religious symbols in their doorway to denying a particular resident access to communal resources in a neighborhood.[62] In the context of historical redlining and its connection with producing discriminatory housing outcomes, the FHA fails to provide sufficient protections for homeowners and renters impacted by systemic disinvestment in their communities. Particularly, the FHA does not have measures in place that ensure equal access to credit along with equal opportunities to gain home loans to members of previously redlined communities.[63] The FHA also lacks measures to hold accountable lending institutions that continue to engage in discriminatory practices in the communities they serve.[64] A reversal of discriminatory policies is crucial because it would help break recurring cycles of discrimination; it could help dismantle systems that continue to create discriminatory outcomes.[65] One key discriminatory practice has not yet been reversed is the Home Owners' Lending Corporation's redlining policy. This policy reversal is likely to be complex and highly incisive; not only will the government need to remove the redlined statuses of various communities, but the government will also need to inject investment into communities that have historically been denied such funds.[66] Although the FHA does provide some financial

[58] *Id.* at 21.
[59] *Id.* at 22.
[60] *Id.*
[61] *Bloch*, 587 F.3d at 3.
[62] *Id.* at 15.
[63] Mitchell, *supra* note 11.
[64] *Id.* at 4.
[65] *Id.* at 14.
[66] *Id.* at 4.

protections such as prohibiting "discrimination in provision of brokerage services," this section of the Act fails to undo historical discrimination in such services.[67] The section also fails to address additional aspects of financial protections for homeowners and renters beyond equitable brokerage services.[68] There is substantial scope for the Act to be more effective in its protection of consumers concerning mortgage practices such as forbearance and loan processes.[69] Forbearance is a process by which a lender temporarily allows a client to provide lower loan payments under special circumstances.[70] In pursuit of equity in the provision of financial services related to homeownership and rental, the FHA has potential to undo previous discrimination and to institute regulations that cover a broader scope of issues.

B. Issues Present in the Application/Enforcement of the Act: Ways in which Discriminatory Practices Persist despite Laws Prohibiting Various Forms of Housing Discrimination

Primary issues in the enforcement of the FHA derive from issues in the structure of the HUD.[71] The current structure of the HUD renders it incapable of sufficiently enforcing the FHA. Authority over enforcement of the FHA belongs to the Secretary of Housing and Urban Development.[72] The power to delegate these functions to any of the employees of the HUD or to such boards belongs to the Secretary.[73] In terms of research and dissemination of HUD policy, the Secretary creates and implements studies that evaluate the extent of discriminatory housing practices in different communities across the U.S..[74] The Secretary is also responsible for ensuring that reports are distributed effectively across the public.[75] The many powers conferred to the Secretary raise whether this position is being granted too much power; perhaps the position needs certain restrictions and checks to ensure that there is at least some oversight.[76]

There are additional issues in the structure of the HUD. Specifically, there is a need for stronger accountability mechanisms to strengthen the enforcement of the FHA. Since

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[67] 42 U.S.C. § § 3601-3619 (1968).
[68] *Id.* at 19.
[69] Mitchell, *supra* note 11.
[70] *What Is Mortgage Forbearance?*, Consumer Financial Protection Bureau (2021), https://www.consumerfinance.gov/ask-cfpb/what-is-forbearance-en-289/.
[71] 42 U.S.C. § § 3601-3619 (1968).
[72] *Id.* at 26.
[73] *Id.*
[74] *Id.* at 27.
[75] *Id.*
[76] *Id.*.

the Secretary can single handedly initiate rulemaking, there is no third-party body independent of the HUD to impartially assess and regulate the actions of the Secretary. Also, the role of the Secretary is too focused on the early stages of policy implementation rather than examining the later stages of the process.[77] In particular, the Secretary conducts research on the extent of discriminatory housing practices, but not for evaluating the aftermath of interventions and consequences of legal interventions related to discriminatory housing practices.[78] It is critical to examine the outcomes of policies designed and implemented to address housing discrimination to make necessary changes.[79]

There is also a lack of strong post acquisition protections related to housing. Most protections conferred by the Act are either pre acquisition or during the process of acquisition.[80] Protections within the FHA that are during acquisition relate to discrimination in the sale or rental of housing, residential property transactions, provision of brokerage services, religious organizations, and private club processes.[81] There are no such protections offered in the following period.[82]

C. Lack of Bipartisan Support for the FHA in Current Times

After its initial passage, the FHA had widespread bipartisan support in 1968 and the following years.[83] Over the course of the Trump administration, many accomplishments of the FHA were stripped away.[84] This stripping of protections also triggered a push to increase Section 8 funding under the Biden administration.[85] The Section 8 housing program, also called the Housing Community Development Act of 1974, helps solve the housing affordability problem specifically for low income individuals.[86] Since its inception, the program, which grants subsidies to qualifying recipients in residential properties that are government allocated, has evolved significantly.[87] If selected for the program, a recipient must contribute at least thirty percent of their income toward their rent payments.[88] Along

[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 22.
[81] *Id.*
[82] *Id.*
[83] Stephen M. Dane, *Fair Housing Policy Under the Trump Administration*, American Bar Association (2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/fair-housing-policy-under-the-trump-administration/.
[84] *Id.*
[85] *Id.*
[86] *The History of Section 8 Housing, supra* note 30.
[87] *Id.*
[88] *Id.*

with the FHA, Section 8 housing helps implement solutions to housing discrimination issues when they relate to affordability.[89]

Systemic underinvestment due to redlining is a major factor that disadvantages communities.[90] Section 8 housing is intended to channel aid toward such communities.[91] In recent years, the program has also been effective in expanding the reach of affordable housing across the U.S.[92] Rather than having a single voucher funding contract with HUD, different agencies can have their own contracts.[93] Also, the breadth of locations for low income housing has since expanded following implementing Section 8 housing.[94] Low income housing was previously concentrated overwhelmingly in the projects, but it has recently expanded into more developed regions that have stronger infrastructure.[95] Another strength of Section 8 housing is that it grants many options to recipients.[96] Previously, individuals could be housed only in Section 8 apartments, but now they have the options of renting and purchasing various homes under the program.[97] Additionally, Section 8 housing has been useful in expanding opportunities for residence for individuals with disabilities.[98] In *Olmstead v. L.C.* (1999), the United States Supreme Court opposed the involuntary institutional submission of individuals with disabilities.[99] Individuals now could be integrated into communities if their situation was found to be justified.[100] It is crucial to have Section 8 alongside FHA because it increases integrative opportunities for people who are discriminated against.

Still, there are differences in opinion about funding for Section 8 housing as the Trump administration reduced funding for the program.[101] Because of bipartisan conflict

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[89] *Id.*

[90] *Fair Housing Act Overview and Challenges, supra* note 50.

[91] Mitchell, *supra* note 11.

[92] *Project Based Vouchers – Frequently Asked Questions*, U.S. Department of Housing and Urban Development (Jul. 2021), https://www.hud.gov/sites/documents/DOC_9157.PDF.

[93] *Id.*

[94] *Id.*

[95] Yap Sheng, *Community Participation in Low-Income Housing Projects: Problems and Prospects. 56* Community Development Journal (1990).

[96] *Id.* at 58.

[97] *Project Based Vouchers, supra* note 92.

[98] Olmstead v. LC, 527 US 581, 582 (1999).

[99] *Id.* at 582.

[100] *Id.*

[101] Dane, *supra* note 83.

over the FHA, both the efficacy and funding for the agenda of the FHA have been challenged in recent times.[102]

III. Policy Solutions Under Biden Administration for Improving the Fair Housing Act's Effectiveness in Addressing Housing Discrimination

A. Extend the Definition of Discrimination in the FHA

In order to offer more inclusive protections against housing discrimination, the FHA must extend the definition of discrimination in the FHA to include more forms of discrimination based on factors such as sexual orientation, gender identity, and domestic violence survivor status.[103] The FHA provides protections on the basis of sex and familial status, but these definitions are not broad enough to protect various identities.[104] In terms of redefining protections in the FHA, protections can be extended to the post acquisition period of obtaining a house or rental property.[105]

B. Alter the Structure and Functions of the HUD

There is a need for oversight of the Secretary of the HUD as many of the responsibilities of the HUD lie mainly under the control of only one individual.[106] A body that acts as an accountability mechanism for the Secretary to abide by can perform such a function. Its members can include individuals from the House Committee on Housing, Transportation, and Community Development.[107] Equipped with expertise on housing development issues, these individuals can offer their views on issues regarding housing rules initiated by the Secretary.[108] The body of oversight can be largely responsible for ensuring that the Secretary does not exploit rule initiating power.[109]

After interventions take place, they must be evaluated in order to improve their effectiveness over time. Such interventions can be performed in the form of a third-party investigation. This third-party should comprise a membership that is not government affiliated. Additionally, such a party can be a non-governmental organization that holds direct knowledge about the community where the intervention was implemented. Such an

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[102] *Id.*
[103] 42 U.S.C. § § 3601-3619 (1968).
[104] *Id.* at 22.
[105] *Id.*
[106] *Committees*, United States House of Representatives (2021), https://www.house.gov/committees.
[107] *Id.*
[108] *Id.*
[109] *Id.*

NGO should be aware of the social dynamics of the community linked to instances of discrimination in the community. The FHA mandates the Secretary of the HUD to only conduct research on the nature of housing discrimination issues before policy implementation.[110] It is crucial to continue evaluative efforts of measures both during and after policy implementation to ensure that interventions produce sustained results.

C. Policy Recommendations that Address Redlining and Housing Affordability

The government must remove the redlined statuses of various communities and inject investment into communities that have historically been denied these funds.[111] In order to achieve this objective, the government must first increase incentives for investments in economically degraded communities.[112] The use of opportunity zones can also help drive private investment into such communities; these zones give tax incentives to private investors who choose to invest capital into an opportunity fund.[113]

Policy that exploits the enhancing relationship between Section 8 housing and the FHA can facilitate the reduction of housing discrimination. There is an enhancing relationship between Section 8 housing and the FHA because the FHA helps identify instances of housing discrimination, and Section 8 housing helps provide affordable housing to individuals facing discrimination among other difficulties.[114] A section can be added to the FHA that provides fast tracked access to Section 8 housing for those facing housing discrimination. This policy solution would not only help identify instances of housing discrimination, but it would also help those who are discriminated against attain affordable solutions.[115]

D. Acknowledgement of Counterarguments

Through the expansion of definitions of discrimination, a concern arises about the potentially harmful effects of such an action. An expansion of this form could cause complexities in the assessment and remediation of discriminatory acts. According to Kimberlé Crenshaw, intersectional discrimination occurs when an individual faces discrimination on the grounds of more than identity.[116] At the intersection of identities such

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[110] 42 U.S.C. § § 3601-3619 (1968).
[111] *Opportunity Zones*, Opportunity Now (2021), https://opportunityzones.hud.gov/.
[112] *Id.*
[113] *Id.*
[114] *The History of Section 8 Housing, supra* note 30.
[115] *Id.*
[116] Grace Ajele and Jena McGill, *Intersectionality in Law and Legal Contexts,* Women's Legal Education and Action Fund, 4 (2020).

as sex and race, individuals face a unique set of challenges. In American antidiscrimination law, the intersectional aspect of discrimination is not consistently recognized.[117] Broadening the definition of discrimination may have the effect of complicating proceedings for individuals facing discrimination who must articulate their situation by selecting one of their identities at the expense of others. Still, expanding the definition of discrimination to include additional identities has the overall effect of allowing a broader segment of the population grounds for seeking remediation following housing discrimination. By protecting more identities under the law, complications may arise, but the enforcement of housing discrimination law is made more inclusive and broader in its scope to provide protections.

Conclusion

Housing discrimination remains a concern as there are still disparities in home ownership and rental across the U.S. on the basis of race, sex, disability status, and other factors.[118] Strengthening the scope of the Federal Housing Act of 1968 to protect individuals against housing discrimination not only has advantages for those individuals, but it also builds stronger communities.[119] When minorities are well integrated into communities, more diverse communities emerge that grant common access to high quality resources and amenities.[120]

It is critical that the proposed reforms related to housing discrimination policy close gaps in homeownership and renting. And it is important that measures are taken to strengthen accountability when it comes to policy making and enforcement. Conducting post intervention research and creating systems of oversight for the Secretary of the HUD help hold solutions to housing discrimination to a higher standard.

The development of increasingly diverse communities has benefits that extend beyond the minorities who are introduced to more capital-rich neighborhoods.[121] Society as a whole benefits from more diverse communities because segregation as a result of housing discrimination is linked to certain costs.[122] These costs are characterized by low property tax

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[117] *Id.*

[118] 42 U.S.C. § § 3601-3619 (1968).

[119] Margery Turner, *Promoting Neighborhood Diversity Benefits, Barriers, and Strategies,* The Urban Institute, 3 (2009).

[120] *Id.* at 4.

[121] *Id.*

[122] *Id.* at 4.

revenues, low government expenditure on public services, and low competitiveness in the workforce.[123] Through meaningful reform, the FHA can empower more and more individuals facing housing discrimination and help construct more equitable and integrated communities.

[123] *Id.* at 2.

War Crimes in Latin America and Transnational Prosecution: The case for Universal Jurisdiction as the Future of International Criminal Law

Emmanuelle Dyer-Melhado

Introduction: Universal Jurisdiction and Specific Case Studies

While the exact origin of the term "crimes against humanity" remains contested, one of its first usages can be traced to a 1915 declaration by "Allied governments (France, Great Britain, and Russia) condemning the mass killing of Armenians in the Ottoman Empire."[1] Since then, its prominence has grown as international tribunals have prosecuted individuals involved in the Rwandan and Yugoslavian conflicts for committing "crimes against humanity."[2] As a legal doctrine in international law, it means conducting acts such as murder, extermination, torture, and rape "as part of a widespread or systematic attack directed against any civilian population."[3] Despite the intent of tribunals to alleviate human suffering through such designations, they often fail due to laws that allow war criminals to evade punishment because of their nationality or where the crime was committed.[4] Universal Jurisdiction provides an answer.

Universal Jurisdiction is a legal principle that continues to gain prominence as today's social, cultural, and political climate calls upon both countries and international organizations to right the wrongs of the past.[5] It is seen as a tool for the advancement of human rights, but some nation-states worldwide also consider it a danger to their sovereignty.[6]

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[1] *Crimes Against Humanity*, UNITED NATIONS https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml (last visited Jan. 24, 2022).

[2] *Id.*

[3] Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90.

[4] David Stewart, *Some Perspectives on Universal Jurisdiction, Proceedings of the Annual Meeting*, 102 AMERICAN SOCIETY OF INTERNATIONAL LAW 404 (2012).

[5] *Id.*

[6] *Id.*

The origins of this doctrine can be traced to post-tenth century medieval Italy, in which law permitted all city-states to prosecution of individuals even if they did not hold permanent residence in the city-state where they committed a crime.[7] In comparison to territorial jurisdiction, "the principle contemplates a unilateral assertion of national jurisdiction even though offense has no connection to the territory of the prosecuting state, was not committed by or against a national of that state in question, and was not directed against any of its essential interests."[8] The modern transformation of Universal Jurisdiction can be seen in the aftermaths of World Wars I and II, which resulted in increased the trust in institutions.[9] The rule of law set a new precedent of accountability for those who committed "crimes against peace and against humanity."[10] Subsequently, tragedies like the Yugoslavian and Rwandan Genocides have served as catalysts for the advancement of Universal Jurisdiction as it is seen as a plausible solution to ensuring accountability.[11]

In contrast to other principles of jurisdiction, such as personal and territorial jurisdiction, Universal Jurisdiction is marked by the lack of requirements necessary for a prosecution.[12] Per the Institut de Droit International (The Institute of International Law), if an individual carries out a "serious violation of international humanitarian law committed in international or non-international armed conflict," states can "prosecute alleged offenders and punish them if convicted."[13] Furthermore, the "punishment comes irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, other grounds of jurisdiction recognized by international law."[14]

While the specific doctrines that support Universal Jurisdiction will be analyzed in detail, two concepts are vital to understanding its formation and purpose: *erga omnes* obligations and *hostis humani generis*. Within the context of this International Criminal Law, *erga omnes* obligations can be defined as the obligation to intervene when crimes violate

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Frances Webber, *The Pinochet Case: The Struggle for the Realization of Human Rights*, vol. 26, no. 4 JOURNAL OF LAW AND SOCIETY 523, 533 (1999).

[11] *Id.*

[12] Yee Sienho, *A Call for a More Rigorous Assessment of Universal Jurisdiction*, 107 AMERICAN SOCIETY OF INTERNATIONAL LAW 242, 242-245 (2013).

[13] Justitia et Pace, Institute of International Law, Seventeenth Commission: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes, 2 Krakow Session (2005).

[14] *Id.*

society's most fundamental values.[15] Similarly, *hostis humani generis* signifies that there are specific individuals who are "enemy of all mankind,"[16] because of a violation of international law and human rights to such a degree it causes harm to humanity as a whole.

With that in mind, other international law principles fall under the application of Universal Jurisdiction. One, crimes that can be subject to Universal Jurisdiction fall under three categories: customary law and treaties, conventions, or international agreements. [17] Those that fall under established laws and treaties include "piracy, slave trading, war crimes and genocide,"[18] while those under conventions or international agreements are "hijacking, terrorism, torture, and apartheid."[19]

Furthermore, there are essential distinctions between *Conditional Universal Jurisdiction* and *Absolute Universal Jurisdiction* and how different countries exercise such jurisdiction. For example, France practices Conditional Universal Jurisdiction, and its laws dictate that "a state may prosecute a defendant only if he is in custody."[20] Under Absolute Universal Jurisdiction—practiced by Spain and Belgium—"a state may prosecute a defendant regardless of whether he is in custody."[21] Overall, extent to which countries apply Absolute or Conditional Universal Jurisdiction depends on the power domestic laws give to courts.

This paper highlights cases led by Spain against Augusto Pinochet of Chile and Inocente Orlando Montano of El Salvador to explain Universal Jurisdiction. These trials show a trend of former military members and state leaders being extradited, prosecuted, and indicted, which offers a legal shift from complete immunity for perpetrators of war crimes to a recognition of retributive justice in Latin America. This article will analyze the international legal sources of authority that support or hinder these processes and Spanish domestic law to understand why it has been at the forefront of Universal Jurisdiction usage in the past two decades. In addition, the article will explain the benefits and failures of the legal doctrine.

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[15] Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, vol. 87, no. 7 COLUMBIA L. REV. 1524-1528 (1987).

[16] *Id.* at 1520.

[17] *Id.* at 1519-1533.

[18] *Id.* at 1522.

[19] *Id.* at 1523.

[20] Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495 (2007).

[21] *Id.* at 499.

With this, there are certainly obstacles to widespread Universal Jurisdiction. These usually arise from domestic laws that define courts' access to individuals. Notably, this includes amnesty law, immunity, sovereignty, and domestic norms. However, if legal standards like the principle of complementarity are used when Universal Jurisdiction is applied, then inter-state collaboration can advance its legitimacy and effectiveness.

I. Legal Sources of Authority and Universal Jurisdiction in Practice

A. Legal Sources of Authority

Universal Jurisdiction relies on domestic laws to function fully; however, there are myriad international treaties and conventions that support its application and expansion in use.[22] It is worth restating that because Universal Jurisdiction is meant to combat extensive crimes —such as genocide— its legal sources of authority tend to have a large scope of power so that it can combat the mentioned. At its forefront is the Nuremberg Charter of 1945.[23] Article 1 of the charter says:

> there shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographic location whether they be accused individually or in their capacity as members of organizations or groups in both capacities.[24]

This helps support two critical principles of Universal Jurisdiction. To begin with, where the actual location of a crime occurs should not prevent the creation of trials or the right to prosecute an individual in another country. If the crime meets the precedents for applying Universal Jurisdiction—such as that it is a crime against humanity— that is the priority. Similarly, the charter sets out that singular individuals, military leaders, presidents, and entire countries committed the crime, and therefore there must be accountability through the rule of law. With that, according to Article 6 of the Nuremberg Charter, crimes against peace, war crimes, and crimes against humanity qualify for individual prosecution by trial.[25] Crimes against peace are described as "planning, preparation, initiation or waging of a war in violation of international treaties, agreements or assurances, or participation in a common

[22] *Id.* at 499-509.

[23] Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*. Vol.105, No.1 THE AMERICAN JOURNAL OF INTERNATIONAL LAW. 3 (Jan 11).

[24] United Nations Charter of the International Military Tribunal, Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S.

[25] *Id.*

plan or conspiracy for the accomplishment of any of the foregoing."[26] War Crimes are considered "violation of the laws or customs of war. Such violations shall include…murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages...destruction of cities, towns or villages, or devastation not justified by military necessity."[27] Finally, Crimes Against Humanity relate to the "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population."[28] These three definitions advanced the protection of human rights by permitting Universal Jurisdiction in any case when a crime qualified under any of them, according to the International Military Tribunal. While this was a specific, internationally agreed-upon, and joint tribunal, its basis has supported many cases that relied on Universal Jurisdiction.[29]

The Geneva Convention of 1949 and the Additional Protocol 1 of 1977 are also prominent sources of authority for any legal doctrine related to international humanitarian law. In addition, they provide a broader scope of power as it relates to strict norms that need to be upheld by the international community. Articles 49 and 50 in the first Geneva Convention are found in both Geneva Conventions and expand on the importance of Universal Jurisdiction and the crimes that fall under its scope.[30] Article 49 states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.[31]

This article sets the expectation that if crimes against humanity are committed, countries have a responsibility to seek justice to the best of their abilities. Anything less would be a violation of the Geneva Convention under Article 49.

Dividing this article into three parts helps to analyze the effectiveness of Universal Jurisdiction. For one, the notion that High Contracting Parties must "undertake to enact any

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Langer, *supra* note 19, at 3.
[30] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 U.N.T.S. 287.
[31] *Id.*

legislation necessary" alludes to the fact that nations should—and must— enact domestic laws that protect human rights as a whole and serve to support international law, especially in times of war.[32] Furthermore, extradition proves to be one of the biggest causes of inter-state discussion when Universal Jurisdiction is involved because it requires the explicit approval of one country for the movement of an individual by another country. Article 49 provides an answer by emphasizing that sovereignty does not need to be violated, but that states hold a responsibility to provide and/or prosecute those that committed grave breaches of the convention.[33]

Providing exact definitions for what constitutes a violation of international law is essential to ensure that the individuals who commit them do not escape responsibility by justifying them as part of a legal state mandate. Moreover, since many of the crimes were Universal Jurisdiction is applied involve genocide or crimes against humanity, these must be defined.

In Article 2 of the Genocide Convention of 1948,

> …genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[34]

Similar to Article 49 of the Geneva Convention, Articles 5 and 6 provide a basis for Universal Jurisdiction by calling upon states to ensure any provision necessary to achieve trial. As will be seen in the trial of Pinochet, this proves crucial in the exercise of Universal Jurisdiction. While some of them proved legally successful while others did not, upholding these principles was and continues to be crucial to ensuring impunity does not happen.

B. Universal Jurisdiction in Practice Spanish Universal Jurisdiction

It is important to note that a common principle in all international treaties, charters, and conventions is that they require individual States and their domestic laws to support International Law. The way that many nations have approached this is by expanding the scope of Universal Jurisdiction through domestic laws. One of the most, if not the most, prominent examples is Spain, which "has recognized its universal jurisdiction to prosecute entirely foreign atrocity crimes as a step toward ending impunity for gross human rights

[32] *Id.*
[33] *Id.*
[34] *Id.*

abuses."[35]As a member state of the United Nations, there are two specific treaties that Spain abides by that automatically support Universal Jurisdiction, the Genocide Convention and the Torture Convention.[36] This advances the legitimacy of Universal Jurisdiction within the nation and encourages enacting domestic laws to ensure its application. Three domestic courts hold Universal Jurisdiction: The Constitutional Tribunal, the Supreme Court, and the National Audience.[37] The Supreme Court of Spain and the Constitutional Tribunal hold the most power with the latter having a final say on constitutional matters. However, the National Audience is the first stop for international crimes and provides the first verdicts on trials were Spain deals with Universal Jurisdiction. In 2005, they both tried to dictate the scope of Universal Jurisdiction in Spain.

While Spain's Law on Judicial Power emphasizes that "Spanish jurisdiction is competent to try acts committed by Spaniards or foreigners outside the national territory for crimes recognized under Spanish law as, inter alia, genocide, terrorism, and crimes that, under international treaties and agreements, must be prosecuted in Spain," the Supreme Court of Spain and the Constitutional Tribunal disagreed on what Universal Jurisdiction entailed.[38]

The Spanish Supreme Court's decision strengthened that no international legal principle could violate domestic Spanish law because it goes against Article 27 of the United Nations Charter, and the principle of non-intervention specifically.[39] In comparison, the Constitutional Tribunal greatly disagreed and called upon the Genocide Convention to prove why Spain has a right to prosecute independent of the "procedural link to the national interest."[40] Mainly, that "the Supreme Court's restrictive interpretation of the Genocide Convention is incompatible with its goal of universally prosecuting genocide in order to avoid impunity."[41] The Constitutional Tribunal's decision set a precedent over the arguments of the Supreme court, and as such, dictated the decision in the trial of Adolfo Scilingo.

[35] Joeut, *supra* note 16, at 496.
[36] *Id.*
[37] *Id.*
[38] Ley Organica del Poder Judicial [L.O.P.J.] [Law on Judicial Power], art. 23.4 (Spain).
[39] *Id.*
[40] *Id.*
[41] *Id.*

In 2005, Adolfo Scilingo—a naval officer who participated in the Argentine "dirty war"— was charged with crimes against humanity by the Audiencia Nacional.[42] While his lawyers claimed this violated the principle of legality, the higher-ranked Spanish Supreme Court upheld the conviction by a vote of 11-4.[43] The Supreme Court argued that Article 607 bis of the Spanish Criminal Code supported the precedents of customary international law seen in the Nuremberg Statute and the ICC that remove "the requirement of nexus to armed conflict for crimes against humanity."[44] Moreover, because Scilingo's crimes were "committed as part of a widespread and systematic attack against the civilian population or part of it, or as well when they are committed by reason of the membership of the victim in a group or collective persecuted on political, racial, national, ethnic, cultural or related grounds, or other grounds universally recognized as unacceptable in international law," they can defined as both violations of Spanish domestic law and International Human Rights Law.[45] The Supreme Court also strengthened the usage of Universal Jurisdiction through "its interpretation of Article 23.4 of the LOPJ" and how Spain has jurisdiction to prosecute crimes against humanity under domestic code that supports the Geneva Convention, and the punishment of crimes that "pertain to the core of the most serious attacks on basic Human Rights."[46] With this, Adolfo Scilingo was sentenced to 25 years in prison.[47]

In addition, despite the insistence of the Spanish Supreme Court, there are strict procedural constraints on Spanish Universal Jurisdiction.[48] For one, as will be seen in the prosecution of the Former Head of State of Chile, Augusto Pinochet, Spain "does not recognize the immunity of former heads of state and senior officials."[49] The other prominent principle is that while investigations can occur *in absentia,* meaning that the individuals being investigated do not have to be in the nation conducting the process, courts require physician jurisdiction over the indicted for trials.[50] Finally, while Spain will prosecute an individual if

[42] Richard J. Wilson, *Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity,* vol. 12, no. 1 American Society of International Law (2008).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Ley Organica del Poder Judicial, *supra* at 38.
[49] *Id.*
[50] *Id.*

there is inaction by the domestic court of the accused, Spanish jurisdiction is "only complementary" and does not intend to infringe on sovereignty.[51]

C. Pinochet's Trial

Pinochet's case has set a precedent and changed the way international criminal law worked regarding former heads-of-state. While the trial never formally reached Spanish courts, it changed the way that Universal Jurisdiction was applied in the country and that eventually led to the Scilingo decision.

Pinochet was an official representative of the Republic of Chile from 1973 to 1990 as both the President of the Governing Junta and as Head of State.[52] The specific charges brought upon him by Spain include abduction, torture, over 1,000 disappearances, and the execution of political opponents.[53] In 1998, Spain "issued a second international warrant, alleging terrorism and genocide during the period 1988 to 1990."[54] At the time, Pinochet was in Britain, and despite many attempts to extradite him to Spain, his lawyers claimed that he had immunity due to his previous position.[55] Spain was insistent to try him in their domestic courts due to their application of Universal Jurisdiction.

As such, the British House of Lords heard appeals on whether he was granted state immunity based on the State Immunity Act of 1978. The Act serves

> …with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State immunity; to make new provision with respect to the immunities and privileges of head of State; and for connected purposes.[56]

In the end, Pinochet was not granted former head-of-state immunity. Lord Nicholls emphasized that "since torture is a crime of universal jurisdiction defined by reference to the perpetrator's official position, every torture trial involves scrutiny of 'official' acts."[57]

While the principle of Universal Jurisdiction succeeded in revoking his state immunity, it did not provide legal grounds for extradition based on the nature of his crimes. Due to an appeal by Pinochet's team, a 6-1 majority in the House of Lords ruled that torture

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[51] *Id.*
[52] Webber, *supra* note 6, at 524.
[53] *Id.* at 524-526.
[54] *Id.* at 531.
[55] *Id.*
[56] State Immunity Act c. 33, *reprinted in* 17 INT'L LEGAL MAT'LS 1123 (1978)
[57] Webber, *supra* note 6, at 531.

was not considered a crime for which he could be extradited under the Extradition Act of 1989 because it was not committed in the United Kingdom.[58] They argued that for the actual crime of torture to be worthy of extradition it couldn't be extra-territorial, and it needed to be charged in the United Kingdom. As a result, Spain was not able to prosecute him in their courts, and due to failing health, Pinochet was eventually allowed to go back to Chile, where he passed away without serving time for his crimes.

Despite this, Pinochet's trial at the House of Lords marked a shift for International Criminal Law where Universal Jurisdiction could be at the forefront, fixing the failures of systems like the ICC that continue to provide immunity for heads of state. If anything, it motivated the courts of Spain—in trials like that of Scilingo— to ensure that there were legal precedents to uphold the convictions of war criminals.

As Universal Jurisdiction has advanced and adjusted, the trial of Montano proved to be more effective. After analyzing some of the problems with Universal Jurisdiction, the solutions will be discussed through the successes of the trial.

II. Legal Obstacles to Universal Jurisdiction

A. Amnesty Law

In order to apply the principle of Universal Jurisdiction, the interpretation of the law must provide a wide scope to external governments in their path to prosecution. This concept is where the greatest challenges to expanding Universal Jurisdiction exist. Specifically, in the aftermath of a conflict—during the transitional justice period— one of the most common mechanisms used to achieve reconciliation is amnesty, which can be "understood as the process by which states exercise their sovereign right to mercy by extinguishing criminal or civil liability for past crimes."[59] These prevent prosecution for crimes committed during the conflict and can often be highly controversial.[60] Usually, if the domestic state has granted amnesty, they do not have a desire to prosecute since the social, cultural, and political climate does not require retributive justice. However, other states often have different criteria and apply Universal Jurisdiction to advance trials.

[58] *Id.* at 534-536.

[59] Louise Mallinder et al, *Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy*, vol. 39, no. 3 Journal of Law and Society. 413 (2012).

[60] *Id.* at 413-15.

Blanket amnesty can be divided into two subsets. Self-Amnesty is when a member of a past regime ensures that future prosecution does not occur through additions to domestic law.[61] The second is simply known as blanket amnesty, and it similarly provides unconditional amnesty; however, it is more extensive in that it does not require the individual that committed a crime to be a part of the regime.[62] It is applied "regardless of affiliations, and without requiring anything in return."[63] In comparison, conditional amnesties often require admissions of guilt in exchange for "full or partial amnesty."[64]

A prominent example of post-conflict amnesty was The Arias Peace Plan of 1987. The goal of this endeavor was to prevent a further escalation between the Contadora Group, the Latin American countries suffering the effects of the proxy war between the US and the Soviet Union during the Cold War.[65] The provision for amnesty in the Arias Peace Plan meant that countries such as El Salvador and Nicaragua needed to provide "freedom in all forms, property, and the security of the persons to whom" the amnesty was granted.[66] In terms of the peace process, the hope was that it would promote reconciliation through the forgiveness of perpetrators of human rights violations. Many have issues with the Arias Plan since it often gave countries the ability to prevent prosecutions as a political strategy. For example, there were no specifications regarding who qualified for amnesties, the statute of limitations, the requirements, and whether the degree of the crime held any importance.[67]

In the case of El Salvador, a military dictatorship committed crimes against humanity against a civilian population between 1981 and 1992, and many amnesties were provided to try to advance reconciliation.[68] However, these often proved contentious and led to lawsuits from victims of human rights violations in other countries. An example of the Salvadoran amnesty is seen in *Chavez v. Carranza*. The defendant, Nicolas Carranza, was the Vice-Minister of Defense and Public Security in El Salvador from 1979 to 1981 and

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[61] *Id.*

[62] Smith, Rachel W*, From Truth to Justice: How Does Amnesty Factor In? A Comparative Analysis of South Africa and Sierra Leone's Truth and Reconciliation Commissions*, 18-19 HONORS SCHOLAR THESES, (2010) https://opencommons.uconn.edu/srhonors_theses/136.

[63] *Id.* at 18.

[64] *Id.*

[65] John J Moore, *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvado*r, vol. 43, no. 3 Stanford Law Review. 743-59(1991).

[66] Arias Peace Plan, reprinted in THE COSTA RICA READER 364 (M. Edelman & J. Kenen eds. 1989).

[67] Moore, *supra* note 58, at 743.

[68] Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009).

became a naturalized citizen of the United States in 1991.[69] Four plaintiffs filed a suit in 2003 against Carranza for having command responsibility in "the acts of torture, extrajudicial killing, and crimes against humanity."[70]

A jury found Carranza responsible, and "awarded $500,000 in compensatory damages and $1 million in punitive damages to each plaintiff."[71] He appealed the verdict by arguing that the district court did not respect the amnesty laws enacted by El Salvador. [72] It is necessary to emphasize that the Salvadoran Amnesty Law "passed by the Salvadoran Legislature in order to provide amnesty to all those who participated in political or common crimes during the civil war in El Salvador before 1992"[73] excused Carranza domestically from crimes against humanity; however, the court ruled against its effectiveness in protecting Carranza.

The district court ruled as such because it deemed the crime amounted to extraordinary circumstances and the amnesty law did not have an extraterritorial effect since "there is nothing in the Salvadoran Amnesty Law to suggest that it should apply or was intended to apply outside the country enacting it."[74] The fact the defendant had to abide by domestic U.S. law provided grounds for the ineffectiveness of the amnesty. However, more often than not, an amnesty must either expire, be declared a violation of international law, or be removed by the country who granted it to be able to advance in holding individuals accountable. This makes the application of universal jurisdiction rare due to each country's own agendas.

B. Immunity

Another roadblock to universal jurisdiction is state-provided immunity. Similar to amnesties, immunity prevents prosecution to occur without infringing on another country's domestic laws and sovereignty since it directly denies foreign court jurisdiction in all cases.[75] There are two main types of immunities*: ratione materiae* and *ratione personae*. In the case of *ratione materiae*, the immunity is given by the state based on specific actions committed in its

[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Andrew Sanger, *Immunity of State Officials From The Criminal Jurisdiction of A Foreign State*, vol. 62, no. 1 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 193, 199-202 (2013).

favor.[76] It specifically deals with the act's nature, times, and place.[77] As such, it "is guaranteed in customary international law and precludes foreign courts from exercising jurisdiction in a suit brought against the State itself, an agent of the State or an individual performing an official function of the State."[78] This is the type of immunity that provided Pinochet protection in England.[79] In the House of Lords, many argued that because all of his actions were as Head of State and in an official capacity, Spain could not have criminal jurisdiction over his war crimes.[80]

On the other hand, *ratione personae* defines the immunity given to individuals such as heads-of-state.[81] The International Court of Justice, in the case Arrest Warrant, concluded that

> …in international law, it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from the jurisdiction in other States, both civil and criminal.[82]

C. Sovereignty and Rights

Amnesties and Immunities conflict with Universal Jurisdiction because they depend on the will of states to grant and revoke them. As such, trials that deal with them can often inflict on state sovereignty, and how far multi-state cooperation should go. Moreover, they usually argue in favor of Universal Jurisdiction to be widespread or for domestic laws to be the only source of accountability. As seen in the case of Pinochet, even if an external nation can prove they have legal grounds to apply Universal Jurisdiction, if a state does not grant permission for extradition or does not waive amnesties or immunities, the prosecution cannot advance. Universal Jurisdiction requires full collaboration from all states involved, or it does not have the scope to function effectively.

Unsurprisingly, this tension is also seen in instances when two countries want to prosecute the same individual for the same crime. Based on Universal Jurisdiction, there is

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[76] *Id.*

[77] Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction, Warsaw, April 27, 2015.

[78] *Id.*

[79] Webber, *supra* note 6, at 528.

[80] *Id.*

[81] Sanger, *supra* note 65, at 195.

[82] Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction, *supra* note 67.

an equal claim to prosecute since it does not require a national link to pursue or hold a trial.[83]As such, conflicts can arise simply from this division and add to the cycle of impunity in which there are no convictions.

III. Why does Universal Jurisdiction need to be prominent?

While the roadblocks to increasing the prominence of Universal Jurisdiction are powerful, there are more substantial arguments for its advancement. Indeed, the fact that it is growing in support and usage despite past failures shows how there is a necessity to prevent impunity. By strengthening the claim of International Tribunals like the International Criminal Court, encouraging states to pass domestic laws, and defining clear guidelines for applying Universal Jurisdiction, there could be a new era of international law. As such, they will be discussed further.

A. Strengthening the ICC

The International Criminal Court and the principle of Absolute Jurisdiction go hand in hand. They both require international jurisdiction and collaboration to maintain the rule of law around the world. The ICC was established as a permanent tribunal to "bring to justice individuals who commit genocide, war crimes, and crimes against humanity,"[84] and its formation was based on the ratification of the Rome Statute. As such, strengthening the ICC—and its foundations— would aid resolve issues of sovereignty and prevent impunity from occurring by forcing the removal of amnesties and immunities when a crime of immense proportions occurs.[85]

It is essential to review the articles of the Rome Statute that provide support for Absolute Jurisdiction. Article 4 emphasizes that the ICC "shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes" and that its jurisdiction can extend to non-member states "by special agreement."[86] Article 5 dictates that crimes such as genocide, war crimes, and crimes against humanity will fall under the court's jurisdiction. In the cases where Universal Jurisdiction has been applied, the legal basis relies on these two articles since they give grounds for persecution in foreign courts

[83] Langer, *supra* at 19, at 1.

[84] K. P. Prakash, *International Criminal Court: A Review,* 4113-15 Economic and Political Weekly, vol. 37, no. 40, ECONOMIC AND POLITICAL WEEKLY (2002).

[85] *Id.*

[86] Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90.

since the acts of violence violate international law as a whole.[87] With this, the added specifications of murder, torture, and enforced disappearances in Article 7 and what war crimes constitute in Article 8 is why General Pinochet and Coronel Montano were also able to be prosecuted.[88]

B. Encouraging States to Pass Domestic Law

Absolute Jurisdiction can only work if the domestic state of the individual who committed the crimes or where they currently reside agrees to its application. One of the best ways to ensure the removal of amnesties and immunities is to promote the passage of domestic laws through multi-state pressure that allow for their removal in circumstances where international law is violated and encourage the prosecution of other countries to achieve justice. The United States and Spain demonstrated these principles in one of the latest cases founded on Universal Jurisdiction.[89]

This is seen in the 2020 trial of Colonel Inocente Montano for the massacre of five Spanish priests during the Civil War Period in El Salvador. To begin with, the Center for Justice and Accountability "and Spanish Association for Human Rights filed criminal charges in Spain against the former President of El Salvador and 19 former members of the military for the massacre"[90] While many had amnesties or still resided in the United States, the United States Department of Homeland security found Former Colonel Montano and filed immigration fraud charges to support the Spanish investigation.[91] Moreover,

> April 8, 2015, the United States Attorney for the Eastern District of North Carolina, on behalf of Spain, filed a complaint seeking extradition of Relator to face prosecution for 'terrorists acts involving the murder of five Jesuit priests' committed on November 16, 1989, in El Salvador.[92]

Eventually, the U.S. Supreme Court allowed Montano to be extradited to Spain based on the "extraditable offenses under the terms of the extradition treaty between the United States and Spain"[93] which include the murders Montanto committed.

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[87] *Id.*

[88] *Id.*

[89] Murder of Jesuit Priests and Civilians in El Salvador: The Jesuits Massacre Case, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, https://cja.org/what-we-do/litigation/the-jesuits-massacre-case/ (last visited Jan 24, 2022).

[90] *Id.*

[91] *Id.*

[92] United States District Court for the Eastern District of North Carolina Northern Division, No. 2:15-MJ-1021-KS

[93] *Id.*

In Spain, he was sentenced to 133 years in jail by the Audencia Nacional for "terrorist murder."[94] While the tribunal mentioned how the 2014 reform to its "Ley Organica del Poder Judicial" heavily reduced the scope of Universal Jurisdiction in Spain, it reinforced that it is this principle that allowed them to pursue their investigation and prosecution.[95]

C. Strengthen the Principle of Complementarity

The principle of complementarity is also part of the Rome Statute, and if states adhere to the rule of law, it could prevent inter-state conflict when deciding how to prosecute crimes. The jurisdiction of the ICC is extensive unless a state that has domestic jurisdiction is currently investigating the same case; however, in "situations when the state is unable or willing to proceed with an investigation or where the state investigation is conducted in bad faith, such as when it is used to shield the person from criminal responsibility" complementarity grants jurisdiction to the ICC.[96] In the case of Universal Jurisdiction in a domestic context, the principle of complementarity could be added to domestic laws to ensure if a state is not achieving retributive justice, external courts have the right to apply universal jurisdiction and prosecute individuals. Furthermore, there are already individual states, like the United States, which include the principle of complementarity to promote International Law while having control over their sovereignty.[97]

Conclusion

For the last two decades, the trends of accountability through the rule of law that began at Nuremberg expanded to post-World War II crimes. As a result, International Criminal Law has adjusted and evolved to try to meet the changing social, political, and cultural demands.

Universal Jurisdiction is one of the main legal mechanisms that has gained prominence as the best way to meet the demand for these calls for justice. While it is not without controversy or risk, if encouraged through inter-state collaboration it can advance deterrence, close the impunity gap between government and military officials, and aid in a

[94] *Murder of Jesuit Priests and Civilians in El Salvador: The Jesuits Massacre Case*, *supra* note 89.

[95] Joeut, *supra* note 16, at 504.

[96] *Complementarity*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/complementarity (last visited Jan 24, 2022).

[97] Donovan, Donald Francis & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction,* vol. 100, no. 1 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 142, 142–63 (2006).

successful transitional justice process. We are only starting to see the powerful effects of Universal Jurisdiction, and it appears it can be the future of the field of International Criminal Law.

With precedents such as the Geneva Convention, Rome Statute, and the Genocide Convention to support its application, states have the opportunity to support human rights through Universal Jurisdiction. It ensures that the worst crimes and perpetrators are held accountable by having the rule of law as its main driving force. This is why from Ukraine to Myanmar; Universal Jurisdiction is seen as a plausible solution to prevent further war crimes from occurring.

Gerrymandering and Statistical Models

Sarah Miller

Introduction: Gerrymandering: Unstoppable

Before the 2010 Census, Republicans were in control of twenty-five state senates and twenty-eight state House of Representatives. This included twenty-five states where Republicans controlled all chambers of the state legislature, compared to only sixteen state senates and sixteen state houses that were under Democratic control.[1] The Census gave Republicans an opportunity to favorably redraw more electoral districts. The Republican State Leadership Committee initiated a strategy known as REDMAP, an effort to redraw the electoral districts in as many states as possible to favor Republicans for both state and federal office.[2] The results of this plan became evident in the 2012 elections, when Democrats received 1.4 million more votes across the country and Republicans regained control of the federal House by a margin of 234 to 201 seats.[3] This practice, known as partisan gerrymandering, is the process of drawing districts to give one party a political advantage over another.[4]

The specific procedures vary state by state, although in general, the maps are drawn by the state legislature, specifically, the party in control.[5] The procedures for drawing a district can amplify or diminish the political power of certain groups within the state. Such strategies can include "packing" – the practice of concentrating people of a certain political leaning or similar identity into only a few districts to minimize the efficacy of their votes. Another practice known as "cracking," which is employed in which those same groups of

[1] *State legislative election results 2010,* BALLOTPEDIA, https://ballotpedia.org/State_legislative_elections_results,_2010#State_legislature (last visited Apr. 7, 2022).

[2] Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 3, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html..

[3] *Redistricting Majority Project,* Redistricting Majority Project, http://www.redistrictingmajorityproject.com/ (last visited Apr. 13, 2022).

[4] Ron Johnston, *America Gerrymanders On*, 89 Pol. Quar. 667, 669 (2018).

[5] *State-by-state redistricting procedures,* BALLOTPEDIA, https://ballotpedia.org/State-by-state_redistricting_procedures (last visited Apr. 7, 2022).

people who are geographically concentrated are spread out among numerous voting districts to dilute their voting power.[6] Both of these methods are attempts by lawmakers to manipulate the electoral process to favor their party. These practices are inherently antithetical to representative democracy, as elected officials can manufacture voting conditions that skew electoral results to allow election results to be unrepresentative of the people.

Partisan gerrymandering is not new to American politics; in fact, the term itself dates to the early 1800s, when the governor of Massachusetts, Eldridge Gerry, created a salamander-shaped district.[7] The strategy of employing gerrymandering techniques remains a staple of political strategy, utilized by both political parties. Currently, there are many more states that are gerrymandered to favor Republicans than Democrats[8], although the exact number is unclear given discrepancies in identifying and quantifying gerrymanders. That there are more gerrymanders to favor Republicans than Democrats can be attributed to the fact that Republicans were able to win many state legislatures during the 2010 census, not an indication that gerrymandering is a practice that is unique to only Republicans.[9] Instances of gerrymandering are on the rise,[10] which, in combination with polarization in American politics, has only further diminished the competitiveness of elections.[11] This, in turn, decreases the incentive for elected officials to listen to the voices of their constituents as districts are no longer as competitive. Political parties have also been more brazen recently in their gerrymandering efforts.[12] The Supreme Court, itself a nonpartisan body, recently ruled that partisan gerrymandering is a nonjusticiable political question despite the use of statistical data to empirically prove that gerrymandering had taken place.[13] These conditions

[6] Johnston, *supra* note 4, at 669.

[7] *Id.* at 668.

[8] Michael Martin & Katie Fahey, *How Gerrymandering Efforts Fit Into the 2020 Presidential Election*, NPR (Nov. 8, 2020, 5:07 PM), https://www.npr.org/2020/11/08/932880774/how-gerrymandering-efforts-fit-into-2020-presidential-election.

[9] Nina Totenberg, Domenico Montenaro, & Miles Parks, *Supreme Court Rules Partisan Gerrymandering Is Beyond the Reach Of Federal Courts*, NPR, Mar. 27, 2019, https://www.npr.org/2019/06/27/731847977/supreme-court-rules-partisan-gerrymandering-is-beyond-the-reach-of-federal-court.

[10] Zachary B. Wolf, *Gerrymandering: How it's being exposed and how it affects your state,* CNN (Nov. 20, 2021, 8:00 AM), https://www.cnn.com/2021/11/20/politics/redistricting-maps-gerrymandering-what-matters/index.html.

[11] Carroll Doherty, *Key takeaways on Americans' growing partisan divide over political values*, Pew Research (Oct. 5, 2017), https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/.

[12] Stuart Chinn, *Procedural Integrity and Partisan Gerrymandering*, 58 Hous. L. Rev. 597, 641 (2021).

[13] Rucho v. Common Cause, 139 U.S. 2484, 2519 (2019).

combine to create a dire state of gerrymandering, where the practice is rampant without any meaningful way to check it. Given these conditions, it is crucial that there be ways to address or mitigate its effects. This article examines the history of gerrymandering and apportionment in the courts, analyzes the legal doctrines currently governing gerrymandering and issues of apportionment, and addresses the flaws that continue to exist. Finally, this article proposes solutions to the issue of gerrymandering, relying on the use of statistical data and measurements to better regulate gerrymandering.

Part I: Gerrymandering in the Courts

A. Redistricting Methods

The basis for apportionment can be found in Article I, Section II of the Constitution, which says that:

> Representatives…shall be apportioned among the several states which may be included in this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons… The actual Enumeration shall be made… within every subsequent Term of ten Years, in such Manner as they shall by Law direct.[14]

Additionally, Article I, Section IV states that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[15] This means that while the way in which the Census is conducted is determined by Congress, states retain the authority to design their own electoral maps. Based on the Constitution, as well as Supreme Court rulings, the only legal guidelines that these maps must satisfy include those that state that districts must be contiguous, contain equality of population within each district, and cannot be designed solely on the basis of race.[16] However, many states have chosen to prioritize the creation of some majority-minority districts to enhance the representation of people of color in government.[17] Additionally, it is common practice to keep districts compact for retaining the integrity of existing municipalities.[18] Some states have turned to other methods of enforcing these practical

[14] U.S. Const. art. 1 § 2.

[15] U.S. Const. art. 1 § 4.

[16] *Redistricting Criteria*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 16, 2021), https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx.

[17] *Majority-minority districts*, BALLOTPEDIA, https://ballotpedia.org/Majority-minority_districts (last visited Apr. 7, 2002).

[18] *Redistricting Criteria*, *supra* note 16.

norms, although these practices have neither become widespread nor have they been completely effective in circumventing partisan influences on this process.

Generally, the redrawing of districts occurs after the Census takes place, unless a court ruled a district map unlawful. In such rare cases, the court would order that a new map be redrawn.[19] Thus, the party who is in power during the drawing of the districts leverages the ability to sway politics in their state for the next decade. History has proven numerous examples of how drawing politically favorable districts has given that party an electoral advantage for years until state demographics shift enough to mitigate the effects of the party's gerrymander.[20] If the party in power can tilt the electoral map in their favor, their ability to remain in power and face better reelection odds increases even if they lack actual popular support.

There have been various efforts led by states aimed at rectifying unjust redistricting practices, including moving towards independent redistricting commissions. These commissions, which are nonpartisan in nature, try and mitigate the political motivations of state legislators.[21] However, even these commissions contain weaknesses and vulnerabilities to outside pressures. So far, only fifteen states have implemented some form of independent commissions. After the development of the independent commission in California, evidence arose of the Democratic Party working covertly to influence the committee into creating a map that would favor Democrats.[22] They surreptitiously reached out to local officials, community organizations, and individual voters to get them to testify in favor of maps that would benefit Democrats.[23] When testifying to the redistricting committee, these people were told not to disclose their relationship to the Democratic Party.[24] This strategy was

[19] Jonathan Lai, *Pa. Gerrymandering case: State Supreme Court releases new congressional map for 2018 elections*, PHILADELPHIA INQUIRER (Feb. 19, 2018), https://www.inquirer.com/philly/news/politics/pennsylvania-gerrymandering-supreme-court-map-congressional-districts-2018-elections-20180219.html.

[20] Christopher Warshaw, *An Evaluation of the Partisan Bias in Pennsylvania's Congressional District Plan and its Effects on Representation in Congress*, BRENNAN CENTER FOR JUSTICE , 10-11 (Nov. 27, 2017), https://www.brennancenter.org/sites/default/files/legal-work/LWV_v_PA_UpdatedExpertReport_ChristopherWarshaw.pdf.

[21] *Creation of Redistricting Commissions,* NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 10, 2021, https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx.

[22] Susan Crabtree, *In California, 'Independent Redistricting' Proves Suspect,* RCP (Dec. 9, 2021), https://www.realclearpolitics.com/articles/2021/12/09/in_california_independent_redistricting_proves_suspect_146858.html#!.

[23] Olga Pierce and Jeff Larson, *How Democrats Fooled California's Redistricting Commission,* PROPUBLICA (Dec. 21, 2011), https://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission.

[24] *Id.*

ultimately successful, as the electoral map ended up favoring Democrats even more than the previous one, despite there being little to no demographic shifts.[25] This shows the lengths political parties are willing to go to try and rig district maps in their favor. Even this seemingly apolitical body was not immune to partisan interference.

Overall, the success of independent redistricting commissions has been questionable. In states where such commissions have been created, political parties are using their resources to influence or circumvent the supposed non-partisan committees, in some cases ignoring entirely the maps suggested by these commissions.[26] Even in instances where independent redistricting commissions have been able to enact their maps, these maps have not been more competitive,[27] showing that these commissions have not been able to counteract the gerrymandering activities of political parties. Clearly, independent redistricting commissions have not provided a solution to partisan gerrymandering.

B. United States Supreme Court Apportionment Precedents

It was not until 1962 that the U.S. Supreme Court considered redistricting to be a political issue, and therefore ruled that the courts did not have jurisdiction on redistricting issues.[28] In the 1962 landmark case *Baker v. Carr*, a Tennessee voter sued under the Equal Protection Clause of the Fourteenth Amendment on the grounds that he was not granted Equal Protection under the law because the urban district in which he lived housed a far greater population due to recent population movements than other more rural districts. The Court ruled that courts within the federal judiciary did in fact have limited jurisdiction over apportionment because it concerned the Equal Protection Clause of the Fourteenth Amendment, making it a Constitutional issue.[29] The Court also ruled that unequal populations within a state's electoral districts violated the Fourteenth Amendment's Equal Protection Clause because it unfairly disadvantaged those living within the more populous districts[30]. The Equal Protection Clause guarantees "equal protections of the laws" to all

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[25] Crabtree, *supra* note 22.

[26] Nick Corasaniti & Reid J. Epstein, *How a Cure for Gerrymandering Left U.S. Politics Ailing in New Ways*, N.Y. TIMES (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/us/politics/gerrymandering-redistricting.html.

[27] Sam Gringlas, *Success of Independent Redistricting Boards a Work in Progress,* NBC NEWS, Jul. 27, 2015, https://www.nbcnews.com/politics/politics-news/independent-redistricting-boards-are-constitutional-how-effective-are-they-n399311.

[28] G. Michael Parsons, *Gerrymandering and Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 Ind. L.J, 1295, 1297 (2020).

[29] Baker v. Carr, 369 U.S. 186, 199 (1962).

[30] *Id.* at 207

citizens, and the Constitution guarantees to all citizens the right to vote.[31] The state action that resulted in the comparative dilution of the votes of citizens living in certain districts relative to others is Constitutionally unjustifiable because it infringes upon their right to vote.[32] Over time, this has evolved into the "one person, one vote" doctrine, which states that each person should have an equal voting power within the same state.[33] This ruling also formalized that all districts within a state must be of approximately equal population, so as not to distort the impact of people's votes.[34]

This was furthered in the 1964 U.S. Supreme Court cases of *Wesberry v. Sanders* and *Reynolds v. Sims*.[35] In *Wesberry*, the Court dealt with the unequal district sizes in Georgia, where the Fifth District Congressional member was representing at least twice as many voters as the other districts in the state.[36] The Court sided with the appellants, who claimed that the unequal apportionment here was a violation of the Equal Protection Clause of the Fourteenth Amendment, and that the dilution of the votes of those within the Fifth District was unconstitutional[37]. Writing for the majority opinion, Justice Black was careful to note that the same reasoning that led to the *Baker* ruling was equally applicable in this case.[38] Similarly, in *Reynolds*, another apportionment case, the Court upheld the *Baker* precedent, with Chief Justice Warren stating unequivocally that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State".[39] These rulings strengthened the *Baker* precedent and the legal reasoning that justified it, enforcing reasonable guidelines as to how districts must be drawn in order to abide by the Constitution.

Another case of partisan gerrymandering to reach the Supreme Court was *Davis v. Bandemer* in 1986. [40] In this case, Indiana Democrats claimed that the map was gerrymandered to favor Republicans.[41] The plaintiffs sued under the Fourteenth Amendment's Equal

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[31] U.S. Const. amend. XIV § 1.; U.S. Const. amend. XV § 1

[32] *See Baker*, 369 U.S. at 207-208.

[33] John D. Griffin and Brian Newman, *One Person, One Vote? — Why Citizens' Votes Carry Unequal Weight Despite Baker and Why it Matters*, 64 Case West. Res. L. Rev., 1079, 1079 (2012).

[34] *Id.* at 1084.

[35] Wesberry v. Sanders, 376 U.S. 1, 6 (1964); Reynolds v. Sims, 377 U.S. 533, 556 (1964).

[36] *Wesberry,* 376 U.S. at 7.

[37] *Id.* at 6.

[38] *Id.* at 5.

[39] *Reynolds,* 377 U.S. at 560-61.

[40] Davis v. Bandemer, 478 U.S. 109, 115 (1986).

[41] *Id.*

Protection Clause.[42] The Supreme Court ruled that this case was justiciable because, despite the political nature of the case, the question of whether or not a branch of government had gone beyond its constitutional limitations does fall within the Supreme Court's purview.[43] Ultimately, the Court ruled that the plaintiffs had not sufficiently proven that a violation of rights had occurred.[44] Additionally, the Court was unable to establish whether any partisan gerrymandering was unconstitutional under the Equal Protection Clause. Justice Powell, writing in a concurring opinion, put forth a potential method for adjudicating the constitutionality of a partisan gerrymander. His method would attempt to consider the method of districting, how well the existing districts aligned with political subdivisions such as townships or neighborhoods, as well as statistical data demonstrating vote dilution.[45] However, this test was not approved by a majority of the Court, because they found that disproportionate election results from an election were not enough basis to constitute a violation of the Fourteenth Amendment. The Court further states that they were not convinced by the additional evidence brought by the Indiana Democrats that demonstrated intent of vote dilution.[46] Although Powell's test was not considered part of the Court's decision, it presents a potential future viable path in testing districting processes for constitutional violations.

The next major Supreme Court decision on apportionment came in 1993, in *Shaw v. Reno*, which began to establish guidelines for apportionment and districting.[47] This case involved the Voting Rights Act of 1965, a major piece of civil rights legislation that provided federal protections for voting rights.[48] This bill passed as a remedy for the systematic disenfranchisement of African American voters, and empowered the federal government to intervene in the election process to protect against infringements on the right to vote.[49] Some of the main provisions within the Voting Rights Act prohibited any voting regulations or practices that might deny a person the right to vote due to their race, outlawed voter intimidation, and created federal oversight for these state processes.[50] Section Two of the

[42] *Id.*
[43] Davis v. Bandemer, 478 U.S. 109, 155 (1986).
[44] *Id.* at 131.
[45] *Id.* at 134.
[46] *Id.* at 140.
[47] Shaw v. Reno, 509 U.S. 630, 647 (1993).
[48] Voting Rights Act, 52 U.S.C § 10301-10702 (2021).
[49] Kevin J. Coleman, R432626 Cong. Research Serv., *The Voting Rights Act of 1965: Background and Overview* 12 (2015).
[50] *Id.* at 14.

Voting Rights Act prohibits any electoral practices that might dilute the voting power of minority groups, including gerrymandering districts to diminish the voting power of racial minorities[51]. A known remedy for this was the creation of majority-minority districts to ensure that the voting power of racial minorities was not diluted.[52] Another key aspect of the Voting Rights Act was the designation of certain regions in the country with a history of voting discrimination as needing federal approval from the Justice Department or a federal court on all new voting legislation.[53] This procedure was enacted to protect against discriminatory voting practices within these areas.[54] The Voting Rights Act furthered the ability for federal oversight of districting processes to prevent gerrymandering as a means of diluting the voting power of certain groups.

North Carolina was one of the states covered by preclearance, and as such, the state had to submit its redistricting plan after the 1990 Census to the Attorney General for approval.[55] North Carolina had drawn one majority-minority district in the state. Upon review, the Attorney General ordered that a second majority-minority district be created, given the racial makeup and the population of the state.[56] In order to satisfy this requirement, they redrew the map to include a barely contiguous majority-minority district that cut through ten different counties.[57] A group of white citizens in North Carolina sued claiming that this majority-minority district was racial discrimination in violation of the Fourteenth Amendment.[58] The Supreme Court sided with the white appellants in this case, ruling that gerrymandering districts solely on the basis of race is unconstitutional, because it is essentially racial segregation within the electoral process.[59] The Court stated that, while race-conscious policies are Constitutional, any classifications on the basis of race are immediately subject to strict scrutiny to ensure that they are justifiable, thus creating an important distinction between the two.[60] This would allow for race to be considered as a factor in creating districts, but it could not be the only consideration. In the majority opinion, Justice O'Connor stated

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[51] 52 U.S.C. § 10301 (2021).

[52] *Majority-Minority Districts*, *supra* note 17.

[53] 52 U.S.C. §10304.

[54] Coleman, *supra* note 49, at 14.

[55] U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, LIST OF JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5 (2021), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

[56] Elianna Spitzer, *Shaw v. Reno: Supreme Court Case, Arguments, Impact*, THOUGHTCO (Nov. 23, 2020), https://www.thoughtco.com/shaw-v-reno-4768502.

[57] Shaw v. Reno, 509 U.S. 630, 636 (1993).

[58] *Id* at 634-35.

[59] *Id.* at 642.

[60] *Id.* at 643.

that some "legitimate state interests" that should be taken into account were "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions."[61] In this ruling, these factors were recognized by the Court as important when districting. This, in turn, provided some standards and criteria that states could use as guidelines when drawing electoral districts.

The established precedent was overturned by the 2004 Supreme Court case of *Vieth v. Jubelirer*.[62] This suit was brought by Pennsylvania Democrats who claimed that the Republican-controlled state legislature had violated their Fourteenth Amendment rights by constructing a map that limited their voting power within their district.[63] They argued that this was a violation of the "one person, one vote" doctrine established in the *Baker v. Carr* case of 1962, claiming that the "one person, one vote" principle contains the inherent idea that each political party should have a fair chance at electing their representatives, and that distorting the voting power of certain political groups is unconstitutional.[64] The appellants also attempted to rely on the same standards used to adjudicate racial gerrymandering; that is, proving both discriminatory intent and effect. This strategy was unsuccessful because it presumed that political parties were granted the same constitutional rights as racial minorities, which the Court found to be false.[65] The Court overturned part of the standing precedent set by *Davis v. Bandemer*, stating that because there is no standard for measuring gerrymandering in these cases, the issue is not justiciable in court.[66] The majority opinion held that since there had been no cases, in the years since *Davis v. Bandemer*, where the federal courts had been able to provide redress for the harms done by gerrymandering, these matters were clearly unable to be resolved in federal court.[67] The subsequent spike in gerrymandered maps after the 2010 census can be partly attributed to this ruling and its provided legal cover for gerrymandering.[68]

At this point, the implementation of a concrete test would be necessary for the Supreme Court to overturn a partisan gerrymander. In the 2018 Supreme Court case of *Gill*

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[61] *Id.* at 641
[62] Vieth v. Jubelirer, 541 U.S. 267, 306 (2004).
[63] *Id.* at 273.
[64] *Id.* at 284.
[65] *Id.* at 284-85.
[66] *Id.* at 279.
[67] *Id.*
[68] Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, The Atlantic (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/.

v. Whitford, Wisconsin Democrats claimed that their state's map unfairly concentrated Democratic voters into only a few districts to limit their electoral power.[69] They demonstrated this through use of the efficiency gap metric, which approximates the numbers of "wasted votes," [70] a term which refers to votes that have no impact on the outcome of the election. For example, if the winning candidate in an election received 10,000 votes and the losing candidate received 6,000 votes, there would be 3,999 votes cast for the winning candidate that were "wasted." A large number of wasted votes can be an indicator of a gerrymandered district.[71] In this case, the Court acknowledged the undemocratic nature of partisan gerrymanders. In Justice Kagan's concurring opinion, she wrote that gerrymandering "enables politicians to entrench themselves in power against the people's will" and that "only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches."[72] However, the Court ultimately dismissed the case, finding that the appellants did not adequately prove that they had standing, as they did not demonstrate their personal stake in the matter.[73] The significance of the Supreme Court's ruling lies in the acknowledgement that partisan gerrymandering is a grievance that can be adjudicated in federal court and that instances of gerrymandering have the potential to be a violation of Constitutional rights, such as the Fourteenth Amendment.[74] Even though the Supreme Court did not rule in favor of the Wisconsin voters, this ruling provided the opportunity for future gerrymandering cases by stating that partisan gerrymandering dilutes the power of an individual's vote in comparison to the votes of others within their state in a manner which would not happen if the electoral map were neutral.[75] This is unconstitutional, as it violates the Equal Protection Clause of the Fourteenth Amendment.

However, the 2019 U.S. Supreme Court ruling in *Rucho v. Common Cause* completely terminated any potential for federal adjudication of gerrymandering.[76] North Carolina Democrats sued the state legislature over an electoral map that would disproportionately

[69] Gill v. Whitford, 138 U.S. 1916, 1920 (2018).
[70] *Id.* at 1932.
[71] Ron Johnston, *America Gerrymanders On*, 89 Pol. Quar. 667, 671 (2018).
[72] *See Gill*, 138 U.S. at 1923.
[73] *Id.* at 1933.
[74] *Id.* at 1925.
[75] *Id.* at 1935.
[76] Rucho v. Common Cause, 139 U.S. 2484, 2487 (2019).

benefit Republicans in elections.[77] The U.S. District Court for the Middle District of North Carolina first struck down the map in early 2018, and ordered the state to draw a new map.[78] The U.S. Supreme Court remanded the case to the district court for reexamination in light of the Supreme Court ruling in *Gill v. Whitford*.[79] The District Court then ruled in favor of the plaintiffs again, and the defendants then appealed this case to the Supreme Court.

In 2019, the Supreme Court ruled that these claims could not be decided by a federal court, and in doing so, overruled the precedent on gerrymandering going back to *Davis v. Bandemer*.[80] The majority opinion based this on the fact that the Justices were divided in the *Davis* decision, citing the Court's inability to come to a conclusion as to what a meaningful standard to apply in gerrymandering cases could be.[81] The Court ruled that partisan gerrymandering is a political question and therefore the federal courts have no authority on the matter. Therefore, partisan gerrymandering is only justiciable in state courts under state statutes.[82] However, this decision does not refute the claim that partisan gerrymandering, in principle, is an unconstitutional voting practice under the Fourteenth Amendment because it dilutes the voting power of individuals. This claim reflects another piece of precedent established in *Davis*. Despite this, the Court's ruling that federal courts do not have jurisdiction over cases of partisan gerrymandering means that these cases must now be decided based on state law, which can vary between jurisdictions.[83]

C. Partisan Gerrymandering Cases at the State Level

Although partisan gerrymandering cases have experienced little success on the national level, the opposite is true of cases at the state level. In 2018, the League of Women Voters sued the state of Pennsylvania claiming the redistricting map violated the Free and Equal Elections Clause of the Pennsylvania Constitution.[84] This clause states that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[85] The case, *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, used the testimony of expert witnesses to show a deviation from

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[77] Common Cause v. Rucho, 240 F. Supp. 3d 376, 379 (M.D.N.C., 2017).
[78] *Id.* at 378.
[79] *Rucho v. Common Cause*, BRENNAN CENTER FOR JUSTICE (Aug. 1, 2019), https://www.brennancenter.org/our-work/court-cases/rucho-v-common-cause.
[80] Rucho v. Common Cause, 139 S. Ct. 2484, 2487 (2019).
[81] *Id.* at 2497.
[82] *Id.* at 2507.
[83] *Id.* at 2504.
[84] League of Women Voters v. Commonwealth, 645 Pa. 1, 131 (2018).
[85] Penn. Const. art. 1 § 5.

a non-partisan district map. The non-partisan map was drawn by a computer using only basic guidelines regarding population size, compactness, and contiguousness.[86] These experts utilized computer simulations and statistical analysis to show that the map created by the state legislature was a statistical outlier when measuring nonpartisan redistricting criteria such as compactness or integrity of municipalities.[87] It was further demonstrated that this map prioritized partisan advantage over all other criteria including compactness and municipality integrity.[88] Various other expert witnesses provided testimony regarding the efficiency gap in Pennsylvania, finding that the efficiency gap was 24%, whereas historically, 75% of all district maps had efficiency gap scores less than or equal to 10% and only 4% have an efficiency gap score above 20%.[89] The data shows the extent to which this map was gerrymandered in comparison to other district maps. This testimony proved crucial in demonstrating that the map violated the Free and Equal Elections Clause. The court ruled in favor of the League of Women Voters and overturned the map, stating in the opinion that "a diluted vote is not an equal vote."[90] The court also ruled that even though state legislatures are granted the power to create electoral districts, courts have the power to step in when the legislature fails to produce a legal map.[91] This precedent is drawn from *Baker v. Carr*, in that the courts do have the power to ensure that apportionment is conducted within constitutional bounds.[92] The PA Supreme Court also issued a remedial district map, drawn up with the help of an outside political science expert brought in from Stanford University to draw a map that was contiguous and prioritized compactness and municipality integrity.[93]

In a similar case in North Carolina, *Common Cause v. Lewis,* centered upon Common Cause, a group advocating for voting rights, suing the Republican-controlled state legislature over a gerrymandered map.[94] Common Cause needed to prove both the intent of the Republican legislature to dilute the voting power of Democrats, as well as the successful accomplishment of that intent in order to prove that a violation of rights under the North

[86] *See League of Women Voters, 645* Pa. at 45.
[87] *Id.* at 47.
[88] *Id.* at 49.
[89] Warshaw, *supra* note 20, at 8, 11.
[90] *See League of Women Voters, 645* Pa. at 131.
[91] *Id.* at 109.
[92] Baker v. Carr, 369 U.S. 186, 85 (1962).
[93] Jonathan Lai & Liz Navratil, *Pa. gerrymandering case: State Supreme Court releases new congressional map for 2018 elections*, PHILADELPHIA. INQUIRER (Feb. 19 2018), https://www.inquirer.com/philly/news/politics/pennsylvania-gerrymandering-supreme-court-map-congressional-districts-2018-elections-20180219.html.
[94] Common Cause v. Lewis, 358 F. Supp. 3d 505, 507 (E.D.N.C., 2019).

Carolina constitution had taken place.[95] The plaintiffs relied heavily on statistical evidence. They claimed that the North Carolina districts were drawn with intent to tilt elections in favor of the Republican Party. Information used as the basis for drawing these districts contained almost exclusively data and statistics regarding the partisan geographic makeup of the state, thus showing that the mapmakers, in this case, prioritized partisan leanings over all else.[96] They further illustrated how the differences between the non-partisan computer-drawn maps and the Republican-drawn maps were greatest in electoral environments that tended to favor Democrats.[97] Additionally, to show effect, experts ran simulations of possible election outcomes on various maps and demonstrated that it would be essentially impossible for Democrats to win a majority of legislative seats.[98] The North Carolina Supreme Court overruled the Republican map based on being an illegal partisan gerrymander. This case was particularly egregious, as in the 2018 midterm elections, Democrats won 48.3% of the vote and only three Congressional seats, whereas Republicans won 50.4% of the vote and won nine House seats.[99] In their ruling, the court ordered the state legislature to draw up a new one, largely based on the evidence demonstrated by the experts' models.

Part II: Constitutional and Philosophical Issues

The current system of gerrymandering is a subversion of the intentions of democracy. Instead of elections being held on an equal playing field, their outcomes are often predetermined by the very politicians whose futures they decide. Gerrymandering is a harmful practice to American democracy, as is warranted by the numerous examples in which gerrymandering has been proven in court to do real harm to the voting power of individuals. This is only compounded by the reality that there is currently no feasible federal court method to solve this problem nationwide. The most recent federal Supreme Court ruling in *Rucho v. Common Cause* has greatly increased the difficulty to bring any new federal

[95] N.C. Const. Art. 1 § 19; Brief for Reginald Reid as Amicus Curiae Supporting Appellates, *Common Cause v. Lewis* 358 F. Supp. 3d 505 (4th Cir. 2020) (No. 19-1901).

[96] Plaintiff's Proposed Finding of Fact, Conclusions of Law, and Decree at 17, *Common Cause v. Lewis,* 834 S.E.2d. 435 (2018) (No. 18 CVS 014001).

[97] *Id.* at 41-42.

[98] *Id.* at 7, 30, 102, 208.

[99] Maggie Astor and K. K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts,* N.Y. TIMES (Nov. 9 2018), https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html.

cases that might lead to a national standard being established for the adjudication of partisan gerrymandering as a constitutional issue.[100] A lack of measurable tests, which could be used to adjudicate gerrymandering issues, is the sole reason for the Court ruling in the *Rucho* case that the issue is non-justiciable as opposed to any issues over whether or not gerrymandering falls under Supreme Court jurisdiction.[101] Additionally, the majority opinion in *Rucho* explicitly states that there is no constitutional basis for the idea that federal courts, including the Supreme Court, have business adjudicating electoral issues such as partisan gerrymandering.[102] It can therefore be reasonably concluded that the issue of partisan gerrymandering would be able to be adjudicated once and for all in federal courts if a measurable standard for gerrymandering could be implemented. However, the current precedent explicitly states that these cases now fall solely under the purview of state courts, meaning that there is no path forward for partisan gerrymandering in the court system on the federal level.[103]

That said, there have been efforts to combat gerrymandering through other forums. More specifically, the most popular attempt to remedy gerrymandering has been the implementation of independent redistricting commissions aimed at taking the districting process out of the hands of the elected officials who possess an inherent self-interest. However, this strategy does not address the root of the problem: the constitutionality of partisan gerrymandering. Additionally, it does not solve the problem on a national level, as these commissions are only established on a state-by-state basis. Even in states where these policies have been implemented, they do not necessarily mitigate the impacts of partisan influence on the districting process.[104] As was seen in California, even supposedly non-partisan bodies are still vulnerable to partisanship.[105] Increasingly, politics have become more ubiquitous in people's lives, and members of a political party are more willing to adopt negative views of those within the opposite party.[106] This increased politicization and

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[100] G. Michael Parsons, *Gerrymandering and Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 Ind. L.J, 1295, 1325 (2020).

[101] *Id.* at 1303.

[102] Rucho v. Common Cause, 139 U.S. 2484, 2495 (2018).

[103] *Id.* at 2504.

[104] Nathaniel Rakich, *Did Redistricting Commissions Live Up to Their Promise?*, FIVETHIRTYEIGHT, (Jan. 24, 2022), https://fivethirtyeight.com/features/did-redistricting-commissions-live-up-to-their-promise/.

[105] Carroll Doherty, *Key takeaways on Americans' growing partisan divide over political values*, PEW RESEARCH (Oct. 5, 2017), https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/.

[106] Frank Newport, *The Impact of Increased Political Polarization*, GALLUP (Dec. 5, 2019), https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx.

polarization has eroded existing norms of non-partisanship, as there is less backlash from voters for violating these norms, thereby removing all incentives for politicians to act in non-partisan ways in policy areas such as gerrymandering. By following this line of thought to its rational conclusion, it is easy to discern why it has been so difficult to extract political motivation from this process, as politicians have no incentive to act in a non-partisan or apolitical manner.

It is demonstrably difficult to keep political parties from interfering with the districting process with this modern wave of gerrymandering, which can be ascribed to the trend of increasing partisanship.[107] Thus, it is only logical to seek redress on this issue from the most non-partisan branch of government, which is the court system. The difficulties that have befallen partisan gerrymandering cases in the court, while in part is due to the lack of measurable standard in these matters, is also related to the law and the Constitution's ambiguity when it comes to matters of partisanship. There is no mention of political parties within the Constitution, meaning that their role within government was never envisioned and thus was not defined, resulting in many legal questions regarding partisan gerrymandering, as there is no Constitutional framework or guidelines in the ways political parties can operate. The absence of political parties from the Constitution complicates the process of proving partisan gerrymandering to be unconstitutional, as there remains no established way to accomplish this resolution. For example, in *Vieth v. Jubelirer*, Pennsylvania Democrats attempted to use the same elements used to prove cases of racial gerrymandering. Racial gerrymandering is discriminatory intent and effect, and this standard was used to try and demonstrate that this case of partisan gerrymandering was unconstitutional by the same principles.[108] A major reason this strategy failed stemmed from there being no Constitutional basis for the rights of political parties in elections. Therefore, there is no reason for those same protections that are used to prevent racial discrimination to be applied to protection based on political party.

No clear, consistent legal reasoning being applied by the U.S. Supreme Court remains one of the clearest conclusions that arises from an examination of SCOTUS precedents on issues of gerrymandering. The long-standing precedent on political questions, dating back to *Baker v. Carr* in 1962, stated that the Supreme Court does have authority to

[107] Nolan McCarty et al., *Does Gerrymandering Cause Polarization*, 53 Amer. J. of Pol. Sci. 666, 667 (2009).

[108] Vieth v. Jubelirer, 541 U.S. 267, 294-5 (2004).

adjudicate matters that have arisen before it. There are a few narrow exceptions that should be examined using legal reasoning on a case-by-case basis, the most relevant to this topic being if the matter is constitutionally within the jurisdiction of a different area of government or if there is a lack of a manageable standard for adjudication.[109] These judicial tests were not developed as a reason to set aside an entire category of cases as outside the jurisdiction of federal court; rather, these tests set up the guide for the Court to best adjudicate these questions.[110]

This doctrine's evolution since its establishment in *Baker* has become a blanket test used by the Supreme Court to determine whether or not to take up certain cases.[111] This can be seen in the 2004 *Vieth* ruling, which used the standard supplied in Baker to determine that the case was not justiciable, although they did not refute that partisan gerrymandering constituted a violation of the Fourteenth Amendment.[112] The evolution of the political question justiciability test has come to its peak in *Rucho*, where the sole reason the Court claimed that the issue is nonjusticiable in federal court was because of the lack of a manageable standard.[113] This is a distortion of the original logic behind the establishment of this test that was made clear in the *Baker* ruling, as the Court steps away from the legal reasoning in the *Rucho* ruling to claims of pragmatism, saying that the lack of measurable standards in this case, which is an aspect of the case that is not a legal claim, is sufficient to make the entire issue of partisan gerrymandering nonjusticiable in the federal court system.[114] The Supreme Court is abdicating its Constitutional obligation to deliver a ruling on this matter, and further, has closed the door on any future cases that could eventually decide this by declaring that these issues are summarily nonjusticiable.

Part III: Statistics and Democracy

The use of efficiency gap measurements as well as computer-drawn models in gerrymandering court cases would allow for a national standard to be established that could identify and quantify partisan gerrymandering. Such standards would result in a much easier way to standardize and adjudicate. Two of the most realistic ways in which these standards

[109] Baker v. Carr, 369 U.S. 186, 210 (1962).
[110] Parsons, *supra* note 100, at 1300.
[111] *Id.* at 1303.
[112] *See Vieth,* 541 U.S. at 278.
[113] Rucho v. Common Cause, 139 U.S. 2484, 2500 (2018).
[114] Parsons, *supra* note 100, at 1302.

could be enacted would be through either Congressional legislation or Supreme Court ruling. The standards set could be objective and nonpartisan, as they would have a mathematical and statistical basis that would allow them to determine whether a district map disproportionately dilutes the votes of any political affiliation. There is precedent for this, as the testimony provided by experts that was so key in the rulings of *League of Women Voters v. Commonwealth of Pennsylvania* (2018) and *Common Cause v. Lewis* (2019) were based on statistical metrics.[115] The data provided by the political scientists and statisticians was able to identify and measure the extent to which a map was gerrymandered.[116]

Either one of these methods would be superior to the current approaches to addressing partisan gerrymandering. One of the primary drawbacks facing the implementation of solutions gerrymandering in the current situation is that there is no national solution for this issue. Each state is left to address it on their own if they even choose to do so. In state courts, there is limited hope for success. Instances of partisan gerrymandering have been successfully overturned in state courts, although these legal victories are not permanent solutions.[117] Because there has been no established test or policy describing what constitutes a political gerrymander, there is no guarantee that partisan gerrymanders will not continue in future maps. Additionally, these cases can only take place in individual states. This leads to a lot of uncertainty as to the future of districting in the United States as a whole. Each state's court system is independent of the others, meaning that a ruling in any one state can only serve as persuasive authority in another state, and without a guarantee that courts in other states will rule the same way.[118] However, the Supreme Court would be able to act as a mandatory authority that state courts would be required to follow.[119] A lack of mandatory authority would lead to inconsistencies across the country, and no singular standard that could deal with gerrymandering in a satisfactory manner.

Other methods that states have implemented have been the creation of independent redistricting commissions to take over the process of redistricting from the state legislatures.

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[115] Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 Emory L. J. 979, 996 (2019).

[116] *Id.* at 997.

[117] Richard L. Engstrom, *Partisan Gerrymandering: Weeds in the Political Thicket,* 101 Soc. Sci. Quar. 23, 34 (2020).

[118] *See Rucho,* 139 U.S. at 2525. (Kagan J., dissent)

[119] Chad Flanders, *Toward a Theory of Persuasive Authority*,, 62 Okla. L. J. 55, 57 (2009).

This tactic faces one of the same dilemmas as the state court decisions, in that it is a solution for only one state and neither deals with the problem or the impact at the national level.[120] Secondly, the establishment of these commissions does not address the legal issues at play, which is the constitutionality of partisan gerrymanders in the first place. Instead, it works to combat the symptoms of gerrymandering, rather than tackle the issue from a legal standpoint. Therefore, there is still the possibility of an unconstitutional gerrymander taking place even with these commissions in place.[121] Although this tactic has seen some success in reducing partisan gerrymandering, it is demonstrably not infallible, as was the case in California when the Democratic Party was able to influence the supposedly independent redistricting commission into passing a map that disproportionately favored Democrats.[122] There is still no binding prohibition on partisan gerrymanders, only an attempt to treat the symptoms of the issue without addressing the cause. The implementation of a standardized system by which electoral maps can be measured for gerrymandering is still necessary to address the issue at its root.

The established use of statistical metrics and models as a metric for gerrymandering would be able to help set a legal bound for gerrymandering through the potential for a Supreme Court ruling. The implementation of this system would enable the Court to rule on this matter, as it would no longer be deemed a nonjusticiable political question since the lack of manageable standards would no longer be an issue.[123] Courts would have an objective standard by which to easily ascertain whether a map has been gerrymandered, as it would simply become a matter of whether the maps fall within the established parameters for a constitutional electoral map. One of the biggest problems in previous gerrymandering cases was that there is no established standard by which to measure partisan gerrymandering.[124] Therefore, if statistical models such as the efficiency gap were to be considered by the Supreme Court and subsequently by lower courts there would now be an objective standard that could be used to identify what constitutes a partisan gerrymander. This would also establish a federal standard that other states would have to abide by, which would account for discrepancies in the amount of gerrymandering taking place among various states. This

[120] *Id.* at 2524.
[121] Rakich, *supra* note 104.
[122] Crabtree, *supra* note 22.
[123] Eisler, *supra* note 115, at 999.
[124] *Id.* at 994.

would solve the current problem that exists as gerrymandering cases are only brought and judged by state courts, not federal ones. Implementing these objective metrics as a means of standardizing the districting process will finally allow for a nationwide solution to the gerrymandering crisis currently at play.

Implementing these standards through a Supreme Court ruling would have many advantages if such a ruling were to come to pass. Court rulings carry a great deal of weight. Therefore, if the Supreme Court were to rule that maps that are partisan gerrymanders, as determined by these statistical metrics, it would more than likely insulate this issue from being relitigated for a substantial amount of time, as the ruling would apply to all states. However, these benefits of implementing this policy through a Supreme Court policy are not without their drawbacks. This method of implementing these standards to combat gerrymandering is highly unlikely to take place. The current ideological makeup of the Supreme Court is what makes it so unlikely that the standing precedent of *Rucho v. Common Cause* will be overturned any time soon, as many of the Justices who ruled in *Rucho* are still on the bench and will likely uphold the ruling in the future.[125] The Court is now made up of a 6-3 conservative majority, and many of these justices are fairly young, meaning that their seats are unlikely to become available soon.[126] Therefore, it is not likely that they will rule to overturn *Rucho* any time in the near future. This method, although it would be highly effective were it to take place, is unlikely to come to pass given the current ideological makeup of the Court.

Another solution for this that would address this problem nationwide would be passing a piece of legislation through Congress to establish these statistical gerrymandering standards that would then be implemented by each state. However, any piece of sweeping national legislation is highly unlikely to get any traction in Congress. The increasing political polarization has made it difficult for politicians to come together on many major issues.[127] Although this could change with future elections, the current makeup of the United States Senate, where it is split 50-50 between Democrats and Republicans, and the Democratic

[125] Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html.

[126] Laura Bronner and Elena Mejia, *The Supreme Court's Conservative Supermajority Is Just Beginning To Flex Its Muscles*, FIVETHIRTYEIGHT (Jul. 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/.

[127] Burgess Everett and Marianne Levine, *The Senate's record-breaking gridlock under Trump*, POLITICO (Jun. 8, 2020), https://www.politico.com/news/2020/06/08/senate-record-breaking-gridlocktrump-303811.

Vice President, Kamala Harris, breaks the tie.[128] One can assume that very few, if any conservatives will support this policy. This means that there is very little margin for Democrats to be able to pass this legislation as all Democrats would need to vote for it, and this is by no means a guarantee as the Democratic Party is not a monolith. This has been demonstrated by the difficulties the Biden administration has had in passing its major pieces of legislation despite having majorities in both chambers of Congress.[129] However, it is still more likely than a Supreme Court ruling for two main reasons. Firstly, the political makeup of Congress changes more often than that of the Supreme Court because Justices have lifelong tenure. Second, it is easier to raise this issue in Congress than it is for a case to make it to the Supreme Court. The main drawback in enacting this through Congressional legislation is that its longevity would not be guaranteed, as it would in theory be very easy for a future Congress to repeal this law, as it would simply require passing another law. Additionally, there is likely little incentive for members of Congress to propose or sponsor such a bill, as many members benefit from gerrymandered maps. There have been many bills proposed in Congress to provide some sort of national solution to gerrymandering, most recently in 2019, but they have never been successful, and have often not even gotten a floor vote.[130] While a Congressional measure would be better than nothing, it would be less effective than a Supreme Court ruling in reducing partisan gerrymandering long-term.

The effects of either of these methods are largely the same. By establishing legal standards for gerrymandering in districts, either through the Supreme Court or through Congress, state legislatures would still retain their ability to draw up an electoral map. They would lose the free reign to gerrymander and manipulate the districts. All electoral maps would be legally obligated to comply with the established standards or would face legal challenges. Further, a clear standard would be a deterrent in attempting to gerrymander. This would maintain the democratic element of the districting process by having elected officials draw the maps, and would adhere to Constitutional practices, but would simply eliminate the option of gross partisan gerrymandering. The legal precedent for this was established in 1993, with the *Shaw v. Reno* ruling on racial gerrymandering. Federal law can restrict the way

[128] Abigail Abrams, *What Really Happens When There's a 50-50 Split in the Senate?*, TIME (Jan. 12, 2021), https://time.com/5926759/senate-split-50-50-democrats/.

[129] Julia Azari, *A.O.C. and Manchin are in the Same Party. No Wonder Democrats are Struggling*, N.Y. TIMES (Dec. 30, 2021), https://www.nytimes.com/2021/12/30/opinion/democrats-joe manchin.html?searchResultPosition=4.

[130] Redistricting Reform Act of 2019, S. 2226, 116th Cong. (2019).

voting districts are drawn to protect voting rights.[131] The same concept can be applied here, with federal law stepping in to prevent the harms caused by partisan gerrymandering.

Conclusion

The implementation of statistical modeling to set legal parameters for gerrymandering would create many positive impacts. Firstly, the implementation of this metric would help the court system more fairly adjudicate partisan gerrymandering. It would make questions of partisan gerrymandering more clearly justiciable because courts would no longer be creating districting policy by ruling in these cases. Instead, they would be ensuring that the maps drawn up by state legislatures abide by existing policy. It would also be easier for plaintiffs to prove in court that a map is unconstitutional at all levels of the court system because there would be an objective standard to which they could compare the map in question. This would reduce the number of gerrymandered maps and the instances of gerrymandering in maps, and thus make elections fairer and more competitive. This would result in more democratic elections.

By curbing the partisanship at play when creating a gerrymandered map, American democracy will be protected and even strengthened. Representatives who are elected in non-gerrymandered districts will be more beholden to their constituents, as elections will be more competitive, and any candidate will not necessarily be guaranteed an electoral victory in each district. This will help to forward the tenets of representative democracy more broadly, as it will encourage representatives to act in the interests of all their constituents to the best of their ability. If representatives are not essentially guaranteed reelection through gerrymandering, they will do more to represent the will of the people in government, which is the basis of representative democracy and the entire American system of government.

Elections will also be more competitive as candidates will be required to appeal more broadly to the electorate, not merely a more extremist partisan base. In general, the reduction in gerrymandering will make the political process less subject to partisan whims, and instead more closely serve the interests of the people.

The reduction of partisan gerrymandering will also have broader-reaching impacts that will strengthen the foundations of democracy in America. Partisan gerrymandering is effectively a tactic of vote suppression and providing a meaningful avenue through which it

[131] Shaw v. Reno, 509 U.S. 630, 641 (1993).

can be addressed in the courts will reduce the effects on society. One of the key functions of the federal government, established in the Fourteenth Amendment, is to protect citizens from states infringing upon their rights. The gerrymandering that is carried out by state legislatures is a prime example of this, and it is the obligation of the federal government to enact policies that will mitigate this harm or ensure that states take the necessary action to do so.

Additionally, setting a limit to partisan gerrymandering will establish a precedent of protecting the interests of individual voters from the powerful arm of partisan politics. Limiting the power of political parties will perhaps set a trend of limiting the impact of these large interest groups on government. This will ensure that the government remains accountable to the people through free and fair elections rather than having politicians be beholden to large, powerful groups that do not represent the interests of the public. The outcomes of elections will not be determined by partisan interests skewing the districts to try and strengthen their own grasps on power. Partisan gerrymandering is an unconstitutional practice that has carried on unchecked for far too long. The development of statistical modeling and mathematical metrics has provided the potential for an effective solution to be enacted. Using these tools could lead to the creation of standards against which a map can be tested for unconstitutional gerrymandering, allowing for this pervasive practice to be dealt with.

Rape Victims' Right to Privacy: A Look at Freedom of the Press Colliding with States' Interest in Protecting Privacy

Lexie Pupil

Introduction

The First Amendment of the U.S. Constitution grants the Freedom of Speech, Press, Religion, Assembly, and Petition.[1] This Amendment is highly prioritized by the courts even when balanced against other Constitutional rights or state interests.[2] The right to privacy, granted to citizens through the interpretation of the Fourth Amendment, allows citizens to maintain their personal privacy in relation to their own persons, place, home, and papers from the government.[3] However, not all mass media companies are owned or managed by the government so the Fourth Amendment doesn't apply in this case. States' interest in protecting victim's privacy interests and protecting when an invasion occurs is more what collides with the freedom of the press, specifically in that state. That said, freedom of the press and the "right to privacy" can conflict with one another in that the press has a right to speak and publish information yet, people have a right to their own personal privacy and information free from intrusion, as granted by the states.

Rape victims' lack of support from the courts, when balanced against the First Amendment, demonstrates a clear and unacceptable example of the First Amendment overriding victims' essential right to privacy.[4] Historically, many courts have deemed First Amendment rights as more important than victims' right to privacy and protection from invasions of privacy, specifically when the media publishes victims' names in connection to their case, such as *Cox Broadcasting v. Cohn* (1975) and *Florida Star v. BJF* (1989).[5] Although

[1] U.S. CONST. amend. I.
[2] CLAY CALVERT, DAN V. KOZLOWSKI & DERIGAN SILVER, MASS MEDIA LAW 330 (21st ed. 2019).
[3] U.S. CONST. amend. IV.
[4] *Id.*
[5] Fla. Star v. B.J.F., 491 U.S. 524, 525 (1989); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 95 (1975).

there are some privacies guaranteed to rape victims while in court, such as closed courtrooms during victims' personal testimony, victims' privacy rights are superseded when the privacy right is competing against the media's First Amendment right to publish information.

When the media names rape victims to the public and spreads their confidential information without the victim's consent, it is a clear, unwarranted invasion of privacy. This type of publication qualifies as an invasion of privacy under one or more of the invasion of privacy torts, based on common law cause of action lawsuits.[6] Although the public has a right to information about crime in their communities, there is a way for the public to access this information without naming the victim associated with the crime.[7] This article will discuss the media's regular invasion of privacy of rape victims and the lack of support that victims receive in the courts. This article will focus on invasions of privacy by the media using the four torts of the invasion of privacy established by common law and a combination of past court decisions, taking on a new perspective of the media interfering with victims right to privacy and offering potential solutions.

The First Amendment right to freedom of speech and press is central to democracy and is consistently upheld by the U.S. Supreme Court above all else.[8] However, victims' right to privacy is also a Constitutional right and a state's right that the courts need to require a balancing test for so these fundamental rights can be upheld.[9] Rape victims' interest in their privacy should not be sacrificed to allow the press to publish information which harms rape victims both emotionally and physically. This article will provide background information on what qualifies as an invasion of privacy, the history and relevance of the First Amendment Freedom of the Press and how the courts have historically balanced victims' invasion of privacy against the First Amendment. It will also address publicizing rape victims' names and confidential information, and providing uncontrolled open access to courtrooms, all of which endanger victims' safety and expose them to psychological harm and harassment. Second, this article will discuss the First Amendment right to open courtroom proceedings and documents and propose a new judicial test to evaluate whether a courtroom should be closed to the public based on privacy rights.[10] Material facts and the victim's names reveal

[6] RESTATEMENT (SECOND) OF TORTS §§ 652(b)-(e) (AM. L. INST. 1965).
[7] CALVERT ET AL., *supra* note 8, at 340.
[8] U.S. CONST. amend. I.
[9] U.S. CONST. amends. I, IV.
[10] *Id.*

personal details about the victim which the public does not benefit from knowing.[11] The final part of this article will present solutions to fundamental problems surrounding rape victims' right to privacy and propose federal balancing tests to address what qualifies as an invasion of privacy by applying the common law torts of invasion of privacy and proposing new judicial tests to close courtroom proceedings.[12]

I. Background and Relevant Privacy Law

The definition of rape has evolved drastically over time in the United States.[13] The Code of Hammurabi was one of the first written laws ever declaring rape as a crime, stating that rape was a crime of property damage against the father because the male head of the house owned the women living there.[14] Rape was considered a property crime against the family, not a crime against the woman. Once rape laws classified rape as a crime against the woman in the 12th to 13th centuries, lawmakers excluded Black women and Socio-economically disadvantaged women for years until the U.S. civil rights movement in the 1960s.[15] Marital rape was not recognized as a crime in all 50 states until 1993.[16] It is important to have a general understand of the history of the definition of rape and the evolution of rape in our court systems to understand our current definition of this crime and the needs of the victims addressed throughout the paper.

Federal rape law under 10 US Code §920 - Art. 120 states that rape is: any person subject to this chapter who commits a sexual act upon another person by:

> (1) using unlawful force against that other person; (2) using force causing or likely to cause death or grievous bodily harm to any person; (3)threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm or kidnapping; (4) first rendering that other person unconscious; or (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the

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[11] J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and The Sixth Amendment*, 128, U. PENN. L. REV. 549, 559 (1980).

[12] U.S. CONST. amends. I, IV.

[13] Howard N. Snyder & Alexia D. Cooper, *Important Note About Rape Data*, BUREAU OF JUST. STAT. (2013), https://www.bjs.gov/arrests/templates/introduction.cfm.

[14] Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARK. J. SOC. CHANGE & PUB. SERV. (April 15, 2018), https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/.

[15] *Id.*

[16] *Id.*

> ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.[17]

Therefore, rape victims have a constitutional right to privacy, however, when balanced against the First Amendment, the First Amendment is interpreted as more essential to democracy than the Fourth Amendment. The First Amendment states that "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."[18] It is important to note that there is no constitutional right to gather news, only to publish it which allows for stricter privacy protections for victims.[19] The Privacy Act of 1980 made it easier for journalists to publish information they obtain through their investigative measures as this act prevented law enforcement from executing search warrants and asking questions of the press, except in extreme circumstances.[20] However, there is still exists a law of general applicability meaning that journalists have no greater rights than other citizens to access information, so if law enforcement purposely avoids holding journalists accountable, for fear of retaliation or infringing of their First Amendment rights, it would be unfair to other citizens.[21] Law enforcement does not want to execute search warrants usually for journalists information as this is usually seen by society as a First Amendment violation.

Understanding what qualifies as an invasion of privacy is important to understand how the press is invading rape victims' right to privacy and how the First Amendment and the courts allow this to happen. There are four torts of the invasion of privacy: appropriation, intrusion, public disclosure of private facts, and portrayal in a false light, based in common law civil action suits.[22] These four torts allow for victims to receive damages for the invasion in addition to the protections from the Fourth Amendment and the right to privacy.[23]

First, Appropriation. This idea is "when someone publicly uses the name or likeness of another person for her own benefit."[24] In other words, someone is attempting to use or

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[17] Rape and Sexual Assault Generally, 10 U.S. Code § 920 – Art. 10.
[18] U.S. CONST. amend. I.
[19] CALVERT ET AL., *supra* note 8, at 331.
[20] Privacy Protection Act of 1980, 42 U.S.C. § 2000aa.
[21] *Id.*
[22] RESTATEMENT (SECOND) OF TORTS, §§ 652(b)-(e) (AM. L. INST. 1965).
[23] *Id.*
[24] *Id.* at § 652(c).

change one's public image without their consent.[25] Publication of something private for benefit is crucial for proving appropriation.[26] Second is intrusion which is "when someone intentionally intrudes into the private affairs of another person."[27] There is a set, clear standard here that the intrusion must be intentional and highly offensive to a reasonable person.[28] Intrusion is what most citizens think of when they imagine an invasion of privacy.

Third, public disclosure of private facts is defined as "The publication of the private affairs of another person when the disclosures would be highly offensive to a reasonable person."[29] It does not matter if the information is true, but if it is private and was kept private by the victim prior, then publicizing this information is an invasion of privacy.[30] Public disclosure of private facts has the affirmative defense that the information is of legitimate interest and public concern, which is usually the media's defense when publicizing information on rape victims and their names, for example.[31] The last tort of invasion of privacy is portrayal in a false light, which is when someone "states what may be technically truthful or opinion-based information, but in a manner indicating to a reasonable person that something negative and false is true about the target."[32] Affirmative defenses for this type of invasion of privacy include there was no false portrayal or there was no damaging publication about the plaintiff to the public. Some states do not recognize this final tort as an invasion of privacy that should be upheld in court when evaluating a victims' privacy interest however, the Supreme Court does recognize this tort as an invasion of privacy, deeming portrayal in a false light a valid invasion of privacy claim at the federal level. Next, this article applies these four recognized invasions of privacy to current media violations of rape victims' right to privacy and how these torts can provide victims addition protections from the press.[33]

There are some important legislation and statutes relating to rape victims and their right to privacy that provides a foundational understanding of the topic. Rape shield laws

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[25] *Id.*
[26] *Id.*
[27] *Id.* at § 652(b)
[28] *Id.*
[29] *Id.* at § 652(d).
[30] *Id.*
[31] *Id.*
[32] *Id.* at § 652(e).
[33] Hogin v. Cottingham, 533 So. 2d 525 (Ala. 1988).

were federally enacted in 1975, under Rule 412(a) of Sex-Offense Cases Law relating to the victim, after individual states began enacting their own rape shield laws.[34] These laws prevent defense attorneys from using rape victim's past sexual history and sexuality at trial, which provides protection from sexual humiliation, degradation, and public scrutiny of victims' sex lives. Other states began enacting rape shield laws because attorneys kept persecuting rape victims for their past sexual history, their previous connection with the defendant, and were publicly shaming the victims, which now all states have some sort of rape shield laws barring this type of behavior in the court room.[35] Although a defendant has a Sixth Amendment right to confront witnesses,[36] protecting victims' privacy rights and protecting them from harassment and shame in court is more essential, in my opinion after extensive research on this topic. One can still confront witnesses, the victim, without diving into irrelevant, past private details about their lives.[37]

Confidentiality laws have been in place for a long time so that victims' communications with their therapists and law enforcement officials are kept confidential and protected: "Confidentiality is both an ethical and legal duty that a professional owes to a victim, client, or patient to keep certain communications and information safe," according to Victoria Kristiansson in her article on balancing victim's privacy and holding offenders accountability in sexual assault and domestic violence cases.[38] Furthermore, the Crime Victims' Rights Act (18 U.S. Code § 3771) provides many protections to rape victims but specifically states that victims have "The right to be treated with fairness and with respect for the victim's dignity and privacy."[39] Now, we will now take a step further and discuss violations of victims' privacy by the press.[40]

II. Legal Precedent and Problems Surrounding Publishing Victims' Names in the Media

[34] Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO STATE L.J. 1245 (1989).

[35] J. Alexander Tanford & Anthony J. Bocchino, *supra* note 11, at 12.

[36] U.S. CONST. amend. VI.

[37] *Id.*

[38] Victoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions*, STRATEGIES: PROSECUTOR'S NEWSL. ON VIOLENCE AGAINST WOMEN (May 2013).

[39] Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771.

[40] Kristiansson, *supra* note 38.

Naming rape victims in the media violates journalistic ethics principles.[41] There are many ways for journalists to tell a story about a crime without naming the rape victim or disclosing identifiable information that could endanger the victim and violate their constitutional right to privacy.[42] Although the general journalistic consensus is to not publish identifying information about the victim and to protect their privacy rights, The Supreme Court has ruled that publishing this information is legal. *Florida Star v. BJF* is a fundamental case which allowed the publication of rape victims' names in newspapers if the information published was obtained legally and was truthful.[43] The Florida Sheriff's Department was investigating a rape case and left a written police report out that included the victim's name in the pressroom. Although this room wasn't off-limits, there was a sign warning others that there was confidential information inside the room, which was not to be viewed or published.[44] A reporter copied the report word for word then wrote a story publishing the victim's name in connection with the rape.[45] The victim was subjected to emotional distress, harassing phone calls, and threats. This eventuality led her to sue The Florida Star Newspaper. The Florida lower courts awarded the victim damages, as they found the newspaper to be negligent in publishing her name but the newspaper appealed all the way to the Supreme Court.[46] The issue here was whether or not a state could impose civil sanctions on a newspaper company when they have published lawfully obtained, truthful information to the public and whether this type of restriction would violate reporters' First Amendment rights.[47] However, the Supreme Court reversed the lower court's decision in a 6-3 ruling, finding that if the reporter lawfully obtained the information and it was truthful, then the courts cannot limit the publication of the material based on its content.[48] The victim did not demonstrate a compelling interest in stopping the publication of the her name, as emotional distress of the victim was to ambiguous of a defense when balanced against the First Amendment according to the Supreme Court.[49] This case established that no civil sanctions

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[41] Amanda Fountain, *It's All in the Words: Determining the Relationship between Newspaper Portrayal of Rape Victims and Reader Responses*, 4 BRIDGEWATER STATE U. UNDERGRADUATE REV. 33 (2008).

[42] *Id.*

[43] Fla. Star v. B.J.F., 491 U.S. 524, 525 (1989).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

can be imposed on a newspaper company or reporter when truthful, lawfully obtained information is published, regardless of the content.[50] Although the information found was true, it still was an invasion of privacy and the Court failed to address this by stating the victim's fundamental rights were not infringed and only addressed whether the press was entitled to publicize this legally found name. The information in the police report could have been published without naming who the victim was so the victim could have been saved from severe emotional and psychological distress.[51]

This case poses an issue about whether the Court should protect the media's First Amendment right to publish information or victim's privacy rights, even when they deem there to be no infringement on their rights. Protecting victims' information, in my opinion, is a safety issue and publicizing their names can subject them to threats from their abuser or abuser's family and friends and potentially put them in danger. Protecting someone's physical and emotion safety should outweigh the press's right to publish information, even if it is legally obtained, as their right to publish should not be able to put others in danger. Since this has to do with personal safety, the restriction of the media's First Amendment rights is justified, in my opinion.

Correspondingly, in *Cox Broadcasting v. Cohn (1975)*, the courts dealt again with the ethical problem of naming rape victims in the media.[52] A television station published Cohn's daughter's name in relation to her assault. The state of Georgia has a privacy statute that did not permit the publication of rape victims' names and deemed this a breach of privacy.[53] On appeal, the Supreme Court struck this statute down as unconstitutional.[54] The Court ruled that this issue violated the First Amendment and that since the information was truthful and found legally, Cox Broadcasting could publish it.[55] This case allowed any legally obtained documents to be published, as it was considered by the courts, to be open and truthful information that was legally obtained.[56] The Court believed that if the information is truthful and no laws were broken to obtain the information then the public has a First Amendment right to the information, especially pertaining to crime. If a document is legally obtained,

[50] *Id.*
[51] *Id.*
[52] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 470 (1975)
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

meaning the reporter did not commit a crime to obtain this information, then the Court believes it is open to all and allows for that information to be published, as long as it is truthful. This case brings to light the potential for courtrooms and crime documents relating to rape to be closed and sealed in the future instead of allowing the media to have access to victims' names and information through these documents. In both the previously mentioned court cases, the media's First Amendment right to publish information overruled the victim's right to privacy. The ambiguity in these cases that allowed for the court to rule against the victim's privacy interests was that the information was found in a public document and the information found was truthful.[57] The current problem here is that victims do not usually feel safe or trust the current criminal justice system due to how they are already treated by law enforcement and the defense and if victims report their own assault and that information is accessible to the public, then this could potentially continue to discourage victims from trusting the system and coming forward after an assault.[58]

The core issue presented in these two Supreme Court decisions is when a victim's name is associated with their rape or assault, they are forced to relive their trauma as if they are being re raped all over again by the criminal justice system.[59] Releasing this identifying information about the victim's rape to the public would most likely negatively change their lives and their name would be tainted in the public eye forever.[60] The media's First Amendment right to publish information should not outweigh the victims' constitutional right to privacy and safety, as victims have a should be able trust the system will protect them and feel safe from others in society knowing their information and harassing them in relation to their assault. There are other ways for the press to publish information without naming the victim and still satisfy their right to publish information, but there are no other ways for the victim to not be subject to distress or reliving trauma when their name is published; it is out of their control. Publishing a rape victims' name constitutes a complete invasion of

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[57] *Id.*

[58] Kilpatrick, D., C. Edmunds, and A. Seymour, Rape in America: A Report to the Nation, Arlington, VA: National Victim Center and the Medical University of South Carolina, National Crime Victims Research and Treatment Center, 1992.

[59] Fla. Star v. B.J.F., 491 U.S. 524, 525 (1989). & Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 470 (1975)

[60] Kilpatrick, D., C. Edmunds, and A. Seymour, Rape in America: A Report to the Nation, Arlington, VA: National Victim Center and the Medical University of South Carolina, National Crime Victims Research and Treatment Center, 1992.

privacy supported by the torts of invasion of privacy established by common law civil action suits.[61] It is an intrusion of their private space and information because it is taking that information pertaining to an incredibly traumatic event and publishing it in the public eye, despite their being other ways to publish information about the crime without naming the victim in association with the crime.[62] Reporters can go about publishing in the same manner discussing the details of the rape, where it happened, how it happened, and any other information they have without naming the victim's name. Naming the victim's name is not an essential component to publishing information about a crime when all the other information pertaining to the crime can be published. If a reporter intentionally publishes a victim's name in order to secure a story in their own selfish interests, it is an intentional invasion of the person's privacy.[63] They publish private facts that to a reasonable person, would constitute an invasion of privacy because it is their private trauma about rape, and it also does not pertain to the public's interest.[64] A journalist can publish a story about a rape that occurred in a community and satisfy the public's interest and right in knowing information without naming the victim, invading their constitutional right to privacy.[65] It is a clear and unnecessary invasion of privacy and does not protect states' interest in protecting victims' right to privacy and protecting them from potential invasions of privacy.[66]

One of the only protection awarded to victims' in courtrooms today is the permitted closure of courtrooms during victims' personal testimonies.[67] This protection is very effective at protecting victims' testimony from the public, as their testimonies are quite personal and sometimes traumatic, however, only having this specific courtroom protection is not enough.[68] However, everything else in the courtroom is open to the public and can be published by the media, protected by the First Amendment.[69] Words said in the victim's testimony, if brought up in cross-examination or in opening and closing statements by the attorneys, can still be open to the public because the public has open access to this part of the trial.[70] Despite permitted closures during victims' testimonies, these loopholes leave the

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[61] *Id.*
[62] *Id.* § 652(b).
[63] *Id.*
[64] *Id.* § 652(d).
[65] U.S. CONST. amend. IV.
[66] U.S. Const. amend. I.
[67] CALVERT ET AL., *supra* note 8, at 477.
[68] *Id.* at 477.
[69] *Id.* at 477.
[70] *Id.* 478.

victims unprotected from the media and allow potentially for the private facts of their testimony and the case to be released. The First Amendment gives citizens the right to access courtrooms including trials, open court, jury selection and pre-trial hearings.[71] The Court previously ruled that open courtrooms uphold the integrity and fairness of the system and allow citizens to know what is going on with the government and state.[72] *Richmond v Virginia (1980)* laid down the foundation for this issue, granting citizens the original access to courtrooms and opening the doors to all trials.[73] The Supreme Court ruled that having access to criminal trials was explicitly granted in the First Amendment.[74] After a series of three criminal mistrials, the state of Virginia courts granted the defense counsel's motion to close the court proceedings of a fourth criminal trial, without any outright explanation.[75] The trial judge claimed that the open courtroom infringed on the defendant's right to a fair trial under the Sixth Amendment because of the previous three mistrials, however, two news reporters challenged the closure, claiming they had a right to view the proceedings under the First Amendment.[76] In a 7-1 decision, the Court ruled that the First Amendment isn't just about the freedom of expression and free speech but it is also about the right to know what is going on in relation to crime and it is in the press's First Amendment right to have access to this type of information because crime is of public concern.[77] In order for a judge to close any courtroom proceeding, they must satisfy the current five-part Press-Enterprise test developed in 1986 in *Press-Enterprise v. Riverside Superior Court*.[78] The Supreme Court has ruled that this is an effective test for judges to use in their decision-making process of whether or not it is constitutional, in rare circumstances, to close a specific proceeding or document.[79] In order to close a proceeding, a judge must consider whether the type of proceeding has historically been open to the public and then seeing if the public would benefit from this type of proceeding is open.[80] If these elements are satisfied, then the proceeding is deemed

[71] *Id.* 468.
[72] *Id.* at 468-70.
[73] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] CALVERT ET AL., *supra* note 8, at 471, 477.
[79] *Id.* at 471-77.
[80] *Id.* at 474-78.

to be open and there is a five-part test that must be satisfied in order to close the proceeding.[81] The five-part test is as follows:

> 1. The party seeking closure must advance an overriding interest that is likely to be harmed if the proceeding or document is open. 2. Whoever seeks the closure must demonstrate that there is a "substantial probability" that this interest will be harmed if the proceeding or document remains open 3. The trial court must consider reasonable alternatives to closure 4. If the judge decides that closure is the only reasonable solution, the closure must be narrowly tailored to restrict no more access than is necessary 5. The trial court must make adequate findings and put them into the record to support the closure decision.[82]

Although there is a test in play to close courtroom proceedings, this is an incredibly high burden to meet for rape victims to receive a closure and protect their privacy rights, as proving emotional damage and psychological trauma is not a respected and upheld in a court of law compared to concrete evidence.[83] The victim's trauma should be included because demonstrating the effect the trauma has had on the victim for the rest of their life shows more legal evidence as to why reliving that trauma when they testify in front of an entire courtroom could have a very negative effect on them emotionally and psychologically.

A case that first kept the courtrooms open, specifically involving a rape case, was *Globe Newspaper Co. v. Superior Court (1982)*, only two years after the Richmond decision.[84] The court of Massachusetts in a rape trial attempted to close the trial for the psychological well-being and protection of the victim and claimed that this closure was satisfied by a compelling interest, overriding the First Amendment right to open trials.[85] Massachusetts had a law in placed that required trial courts to excluded members of the press and public from sexual offenses and testimonies of victims who were under the age of 18. In this case, a male was accused of raping three minors so the court of Massachusetts conducted a closed trial.[86] This case was brought to the Supreme Court by the press and the question before the court was whether Massachusetts law violated the First Amendment freedom of the press that has been applied to all states through the Fourteenth Amendment.[87] However, The Supreme Court found that closing a trial without a legitimate compelling interest and falling

[81] *Id.* at 471-77.
[82] *Id.* at 472-73.
[83] *Id.* at 472-73.
[84] *Id.*
[85] Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).
[86] *Id.*
[87] *Id.*

back on emotional well-being of the victim to override the First Amendment right to open trials was a violation of the First Amendment and cited *Richmond v. Virginia* for its reasoning.[88] The Court recalled that Richmond v. Virginia that there is a historical and judicial reason as to why the First Amendment grants open access to criminal laws and makes them "properly afforded."[89] The Court allows closure of trial proceedings if a compelling interest is satisfied and evidence demonstrates that the closure is more essential then the First Amendment right to keep the proceeding open. However, the state of Massachusetts did not satisfy the compelling interest component required to close a proceeding as the Court did not believe psychological well-being of the victim satisfied the compelling interest standard required in this case to close a proceeding and strip the public away from their First Amendment right.[90] The Court went on to say that there was no convincing or compelling empirical evidence in the case to prove that the victims would be hurt if the press were allowed to be present at the trials or more likely to come forward if the press was not at their trials.[91] The Court also added that in order to close such a proceeding, there needs to be concrete and compelling evidence of the consequences of keeping that specific proceeding open and the lower courts here did not satisfy this requirement.[92] The compelling interest standard was not satisfied in this case because a psychological well-being defense of the rape victim was deemed to be substantial enough to close a courtroom, setting the precedent that rape cases usually cannot close a courtroom based on psychological, emotional or mental health without showing proof of future guaranteed consequences.

Having full, open access to courtrooms and documents relating to the crime of rape discourages rape victims from coming forward, as anyone in the country can have access to the details of their trauma and any information the Court knows.[93] The Court believes documents and proceedings relating to crime in the system should be open to the public so that society can understand what is going on in the system, as this is a constitutional right to have access to this information.[94] There can be a guarantee to open trials, proceedings, and documents yet in terms of rape in felony cases, it is overriding victims' privacy interests if

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] CALVERT ET AL., *supra* note 8, at 471, 477.
[94] *Id.* at 471-74.

we allow the media to have full access to their private information pertaining to the crime. It is a complete invasion of victims' privacy when extremely intimate and personal details about their rape are published. This could then subject them to harm mentally, physically, and emotionally, putting them at risk in public.[95]

In part three of this article, I develop a solution for protecting victims' right to privacy by drawing on the court case *NASA v. NYT* (1991). In *NASA v. NYT*, a New York Times reporter requested the "transcripts of all voice and data communications" records that were aboard the Challenger as well as "copies of voice communications tapes."[96] The privacy interest of the families of the Challenger astronauts were at play here and the question before the courts was whether the privacy interests of the families outweighed the public's interest guaranteed by the First Amendment to the recordings of the deaths of the astronauts.[97] The Court found that the Challenger families' privacy interest in the tape in question outweighs the public's interest in releasing the tapes because it is clearly an unwarranted invasion of the families' personal privacy.[98]

III. Solutions to Protecting Victims' Privacy Interests in the Court System

Rape victims are unprotected in the criminal justice system when their rights are balanced against the First Amendment freedom of the press.[99] The Supreme Court has continuously ruled in favor of the press over victims' Fourth Amendment constitutional right to privacy and the ethical protections of victims' privacy for their safety.[100] It is clear the Supreme Court does not believe states' interest in protecting victims' privacy and against invasions of privacy from private media companies is nearly as important as the First Amendment, therefore, undeserving of the same amount of protection given to the First Amendment.[101] However, the freedom of the press can remain in tacked and the press can still publish information without infringing on rape victims' constitutional right to privacy and their sense of safety and control over their trauma. To preserve rape victims' right to

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[95] RESTATEMENT (SECOND) OF TORTS, §§ 652(b)-(e) (AM. L. INST. 1965).
[96] New York Times Co. v. NASA, 782 F. Supp. 628.
[97] *Id.*
[98] *Id.*
[99] Kristiansson, *supra* note 38.
[100] Florida Star v. B.J.F., 491 U.S. 524, 526 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 470 (1975).
[101] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 470 (1975).

privacy, the Court could apply a similar test as they did in *NASA v. NYT (1991).*[102] The Court performed a balancing test between the right to privacy and the First Amendment in *NASA v. NYT* and ruled that the families of the victims in the NASA deaths deserved privacy and the tape recordings of the deaths did not need to be publicized or accessible by the press.[103] The transcript of the incident here was enough to satisfy the public's right to information, and privacy finally outweighed the First Amendment freedom of the press.[104] This standard has not been applied to rape victims because the Court, as has been discussed in part 1 and 2 of this article, does not want the states' interest in protecting victims' privacy and against invasions of privacy to outweigh the First Amendment, which applying NASA would have the potential to do. I believe courts ruled the way they did in NASA was because it involved the death of families in a space disaster versus protecting rape victims and usually in the court system, victims are not fully protected by the courts, so it is not surprising that this standard has not been applied in protecting their privacy interests. If we apply the standard in NASA when balancing the public's interest in obtaining information about rape victims and victims' privacy, we could still publish information to the public about the crimes effectively while withholding extremely traumatizing and private information in the victims' interest, as the Court did in NASA with the families.[105] In my opinion after all this research, it is clear there is little benefit to giving victims' names and information to the public that would outweigh the harm that would be done to the victim.

If reporters want to publish rape victims' names and confidential details pertaining to their assault, there needs to be a compelling interest test developed in the courts and this test would then need to be satisfied for this publication to be allowed. A test modelled similarly to *Branzburg v. Hayes,* for a different purpose being disclosure of private facts about rape victims by reporters, rather than compelling grand jury testimony, would be an effective test.[106] This idea entails two aspects: deeming it to be an invasion of privacy to name rape victims in the media and then creating a test that, if it is satisfied, would allow reporters, in a narrowly tailored manner, to publish that information or rape victims' names they inquired about. I have created an original three-part test with a similar model as in *Branzburg*, lining

[102] N.Y. Times Co. v. NASA, 782 F. Supp. 628 (D.D.C. 1991).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Branzburg v. Hayes, 408 U.S. 665 (1972).

out my proposed requirements for journalists to publish rape victims' names and confidential information in the media:[107] 1. Demonstrate a compelling and overriding interest in naming the proposed information and why this interest outweighs the victim's right to privacy. 2. Show that there are no other alternatives than publicizing this information that would reduce the level of invasion of privacy. 3. Address the violation of the victim's privacy by naming how you, as the journalist, will assist in mitigating the damages to the victim from posting such intimate information, if the first two levels of the test are satisfied.[108] The purpose of creating this balancing test was to make it more difficult for journalists to publish rape victims names and their confidential information relating to the case in the media. This test checks journalists' publications and protects victims' right to privacy while still allowing the possibility for journalist to publish this information if they satisfy the three-part test. Despite this being my own test that I developed, I got the idea for the model of the test from the *Branzburg v. Hayes* dissent by Stewart and the three-part test that he proposed.[109] However, this proposed solution would not be legal currently in this form without some constitutional amendment or Court ruling. Whenever information about a rape victim is published, the system needs to have protections in place to support the victim legally and emotionally. Before any trial, prosecutors must review the entire case and what was published about the victim in the media so they can bring concerns to the court about the victim being mentioned in the media and their privacy rights. I proposed that if the prosecutor can satisfy the elements of at least one of the four torts of invasion of privacy then, the publication must be struck down and removed based on it invading a victims' constitutional right to privacy alone and in the interest of protecting victims' state rights to privacy. There needs to be a set legal standard for invasion of privacy claims. We can apply the four torts of invasion of privacy from common law civil lawsuits and apply them to every case involving media publication of a rape victims name or information, as privacy is just as important as the First Amendment.[110] This type of test with a clear standard of what constitutes an invasion of privacy could protect the base line of the First Amendment while finally, validating and protecting victims' constitutional right to privacy.[111]

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] RESTATEMENT (SECOND) OF TORTS, §§ 652(b)-(e) (AM. L. INST. 1965).
[111] U.S. CONST. amend. IV.

When it is in the case of rape, sexual abuse, or any other type of felony sex crime, the victim should be given a choice of whether they want to have an open or closed proceeding. If they request a closed proceeding, a less scrutinizing test must be applied prior to trial. Altering the Press-Enterprise test to fit the needs of rape victims and protect their constitutional right to privacy would create a more obtainable way to close courtroom proceedings in the case of rape. This new test would lower the extremely high standard required in the Press-Enterprise Test, which would then provide more support for victims and allow for their information and emotional trauma to be kept private.[112] Below, I present the new, altered Press-Enterprise test I created, editing steps two and four only of the test and keeping one, three, and five the same.[113] 1. The party seeking closure must advance an overriding interest that is likely to be harmed if the proceeding or document is open. 2. Whoever seeks closure must demonstrate that there is evidence that this interest will be harmed if the proceeding or document remains open, such as documentation or testimony from a therapist, a social worker or a psychologist stating the damages that would be done to the victim if the proceeding was opened. 3. The trial court must consider reasonable alternatives to closure. 4. If the judge decides that closure is the only reasonable solution, the closure must be narrowly tailored to restrict no more access than is necessary. However, other rape cases of similar nature should be able to base a request for closure on a previous closure. 5. The trial court must make adequate findings and put them into the record to support the closure decision. I changed number two of the Press enterprise test from a substantial probability to documentation evidence because the substantial probability is an incredibly high burden to meet for rape victims.[114] In the case of rape, it is usually hard to prove emotional or psychological damage on paper so having extensive documentation from a therapist, psychologist, or social worker can qualify as evidence so, I altered number two. As for number four, narrowly tailored sounds substantial outrightly and protects the First Amendment right to open trials because it does not allow for the restrictions placed on the media in certain cases to be over-broad and relate to other cases.[115] However, if there is a great victory in a rape case and there is a similar case that needs closure, a new ruling

[112] CALVERT ET AL., *supra* note 8, at 471, 477.
[113] *Id.*
[114] *Id.*
[115] U.S. CONST. amend. I.

shouldn't always be necessary in the new case. Loosening the definition of narrowly tailored when applying this new test to rape victims. These reforms will still be upholding the First Amendment while granting a few more avenues for rape victims to receive support and adequately win closures.[116] There can also be certain aspects closed and others open if the test only satisfies all testimony or certain documents but not the entire case. No one has yet supported these reforms, as I came up with them on my own. This new test I presented is not black and white. It should be up to the victim on how they want to proceed unless the courts have a greater interest in making a different decision.

Conclusion

Rape victims' right to privacy cannot be disregarded and abused at the hands of upholding the First Amendment freedom of the press.[117] The Supreme Court has ruled in favor of privacy before when balanced against the First Amendment, as in *NASA v. NYT.*[118] The Supreme Court can apply this same standard and right to privacy to rape victims so that their personal information and names do not get released or publicized in the media. I created and presented a three-part test in this law review, modeled similarly to *Branzburg v. Hayes,* which tests in each case whether a reporter attempting to publish a rape victim's names and confidential details satisfies the three-part test with compelling interest.[119] If they do, then they can publicize or have access to, in a narrowly tailored way, the information. Rape victims also have a right to closed proceedings, as their privacy is more important than the public's right to information yet. I presented an altered Press-Enterprise test to address and support rape and sexual assault victims in their cases. These reforms will still be upholding the First Amendment while granting a few more avenues for rape victims to receive support and adequately win closures.[120] The future for rape victims' rests in the higher court's decision to support or not support their right to privacy in the criminal justice system. Rape and sexual assault traumatize victims enough and so, the criminal justice system and The Supreme Court need to rule more in favor of victims so that they do not end up retraumatizing the victim all over again.

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[116] *Id.*
[117] Fountain, *supra* note 41.
[118] N.Y. Times Co. v. NASA, 782 F. Supp. 628 (D.D.C. 1991).
[119] Branzburg v. Hayes, 408 U.S. 665 (1972).
[120] U.S. CONST. amend. I.

Let the Decision Stand?
Roe v. Wade Nearly 50 Years Later

Katelyn Monostori

Introduction: The Abortion Controversy

An abortion is a medical procedure that, through medication or surgery, removes the embryo or fetus and placenta from the uterus, terminating a pregnancy.[1] According to the American Psychological Association, abortion "is one of the oldest, most common, and most controversial medical procedures."[2] Evidence of women undergoing abortion procedures dates back to the height of the Roman Empire, where the law refrained from regulating abortion unless to respect the father's right to a child.[3] Throughout the 18th and 19th centuries in America, abortions were regularly provided and were legal under common law until quickening, the moment when a pregnant woman could feel the fetus moving.[4] During this time, both the general public and leaders such as the Catholic Church held the view that quickening marked the beginning of life.[5] This idea was reflected in the first statutory restriction on abortion procedures, enacted by the Connecticut Legislature in 1821, which regulated access to abortion only for women "quick with child."[6]

The extent to which women were able to access abortions largely varied in the 150 years that followed this first statutory restriction; the extent of the controversy surrounding the procedure, on the other hand, only grew. In 1973, the controversy came to a head with the Supreme Court's decision in *Roe v. Wade*. This landmark decision held that the right to

[1] National Library of Medicine, *Abortion,* MEDLINEPLUS (Sep. 12, 2016), https://medlineplus.gov/abortion.html.

[2] *Research on Mental Health and Abortion,* AMERICAN PSYCHOLOGICAL ASSOCIATION, https://www.apa.org/topics/abortion (last visited Jan. 6, 2022).

[3] *Roe v. Wade*, 410 U.S. 113, 130 (1973).

[4] Jessica Ravitz, *The Surprising History of Abortion in the United States,* CNN (Jun. 27, 2016), https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html.

[5] *Id.*

[6] *Roe*, 410 U.S. at 133.

choose to obtain an abortion is a 'fundamental right' protected by the Constitution.[7] In the nearly 50 years since the Court granted a guarantee of Constitutional protection to the right to abortion, millions of women and men have relied on this guarantee while making important decisions regarding their intimate, medical, familial, and financial futures—and research now indicates that "approximately one in four women will receive an abortion in their reproductive lifetimes."[8]

Over the course of these same years, however, state legislatures have enacted at least 1,074 laws aimed at limiting women's access to abortion procedures.[9] The Supreme Court has heard numerous challenges to the central holding in *Roe v. Wade* and several have succeeded, narrowing the extent to which the right to abortion is protected from state interference. Nevertheless, through almost 50 years of requests to overturn *Roe v. Wade*, the Court has consistently and explicitly declined to do so and has maintained that the right to abortion is a fundamental right. But that all may be about to change, as experts believe that the right to abortion is now facing "its stiffest test and that [the right] is in peril."[10]

On May 17th, 2021, the Supreme Court agreed to hear the case of *Dobbs v. Jackson Women's Health Organization.*[11] On behalf of Mississippi, State Health Officer Thomas Dobbs asked the Court to uphold the Gestational Age Act of 2018.[12] The Act prohibits, with limited exceptions, abortions after 15 weeks' gestation—a prohibition that is nearly two months earlier in pregnancy than *Roe* and subsequent interpretations allow.[13] In its brief, Mississippi once again asked the Supreme Court to undo years of precedent and overturn *Roe v. Wade*.[14] The Court heard oral arguments in this case on December 1st, 2021, and a decision is expected in late June, 2022.

This article argues that the Mississippi Gestational Age Act should be overturned, as it violates the central holding of *Roe v. Wade*, the controlling precedent. Though Mississippi

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[7] *Id.* at 153.

[8] Caitlin Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?,* BROOKINGS INSTITUTE (Nov. 20, 2021), https://www.brookings.edu/research/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/.

[9] Ravitz, *supra* note 4.

[10] Adeel Hassan, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade,* N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/article/mississippi-abortion-law.html.

[11] Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021).

[12] Miss. Code Ann. § 41-191 (2018).

[13] *See* Planned Parenthood v. Casey*,* 505 U.S. 833, 843 (1992) (holding that the state may not ban abortions before viability); Resp't's Br. 8, No. 19-1392 ("Mississippi did not rebut the Providers' evidence that viability is not possible before at least 23–24 weeks of pregnancy").

[14] Pet'r's. Br. 5, No. 19-1392.

is asking the Court to overturn the precedent, this article argues that a line of precedent cases that is principled, consistent, and long-lasting should not be overturned. Furthermore, a case like *Roe,* that millions of women and men have relied on while making their most intimate decisions, should only be overturned in extraordinary circumstances. This article concludes that upholding the Gestational Age Act would require the Court to violate *stare decisis*, the foundational principle that affirms the importance of precedent and underpins the legitimacy of the American legal system. Nevertheless, expert analysis of the oral argument suggests that the conservative Justices—who hold a 6-3 majority—will vote to uphold the Act.[15] This article argues that, if these experts are correct, the Supreme Court will be making a jurisprudential mistake with devastating consequences not only for pregnant women, but for the Court itself.

Part I of this article examines the Court's current abortion jurisprudence: the history of abortion access in America, the salient precedent establishing the protection of abortion, and the true extent of this protection as reflected in existing federal and state statutory restrictions on the procedure. Part II then defends the right to abortion against Mississippi's challenge, arguing, in turn, that the Gestational Age Act violates the controlling precedent on abortion regulation, and that the Court should let the precedent stand and overturn the Act. Part III examines the potentially devastating consequences of upholding the Gestational Age Act, examining both the consequences of losing respect for *stare decisis*, and of limiting the extent to which a woman's right to access abortion is protected. Finally, this article concludes with a recommendation of immediate action towards mitigating these consequences, regardless of the Court's ultimate decision in this case.

I. The Right to Abortion

A. The History of Abortion Law

As previously discussed, though evidence of abortion procedures in America dates back to the 1700s, the extent to which women have access to abortion has changed drastically over the course of American history. Following the passage of the first statutory restriction on abortion in 1821 abortion legislation remained uncommon, and up until the 1840s only eight states had legislation regulating abortion procedures.[16] Analysis of this legislation, and

[15] Hassan, *supra* note 10.
[16] *Roe*, 410 U.S. at 138.

of the general treatment of abortion in the common law, reflects a "loose consensus" in foundational American law: that a "person" comes into being "at some point between conception and live birth."[17] Abortion procedures were largely viewed as unproblematic prior to this point of personhood which, as previously mentioned, was typically thought to occur at quickening.[18] Nevertheless, in 1857 this view of abortion began to change, and this change caused a stark reduction in the extent to which women could legally access the procedure.

Throughout the 1850s, the number of women practicing medicine increased and women seeking professional medical careers began lobbying Harvard Medical School for entry.[19] The perceived threat of the growth of predominantly feminine medical fields—such as midwifery and homeopathy—and the aspirations of women to enter predominantly male areas of practice led to the growth of the American Medical Association's campaign against abortion. According to historian Leslie Reagan, this campaign, championed by Dr. Horatio Storer of Harvard Medical School, was "antifeminist at its core."[20]

The campaign against abortion rights grew stronger throughout the late 19th century as an increase in immigration rates coincided with a decreasing white birth rate, largely caused by access to contraceptives and family planning services.[21] As Reagan explains, "white male patriotism demanded that maternity be enforced among white Protestant women," and anti-abortion advocates argued that the success and "future destiny of the nation"[22] depended on limiting family planning, such as abortion, and increasing the white birth rate.

The success of the anti-abortion campaign challenged the common ideology that abortion should not be proscribed before quickening, and in 1869, the Catholic Church took the official position that life begins at conception.[23] Subsequently, in 1873, Congress passed the Comstock Law, banning abortion drugs,[24] and by the end of the 1950s, abortion was criminalized in the majority of jurisdictions.[25] Though the availability of legal abortions drastically changed, the extent to which women sought abortions remained relatively

[17] *Id.* at 133.
[18] Ravitz, *supra* note 4.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Roe*, 410 U.S. at 139.

constant.[26] As the criminalization of abortion increased, upper-class women seeking abortions would often invite unlicensed practitioners into their homes or travel great distances to secret clinics.[27] For lower-class pregnant women, on the other hand, their options were limited to dangerous and often deadly home methods.[28] At the start of the Great Depression "illegal abortion was the cause of approximately 18% of annual maternal deaths."[29] The demand for and necessity of providing access to safe, legal abortion became increasingly evident as America entered the Depression Era in the 1920s.

For many, the scarcity of resources during the Depression made abortion an economic necessity, as most Americans were struggling to provide for themselves, let alone a family.[30] As a result, though still largely illegal, abortion clinics were able to open, advertise, and operate with minimal state interference.[31] The outbreak of Rubella in the 1960s, and the threat this disease posed to pregnant women, further emphasized the necessity of legal abortion, as abortion procedures became medical necessities for many women.[32] Alongside the success of the women's liberation movement, the negative maternal health outcomes of illegal abortions and the continued economic and medical reliance on the procedure began a widespread trend towards decriminalizing abortion procedures.[33] By the time the Court heard *Roe v. Wade,* "a trend toward liberalization of abortion statutes [had] resulted in the adoption, by about one-third of the States, of less stringent laws."[34]

In 1969, during the height of the movement towards the legalization of abortion, a woman in her early 20s by the name of Norma McCorvey became pregnant.[35] McCorvey sought to safely and legally terminate her pregnancy, but she was living in Texas where abortion was criminalized unless it was necessary to save the life of the mother.[36] Without the means to travel to the nearest legal state, McCorvey was unable to safely obtain an abortion, which she believed was a violation of her rights. She turned to attorneys Linda

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[26] Ted Joyce, Ruoding Tan et al., *Abortion before & after Roe,* 32 J Health Econ 804 (2014).

[27] Ravitz, *supra* note 4.

[28] *Id.*

[29] Rachel Gold, *Lessons from Before Roe: Will Past be Prologue?,* GUTTMACHER INSTITUTE (Mar. 1, 2003), https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue.

[30] Ravitz, *supra* note 4.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Roe*, 410 U.S. at 140.

[35] *Roe v. Wade,* HISTORY.COM (Mar. 27, 2018), https://www.history.com/topics/womens-rights/roe-v-wade.

[36] *Id.*

Coffee and Sarah Weddington, and under the name Jane Roe, McCorvey sued District Attorney Henry Wade.[37]

B. Establishing the Right to Abortion; Roe v. Wade

In Court, on behalf of herself and "all other women who were or might become pregnant and want to consider all options,"[38] McCorvey and her litigant team argued that the Texas statutes that criminalized abortion "were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[39] In its highly controversial 7-2 decision, the Supreme Court found in favor of McCorvey, and held that the fundamental "right of privacy" inherent in the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[40]

Fundamental rights are rights that are given heightened Constitutional protection from encroachment by state actions. The Supreme Court has interpreted the Bill of Rights to enumerate several rights that must be given this protection, such as the rights of speech, press, religion, assembly, and petition;[41] the right of freedom from unwarranted searches and seizures in "persons, houses, and effects";[42] and the right to due process of law before an individual may be deprived of life, liberty, or property.[43] Alongside these rights, the Court has interpreted the non-enumeration clause of the Ninth Amendment,[44] and the protections guaranteed by the First,[45] Fourth and Fifth,[46] and Fourteenth Amendments,[47] to implicitly guarantee the protection of private matters from unwarranted public intrusion. Thus, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[48]

In an evolving line of cases, the Court has upheld a number of personal rights that are not enumerated in the Constitution but that are nonetheless "implicit in the concept of

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[37] *Id.*
[38] *Id.*
[39] *Roe,* 410 U.S. at 118.
[40] *Id.* at 152.
[41] U.S. Const. Amend. I.
[42] U.S. Const. Amend. IV.
[43] U.S. Const. Amend. V.
[44] See Griswold v. Connecticut, 381 U.S. 486 (1965).
[45] See Stanley v. Georgia, 394 U.S. 557, 564 (1969).
[46] See Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886); Olmstead v. United States, 277 U.S. 438, 478 (1928).
[47] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[48] *Roe*, 410 U.S. at 152.

ordered liberty,"[49] and are therefore constitutionally protected from state encroachment. For example, the Court has held that the Constitution protects the right to interstate travel;[50] the right to marriage, and thus to interracial[51] and same-sex marriage;[52] the rights of parents to control the circumstances of their children's upbringing;[53] the right to access contraception;[54] and the rights of adults to engage in consensual sex,[55] and to do so with individuals of any gender,[56] among others.[57] Therefore, though it is certainly true that 'abortion' is not once mentioned in the Constitution, let alone protected in explicit terms, the Court consistently interprets the Constitution to guarantee heightened protection to some non-enumerated rights.

The Court has held that it is only rights that are "objectively, deeply rooted in this Nation's history and tradition"[58] that can be considered 'implicit in the concept of ordered liberty' and deemed fundamental. The Court in *Roe* carefully examined the aforementioned history of abortion, and though the Justices acknowledged the stark increase in the criminalization of abortion, they found that abortion restrictions are "not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."[59] Therefore, considering that abortion procedures have been performed since ancient times, that laws limiting abortion procedures were not common in the historical American legal tradition, and that women have consistently accessed abortion despite the risks associated with the procedure during the height of criminalization, the Court found a history and tradition of abortion access.[60] On this basis, alongside a consideration of the precedent cases protecting other reproductive and intimate decisions,[61] the Court held that the fundamental right to privacy protects a pregnant woman's

[49] *Id.*
[50] Shapiro v. Thompson, 394 U.S. 618, 630 (1969).
[51] *Loving v. Virginia*, 388 U.S. 1 (1967).
[52] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[53] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).
[54] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).
[55] *Id.*
[56] *Lawrence v. Texas,* 539 U.S. 558 (2003).
[57] Resp't's. Br. 18.
[58] *Wash. v. Glucksberg*, 521 U.S. 702, 705 (1997).
[59] *Roe,* 410 U.S. at 129.
[60] *Id.* at 140-141.
[61] *See Pierce* 268 U.S. at 535; *Eisenstadt* 405 U.S at 453-454; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542 (1942); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

right to make the personal and intimate decision of "whether or not to terminate her pregnancy."[62]

Though this holding protects abortion access from undue state interference, the Court cautioned that not all interference will necessarily be undue, pointing to a long line of cases holding that fundamental rights may be properly limited by the state, as long as the limitations serve a "compelling state interest," and are narrowly tailored "to express only the legitimate state interests at stake."[63] The Court held that the state *does* have a legitimate interest in protecting maternal health and potential life.[64] In order to balance the state's interests against the rights of a woman seeking an abortion, the Court established a trimester test[65] where a trimester is approximately 13 weeks.[66]

The Court held that during the first trimester, the decision to receive an abortion should be solely between the pregnant woman and her attending physician.[67] After the first trimester, when the risk of abortion increases, the Court held that the state may enact abortion regulations that are reasonably related to maternal health.[68] Finally, the Court held that after the second trimester, the state may regulate and even ban abortion procedures as long as exceptions are made when the procedure is necessary to protect the life or health of the mother.[69] Nevertheless, despite the Court's stated attempt to strike a balance between conflicting positions,[70] the abortion controversy continued, and the holding in *Roe* was challenged almost as soon as it was proffered.

C. Interpreting the Right to Abortion; Planned Parenthood v. Casey

In the years immediately following its 1973 decision, the Court was faced with a series of cases asserting state interests in regulating abortion and challenging the level of protection the Constitution should afford abortion access. In 1992, the Court's holding in *Roe* faced its strongest challenge in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[71] In this case, the Court was asked to determine the constitutionality of several

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[62] *Roe,* 410 U.S. at 153.
[63] *Id.* at 155.
[64] *Id.* at 154.
[65] *Id.*
[66] *Month by Month,* PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/pregnancy/pregnancy-month-by-month (last visited Jan. 6, 2022).
[67] *Roe,* 410 U.S. at 164.
[68] *Id.*
[69] *Id.* at 165.
[70] *Id.* at 150.
[71] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

provisions of the Pennsylvania Abortion Control Act of 1982[72] that required spousal notification for married patients, parental consent for minor patients, and informed consent from any patient before an abortion could be performed.[73] The respondents argued both that these provisions should be upheld and that the Court should consider overturning *Roe v. Wade*.[74]

In deciding *Planned Parenthood v. Casey,* the Court explicitly declined to overturn the precedent, instead reaffirming what it considered to be the three central holdings of *Roe*: (1) that prior to viability, or the point when the fetus could exist outside of the uterus, a pregnant woman has the right to obtain an abortion without undue interference from the state; (2) that the state may ban abortions after viability, so long as exceptions are made to protect the life and health of the mother; and (3) that the state has legitimate interests "in protecting the health of the woman and the life of the fetus that may become a child," and that these interests become compelling at various stages of the pregnancy.[75] However, while reaffirming these central holdings, the *Casey* Court rejected the trimester test for the constitutionality of abortion restrictions.

Considering the finding that the state has an "important and legitimate interest in potential life,"[76] the *Casey* Court held that the trimester test did not strike the proper balance between the weight this interest carries throughout the pregnancy and the rights of the pregnant woman.[77] Therefore, holding that "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right,"[78] the *Casey* Court replaced the trimester test with the undue burden standard.[79] With this, the Court maintained that viability—which occurs around the end of the second trimester—is the right place to draw the line where the state's interest in fetal life may be sufficiently compelling to entirely outweigh the right to abortion and abortion may be banned.[80]

While this approach protects the right to access pre-viability abortions, the undue burden standard lessens the scope of protection afforded to this right. For example, under

[72] 18 Pa. Cons. Stat. § 3203-3220 (1990).
[73] *Casey,* 505 U.S. at 844.
[74] *Id.* at 845.
[75] *Id.*
[76] *Roe,* 410 U.S at 163.
[77] *Casey,* 505 U.S. at 878.
[78] *Id.* at 873.
[79] *Id.* at 874.
[80] *Id.*

an undue burden standard rather than a trimester framework, the state may "express profound respect for the life of the unborn,"[81] and constitutionally implement regulations aimed at persuading women to choose childbirth at any stage of pregnancy. The burden these regulations place on pregnant women is not undue unless the regulations create 'substantial obstacles' between pre-viability pregnant women and access to an abortion procedure.[82]

With this in mind, it is clear that despite signaling their express commitment to upholding *Roe v. Wade*—and cautioning future Justices against shirking this commitment[83] the Court's holding in *Casey* allows for greater state encroachment on the right to abortion; as the state may now regulate abortions at any point in pregnancy, for reasons entirely unrelated to maternal health, as long as the regulations do not create 'substantial obstacles' to abortion access. To begin to understand the impact of *Casey's* holding, the following section surveys current federal and state abortion legislation that the Court has implicitly or explicitly found not to create 'substantial obstacles' that violate the right to abortion.

D. Restricting the Right to Abortion; Statutory Law

Federal Legislation. There are several pieces of federal legislation that restrict access to abortions. In 1976, Congress passed the Hyde Amendment, which prohibits the use of federal funds for abortion.[84] This prohibition affects the approximately 7.8 million women who rely on Medicaid, Medicare, CHIP, and other federally provided health insurance in the 33 states and District of Columbia that don't fill in the federal coverage gap with state funds, as these women are forced to pay out of pocket if they wish to receive an abortion.[85]

Aside from restricting funding, the federal government also restricted methods of abortion with the Partial Birth Abortion Ban Act of 2003[86] which bans the intact dilation and extraction (D&E) method of abortion.[87] D&E abortions account for approximately

[81] *Id.* at 877.
[82] *Id.* at 878.
[83] *Id.* at 867.
[84] *The Global Gag Rule and the Helms Amendment: Dual Policies, Deadly Impact,* GUTTMACHER INSTITUTE (May, 2021), https://www.guttmacher.org/fact-sheet/ggr-helms-amendment.
[85] *Id.*
[86] 18 U.S.C. § 1531 (2003).
[87] Julie Rovner, *'Partial-Birth Abortion': Separating Fact From Spin,* NPR (Feb. 21, 2006), https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin.

0.2% of abortions[88] and dilation abortions with either extraction or evacuation are the most common second-trimester abortions.[89]

Additionally, it is worth noting that the U.S. government restricts abortion availability worldwide. The Global Gag Rule prevents NGO's that receive U.S. aid from providing information about, or advocating for, abortion access, even if they do so with funds acquired independently of U.S. support.[90] Though the Biden administration recently rescinded this rule, it is historically rescinded by Democratic Administrations and reinstated by Republican Administrations and is therefore likely to go into effect once again.[91] Similarly, the Helms Amendment, which is still in effect, expands the Hyde Amendment globally to prevent the use of U.S. foreign aid for abortions.[92]

State Legislation. While the legislation above applies nationally, there is considerable variation among the states regarding the ability of women to access abortion. Currently, 43 states impose gestational limits which ban abortion after a particular point: 20 states ban abortion after viability which typically occurs between 24 and 28 weeks; four states ban abortion at 24 weeks, and one state bans abortion at 25 weeks, regardless of viability; and sixteen states ban abortion at 22 weeks, arguing that this is the point when the fetus can feel pain.[93]

Aside from gestational limits, many states have laws that restrict the types of procedures that may take place: 36 states require that licensed physicians perform abortions; 19 states require that abortions take place in a hospital, with 17 requiring that a second physician is present after a specified point in the pregnancy; and 21 states ban D&E abortions, with 3 of those states distinguishing between pre- and post-viability.[94]

Furthermore, many states restrict the funding and provision of abortion services: 33 states and the District of Columbia prohibit the use of state funds to insure abortion services

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[88] *Id.*

[89] Megan Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second- Trimester Procedure,* GUTTMACHER INSTITUTE (Feb. 21, 2017), https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure.

[90] *Do You Really Know the Global Gag Rule?,* PAI, https://globalgagrule.org/faq/ (last visited Jan. 6, 2022).

[91] *Id.*

[92] *Helms Amendment Hurts Millions of People Worldwide,* PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/communities/planned-parenthood-global/helms-amendment-hurts-millions-people-worldwide (last visited Jan. 6, 2022).

[93] *State Bans on Abortion Throughout Pregnancy,* GUTTMACHER INSTITUTE, https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (last updated Apr. 1, 2022).

[94] *An Overview of Abortion Laws,* GUTTMACHER INSTITUTE, https://www.guttmacher.org/state-policy/explore/overview-abortion-laws (last updated Apr 1. 2022).

and 12 states restrict the amount of abortion coverage private insurers may provide; 45 states allow individual healthcare providers to refuse service and 42 states allow institutions to refuse services, with only 16 restricting provision refusal to religious or private institutions.[95]

Finally, prior to receiving an abortion, 18 states mandate counseling, 25 states require a waiting period before undergoing the procedure, and 37 states require parental notification before a minor can receive an abortion, with 27 of these states requiring the consent of one or both parents.[96]

Thus, it is clear that though *Roe* established, and *Casey* reaffirmed, that women have the right to obtain an abortion, access to abortion continues to be limited by federal and state legislation. As a result, the right to obtain a pre-viability abortion has been *de facto* eliminated for many women who are unable to access or afford services.[97] For many women in Mississippi, the right to obtain a pre-viability abortion was eliminated *de jure* on March 19, 2018, when House Bill 1510, or The Gestational Age Act, went into effect. The section that follows examines the ways in which this Act violates the right to abortion and argues that the Supreme Court should therefore overturn the Act.

II. Defending the Right to Abortion

A. Dobbs v. Jackson Women's Health Organization

As previously discussed, the Gestational Age Act requires that physicians determine the "probable gestational age" of the fetus before performing an abortion.[98] If the gestational age, as calculated from the first day of the woman's last menstrual period, is estimated to be greater than 15 weeks, the act proscribes the abortion unless there is a "medical emergency" or "severe fetal abnormality."[99] Jackson Women's Health Organization is the only licensed abortion clinic in Mississippi and it offers abortion services up to 16 weeks from the woman's last menstrual period.[100] According to the clinic, each year approximately 100 patients obtain an abortion post-15 weeks' gestation.[101]

[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Resp't's Br. 5.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 7.

As soon as the Gestational Age Act went into effect, Jackson Women's Health petitioned the District Court for a temporary restraining order, motioned to limit discovery to only the issue of viability, and motioned for summary judgment.[102] The District Court held that, by the framework established in *Casey*, the constitutionality of a ban on abortions after 15 weeks' gestation hinges entirely on whether 15 weeks' gestation is pre- or post-viability.[103] With evidence that viability is impossible at 15 weeks' gestation,[104] and Mississippi's concession that the state had no evidence to the contrary, the District Court granted the motion for summary judgment and ruled on the merits in favor of Jackson Women's Health.[105] The Court of Appeals for the 5th Circuit affirmed the District Court's decision,[106] prompting Mississippi State Health Officer Thomas Dobbs to petition the Supreme Court for an appeal. The Court's holding in this case will mark a crucial turning point in the abortion debate, and both proponents and opponents of abortion rights anxiously await the decision.

As evidenced by the nearly two hours of heated debate that occurred at the oral argument in December,[107] the gravity of this case and the weight of the decision is not lost on any party involved. Representing the petitioners, Scott Stewart asked the Court to uphold the Gestational Age Act and provided two avenues by which the Court could do so: (1) The Court could overturn the central holdings of *Roe* and *Casey,* and deny that the Constitution protects the right to an abortion,[108] or (2) the Court could maintain that there is a right to abortion, but reject viability as a standard for determining the constitutionality of abortion bans.[109] Representing the respondents, Julie Rikelman argued that the Court was correct in holding that the right to an abortion is a fundamental right,[110] that the standards of overturning the precedent have not been met,[111] and that the viability bright-line should be maintained, as it strikes the most workable and principled balance between competing interests.[112] She asked the Court to stay the course it has been on for the past 50 years and

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[102] *Id.* at 8.
[103] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 270 (5th Cir. Miss. 2019).
[104] *Id.*
[105] *Id.*
[106] *Id.* at 277.
[107] Oral Argument, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392), https://www.oyez.org/cases/2021/19-1392.
[108] Pet'r's Br. 5.
[109] *Id.* at 48.
[110] Resp't's Br. 17
[111] *Id.* at 15.
[112] *Id.* at 41.

once again reaffirm the central holding of *Roe v. Wade*.[113] This article argues that the Court should heed Ms. Rikelman's advice, uphold *Roe*, and overturn the Gestational Age Act.

B. The Mississippi Gestational Age Act is Unconstitutional

As previously discussed, since holding that the Constitution protects the right to abortion, the Supreme Court has acquiesced to opponents of this interpretation and has continued to expand the extent of obstacles that the state may constitutionally place between pregnant women and access to abortion. That said, though the right to access abortion has been continually defined and limited, it has not been denied, and for nearly 50 years the Court's interpretation of the Constitution has protected this right.[114]

It is uncontested that under the precedent set by *Roe,* and upheld in *Casey*, the state may not deny a pregnant woman her right to choose to obtain an abortion unless the state has a compelling reason to do so. While interest in fetal life may justify reasonable abortion regulations, this interest is not sufficiently compelling to warrant entirely denying a pregnant women access to abortion prior to fetal viability.[115] Furthermore, it is uncontested that under the Gestational Age Act, women in Mississippi are denied access to abortion after their fetus reaches 15 weeks' gestation, and it is uncontested that 15 weeks' gestation is prior to viability.[116] Thus, it is clear that under the Court's current interpretation, the Gestational Age Act violates the right to abortion. While Mississippi denies the existence of this right in the first place—which will be addressed in turn—the state also argues that not all pre-viability bans necessarily violate the right to abortion.

Mississippi contends that the viability bright-line was arbitrarily drawn in a way that does not appropriately balance the protection of abortion against legitimate state interests.[117] The state points to the fact that this ban would only affect approximately 100 women in Mississippi each year, and argues that the burden on these women is not undue as they would be left with several months in which they can legally choose to obtain an abortion.[118] Therefore, Mississippi argues that pre-viability abortion *bans* should be subject to the same undue burden standards as abortion *regulations,* and that by these standards, their 15-week

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[113] *Id.*
[114] *See, e.g.,* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
[115] Resp't's Br. 12.
[116] *Jackson Women's Health*, 945 F.3d at 270.
[117] Pet'r's Br. 19.
[118] *Id.* at 47-48.

ban would be deemed constitutional.[119] This article argues that Mississippi is incorrect in this analysis.

First, it is important to note that most women seeking abortions after 15-weeks' gestation do not truly have the option to obtain an abortion prior to this point. Research indicates that 91% of women seeking elective second-trimester abortions would have preferred to have accessed the procedure sooner.[120] The majority of second-trimester abortions occur because the woman was unaware that she was pregnant up until that point.[121] The remaining procedures largely reflect the experiences of women who had difficulties finding or financing a procedure, who experienced significant unforeseen developments in the course of their lives or health, or who were taking time to consult with family and medical professionals and to devote serious consideration to the abortion decision.[122] The Court has held that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant;"[123] as Ms. Rikelman explained at oral argument, the Court would not allow the state to ban church services on Wednesdays, even if the majority of attendees could just as easily attend on Sundays.[124] With the individuals who the law would affect, or those individuals who can only attend church on Wednesdays, as the focus of analysis, it is clear that such a ban would restrict *this* category of individuals from exercising their freedom of religion, which is impermissible regardless of the size of the category.[125]

Similarly, as most women who seek second trimester abortions were unable to obtain an abortion sooner, a ban on the procedure in the second trimester would prevent *this* category of women from exercising their right to obtain an abortion. If a law that makes it impossible for some women to obtain an abortion is not a substantial obstacle between those women and abortion access, then there is no higher burden on *these* women's abortion rights that could be 'undue.' Their 'right' to access an abortion would no longer have any constitutional protection from state actions. It is clear, then, that upholding the Gestational Age Act requires the Court to reject the holding that the Constitution protects a woman's

[119] *Id.*
[120] Resp't's Br. 37.
[121] *Id.*
[122] *Id.*
[123] *Casey,* 505 U.S. at 894.
[124] Oral Argument at 59:23.
[125] *Id.*

right to obtain an abortion prior to fetal viability. The following subsection therefore addresses Mississippi's contention that the Court should, in fact, reject this holding and argues that the Court's standards of rejecting a past precedent have not been met.

C. The Mississippi Gestational Age Act Should be Overturned

In their decision to uphold the central holding of *Roe,* despite "whatever degree of personal reluctance any of us may have,"[126] the majority in *Casey* considered the well-established fact "that no judicial system could do society's work if it eyed each issue afresh in every case that raised it," and held that maintaining the rule of law requires continuity and respect for precedent.[127] On the other hand, the Court also considered that respect for precedent is not an "inexorable command,"'[128] and that there are many instances in which the Court can, and should, overrule prior decisions it views as being in error.

A Justice faced with a precedent that they strongly believe is incorrect must determine whether they should violate *stare decisis* and correct the error, or whether the force of the command to 'let the precedent stand' constrains their judgment. Justice Amy Coney Barrett has argued that *stare decisis* is best understood as a tool that mediates jurisprudential disagreement.[129] When, as in this case, there is a question of whether a precedential interpretation is consistent with the Constitution's actual requirements, Justice Barrett argues that the decision will largely depend on the particular Justices' 'interpretive commitments.' As the Justice explains, when disagreements with precedent stem from disagreements over fundamental interpretive philosophy—such as whether original intent should control modern application—there does not seem to be a concrete means to determine whether the precedent is 'incorrect.'[130]

Therefore, Justice Barrett argues that "absent a presumption in favor of keeping precedent, and absent the system of written opinions on which *stare decisis* depends, new majorities could brush away a prior decision without explanation," and reversals could indicate political will rather than reasoned jurisprudence.[131] *Stare decisis*, then, ensures that a Justice's jurisprudence is in fact well-reasoned by forcing the Justice to carefully weigh the benefits of correcting an 'error' against the costs of overruling a decision, and by requiring

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[126] *Casey,* 505 U.S. at 861.
[127] *Id.* at 854.
[128] *Id.*
[129] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 Texas L. Rev. 1711, 1711 (2013).
[130] *Id.* at 1714.
[131] *Id.* at 1715.

comprehensive and compelling justification before upending precedent. It is precisely this careful consideration and justification that legitimizes the Court's decisions to overturn precedent, when it chooses to do so, as decisions based in reasoned jurisprudence rather than individual will.[132]

In *Planned Parenthood v. Casey*, though a significant portion of the opinion defended *Roe's* constitutional interpretation,[133] the Court ultimately held that "the immediate question is not the soundness of Roe's resolution of the issue, but the precedential force that must be accorded to its holding."[134] The majority opinion outlined a number of considerations that guided the Court's careful analysis of whether *Roe* should be overturned: the precedent's workability, the reliance of society on the precedent,[135] the jurisprudential development of the precedent's related legal principles, and the known accuracy of the precedent's relied upon facts.[136] The necessity that the Court sufficiently undertake these considerations before ignoring *stare decisis* was recently reaffirmed in the case of *Ramos v. Louisiana.*[137] Writing for the Court, Justice Kavanaugh expressed that before overturning precedent, the Court traditionally considers "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[138]

In concurrence, Justice Sonia Sotomayor highlighted that "the Court's precedents on precedent still require a 'special justification'" to overrule a prior decision. She quotes Justice Antonin Scalia, who believed that "the doctrine of stare decisis always requires 'reasons that go beyond mere demonstration that the overruled opinion was wrong,' for 'otherwise the doctrine would be no doctrine at all.'"[139] Therefore, Justice Sotomayor lays out three questions the Court should ask itself to determine if there is a 'special justification' to overrule a decision: (1) "Is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule."[140] (2) "Has the prior decision caused significant negative jurisprudential or real-world consequences?"[141] and

[132] *Id.* at 1717.
[133] *See Casey,* 505 U.S. at 846-853.
[134] *Id.* at 871.
[135] *Id.* at 844.
[136] *Id.* at 855.
[137] Ramos v. Louisiana, 140 S. Ct. 1390 (2021).
[138] *Id.* at 1405.
[139] *Id.* at 1413.
[140] *Id.* at 1414.
[141] *Id.* at 1415.

(3) "Would overruling the prior decision unduly upset reliance interests?"[142] When applied to *Roe v. Wade*, these questions make clear that the standard of 'special justification' for overturning the precedent has not been met.

Roe v. Wade is not egregiously wrong. As the Respondent's brief explains, "after carefully considering every argument for overruling *Roe*,"[143] the Court chose to preserve *Roe v Wade.* Furthermore, as Justice Stephen Breyer noted at oral argument, the majority opinion went much further than the typical *stare decisis* analysis in justifying the decision to let the precedent stand. Anticipating the continuing attempts to overturn *Roe*, the Court's opinion in *Casey* explained that *Roe* is a "watershed" case in which "feelings run high. And yet the country, for better or for worse, decided to resolve their differences by this Court laying down a constitutional principle, in this case, women's choice."[144] Therefore, the Court cautioned future Justices that when deciding whether to overturn a 'watershed' decision such as *Roe*:

> …only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[145]

This hesitancy to reexamine, let alone overrule, *Roe v. Wade* can be best described as a function of what Justice Barrett refers to as the 'avoidance canon' of *stare decisis*, which adds stability to the law by encouraging Justices to assume the validity of well-established precedent in an attempt to avoid the *possibility* of overruling it.[146] She quotes former Justice Scalia, the founder of modern originalism, in his admission that there are "mistakes he would be willing to correct," while others are "'so woven in the fabric of law' that he would not touch them."[147]

The Court in *Casey* thought it prudent to encourage this avoidance canon around the decision in *Roe v. Wade*; and finding both that the arguments advanced by Pennsylvania in *Casey* were largely the same arguments the Court considered when deciding *Roe,* and that there were no salient factual or legal developments that upset the presumption of *Roe's*

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[142] *Id.*
[143] Resp't's Br. 9.
[144] Oral Argument at 5:39.
[145] *Casey,* 505 U.S. at 867.
[146] Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1940 (2017).
[147] *Id.* at 1928.

validity, the Justices held that the Court could not even "pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973."[148] Though the central holding in *Roe* has been continually 'woven into the fabric of law' in the nearly 50 years since the case was decided, in *Dobbs v. Jackson Women's Health* Mississippi is again arguing that *Roe v. Wade* was an egregiously wrong interpretation of the Constitution. The State mainly points to the history of abortion which shows a pattern of states restricting the procedure, even after the ratification of the Fourteenth Amendment.[149] Though these are the same arguments that were advanced by both Pennsylvania and Texas in *Casey* and *Roe*, respectively, Mississippi contends that there have been legal and factual developments that warrant the Court's reconsideration of the central holding of *Roe*.

First, Mississippi points to the post-*Roe* increase in gender equality laws, which the state argues now allow women to pursue "both career success and a rich family life,"[150] calling into question the liberty implicated by restricting access to abortion. Second, Mississippi points to the increased availability and effectiveness of contraceptives and argues that this calls into question the extent to which women rely on abortion to "control their reproductive lives."[151] Finally, Mississippi points to "advances in medicine and science,"[152] such as new knowledge of the fetal experience of pain, the risk of abortion, and the timing of viability.[153] That said, analyses of these claims of 'developments' find them wanting.

Though Mississippi is correct that there have been legal advancements towards gender equality, this entirely misconstrues the nature of the right implicated by abortion restrictions. As the respondents contend, the right at issue is not the right of a woman to choose career success over rich family life; it is the right of a woman "to decide if, when, and how many children to have,"[154] and the right to choose whether to endure the incredible physical demands of pregnancy, which go uncontested by the state. Second, while the state is correct that access to contraception has increased since *Casey*, effective contraceptives are still inaccessible or unaffordable for many, particularly young and lower-class women.[155]

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[148] *Casey,* 505 U.S. at 864.
[149] Pet'r's Br. 12.
[150] *Id.* at 29.
[151] *Id.* at 30.
[152] *Id.*
[153] *Id.*
[154] Resp't's Br. 34.
[155] *Id.* at 35.

Furthermore, no amount of access to contraception can provide women fail-safe protection against pregnancy.[156] Finally, Mississippi does not provide adequate evidence that advances in medicine and science warrant a reconsideration of *Roe*.

In considering the validity of scientific evidence, the Court relies on the *Daubert* standard which requires that evidence presented in court is supported by appropriate validation.[157] Given the fact that "a multi-disciplinary team of physicians and scientists from all relevant fields after a years-long examination of all peer-reviewed data relevant to the issue"[158] rejected Mississippi's claims to knowledge of fetal pain, *Daubert* should preclude these claims from the Court's consideration. Additionally, Mississippi's claim that our knowledge of the risk of abortion has increased does not challenge the validity of *Roe's* holding. Developments in abortion procedures have only decreased the risk of complications, and in Mississippi it is now "about 75 times more dangerous to carry a pregnancy to term than to have an abortion."[159] Finally, the fact that our knowledge regarding the timing of viability has increased is not a significant development, as viability is the most principled point at which the state's interest in fetal life becomes compelling regardless of the specific point in pregnancy where viability occurs.

As the Court reaffirmed in *Casey,* the holding that abortion is a fundamental right was a principled, legitimate decision that was properly rooted in the Court's constitutional jurisprudence, and that has been both continually reconsidered and consistently reaffirmed.[160] Therefore, given the Court's stance that "the vitality of constitutional principles… cannot be allowed to yield simply because of disagreement with them,"[161] it is clear that Mississippi has failed to provide a sufficiently compelling justification for the Court to reconsider the validity of 50 years of established jurisprudence.

Roe v. Wade has not produced negative consequences. Assuming, *arguendo*, that Mississippi has in fact provided the Court with a compelling reason to believe that *Roe* was decided in

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[156] *Id.*

[157] Oral Argument at 15:20.

[158] Resp't's Br. 33.

[159] *Id.* at 28.

[160] *See, e.g.,* Planned Parenthood v. Danforth 428 U.S. 52 (1976); Maher v. Roe 432 U.S. 464 (1979); Colautti v. Franklin 439 U.S. 379 (1979); Harris v. McRae 448 U.S. 297 (1980); H.L. v. Matheson 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health 462 U.S. 416 (1983); Thornburgh v. American College of Obstetricians and Gynecologists 476 U.S. 747 (1986); Webster v. Reproductive Health Services 492 U.S. 490 (1989); Casey 505 U.S. (1992); Hill v. Colorado 530 U.S. 703 (2000); Stenberg v. Carhart 530 U.S. 914 (2000); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[161] Brown v. Board of Education, 349 U.S. 294, 300 (1955).

error, the Court must still determine whether the benefits of correcting that error outweigh the costs of violating *stare decisis*. Mississippi contends that overturning *Roe* would remedy the significant negative jurisprudential and real-world consequences of the Court's 'incorrect' decision.

Mississippi claims that *Roe v. Wade* has produced negative jurisprudential consequences. The state aims to show that the 30 years since *Casey* have proven *Roe* to be unworkable. Pointing to the Court's divisions over the proper interpretation of *Casey's* undue burden standard, the state argues that "there is no objective way to decide whether a burden is 'undue,'"[162] and that the deep divides "in case after case" as to what *Casey* requires make for inconsistent and unreliable law.[163] Though the state may be correct that the proper application of the undue burden standard to abortion *regulations* has divided the Court, it is important to note the increasing polarization of the Court's voting blocs on far more issues than abortion.[164] The implications of accepting that a divided bench proves a precedent unworkable could have a ripple effect into areas of law entirely separate from abortion jurisprudence. Furthermore, as the Respondents explain, the issue in this case is the constitutionality of an abortion *ban*, not merely a regulation. Regardless of what may be said of the Court's application of *Casey's* undue burden test to abortion *limitations*, the Court has applied this test to abortion *bans* "with remarkable uniformity and predictability for five decades, finding pre-viability bans on abortion invalid regardless of whether those bans operated at 6, 12, or 20 weeks and regardless of the reasons states alleged to justify them."[165]

Aside from jurisprudential consequences, Mississippi claims that *Roe v. Wade* "inflicted severe damage"[166] to the principles of democracy, arguing that the "compromise on the hard issue of abortion" must be achieved "through person-to-person engagement and deliberation"[167] not Supreme Court decision-making. Despite the state's correct assertion that the abortion controversy is far from settled, the Court has found that precedents gain respect "as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."[168] As previously mentioned, the Court has

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[162] Pet'r's Br. 19.

[163] *Id.* at 30.

[164] Carl Hulse, *Political Polarization Takes Hold of the Supreme Court,* N.Y. TIMES (Jul. 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html.

[165] Resp't's Br. 33.

[166] Pet'r's Br. 23.

[167] *Id.*

[168] South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

continually affirmed the holdings of *Roe* and *Casey;* and the legal reasoning used in these cases was relied on to establish the right to same-sex marriage,[169] as well as to further extend the protection of privacy rights into areas of life related to physical autonomy, bodily integrity, "procreation, contraception, family relationships, child rearing, and education."[170] Thus, the progression of the law based on the validity of *Roe's* decision, alongside the commitment to faithful, fair, and consistent Constitutional interpretation embodied by the principle of *stare decisis,* casts substantial doubt on the claim that the Supreme Court's abortion jurisprudence is eroding democracy and damaging society. In fact, empirical analyses of the effects of the Court's holding in *Roe* show overwhelmingly positive outcomes.

In the two years following *Roe*, "the number of illegal procedures in the country plummeted from around 130,000 to 17,000."[171] and the deaths caused by illegal abortion comparably decreased. By 1976, this decline led the CDC to conclude that it was imperative to continue to secure widespread availability of abortion procedures, especially for disadvantaged women, as "any actions which impede their access to legal abortion may increase their risk of death."[172] Aside from improving maternal health outcomes, the Court's decision in *Roe* had a ripple effect into other areas of life. Experts have concluded that "abortion legalization increased women's education, labor force participation, occupational prestige, and earnings and that all these effects were particularly large for Black women."[173] Legalization also improved postnatal outcomes, reducing cases of child abuse or neglect and improving "long-run outcomes of an entire generation of children by increasing the likelihood of attending college and reducing the likelihood of living in poverty and receiving public assistance."[174] Finally, abortion's legalization had surprisingly positive outcomes for crime prevention. With fewer children born into neglectful conditions or conditions of poverty, teenage crime decreased substantially, and "overall crime fell 17.5% from 1998 to 2014 due to legalized abortion—a decline of 1% per year."[175] The legalization of abortion has been found to be responsible for a 47% reduction in violent crime and a 33% reduction

[169] Obergefell v. Hodges, 576 U.S. 644 (2015).

[170] Resp't's Br. 18.

[171] *Abortion Before and After Legalization.* THE GUTTMACHER INSTITUTE, https://www.guttmacher.org/perspectives50/abortion-and-after-legalization (last visited Jan. 24, 2022).

[172] *Id.*

[173] Myers, *supra* note 8.

[174] *Id.*

[175] John Donohue & Steven Levitt, *The Impact of Legalized Abortion on Crime over the Last Two Decades,* 22 Am. L. & Econ. Rev. 241 (2020).

in property crime, and accounts for a significant portion of the overall drop in crime rates.[176] Therefore, it is clear that Mississippi has not shown that *Roe's* purported error has produced significant negative consequences, and empirical evidence shows that *Roe* produced overwhelmingly positive effects.

Roe v. Wade has created reliance. Again, assuming, *arguendo,* that Mississippi was able to show that the decision in *Roe* was incorrect and has produced negative consequences, the Court must still consider whether the benefits of correcting the error are sufficient to outweigh the costs. Aside from the fact that overturning *Roe* upsets the decision's aforementioned positive effects, overturning any precedent necessarily comes "with the cost of upsetting institutional investment in the prior approach."[177]

When the Court commits to a particular legal interpretation, people are able to form reasonable expectations of what the law guarantees and requires of them, and they rely on these expectations when evaluating their current conduct and considering their future prospects. If the proper interpretation of the law was constantly in flux, there would be no way to form reasonable expectations of the legality of one's future actions, and thus no way to adequately plan and control the course of one's life. These 'reliance interests,' as Justice Barrett explains, "are one of the classic concerns of stare decisis. Indeed, while the doctrine serves many goals, the protection of reliance interests is paramount."[178] On the basis of nearly five decades of consistent interpretation establishing that the right to abortion is constitutionally protected from state interference, entire generations of women have reasonably "organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[179] Therefore, the Court must afford substantial weight to the interests of the millions of women, and men, who made incredibly important and intimate decisions impacting the current and future courses of their lives in reliance on the Court's institutional investment in the protection of abortion.

Given that Mississippi has failed to provide the Court a sufficient justification for reconsidering the validity of the central holding in *Roe,* and has failed to adequately show that the holding in *Roe* produced significant negative consequence, the Court should

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[176] *Id.*
[177] Barrett, *supra* note 129, at 1715.
[178] *Id.* at 1717.
[179] *Casey,* 505 U.S., at 856.

conclude that the disruption to almost 50 years of reliance interests caused by the decision to overturn *Roe* would certainly be undue. The right to abortion is, and should be, a fundamental right, and the standards that would justify the Court's decision to overturn any precedent, let alone a case as entrenched as *Roe v. Wade,* have not been met. For these reasons, this article firmly believes that the Supreme Court must once again reaffirm the central holding of *Roe v. Wade* and overturn the Gestational Age Act. Nevertheless, given that experts believe it is likely that the Court will uphold the Act,[180] the following section examines the potential consequences of this jurisprudential mistake.

III. Losing the Right to Abortion

A. Institutional Implications

As Justice Breyer explained during oral argument, *stare decisis* is a key feature of the American legal system,[181] where the power of the judiciary comes not from the purse or the sword but from the people's perception that the Court is a principled rather than political institution.[182] Justice Barrett believes that the goal of applying *stare decisis*, especially in constitutional cases, is to increase both actual and apparent institutional legitimacy.[183] She warns that "if the Court's opinions change with its membership, public confidence in the Court as an institution might decline. Its members might be seen as partisan rather than impartial and case law as fueled by power rather than reason."[184] This sentiment was recently echoed by Justice Sotomayor, who questioned whether the Court would "survive the stench" that *Dobbs v. Jackson* "creates in the public perception that the Constitution and its reading are just political acts."[185]

Though *Dobbs v. Jackson* is far from the Supreme Court's first controversial decision, former President Donald Trump's vow that his three appointed justices would overturn *Roe*[186] raises concerns that the political composition of the Court has been shifted for the purpose of limiting a fundamental constitutional right. These concerns are heightened by the

[180] Hassan, *supra* note 10.
[181] Oral Argument at 01:08:06.
[182] Melissa Murray, *The Symbiosis of Abortion and Precedent,* 134 Harv. L. Rev. 308 (2020).
[183] Barrett, *supra* note 129, at 1716.
[184] *Id.*
[185] Oral Argument at 12:19.
[186] Adam Liptak, *Critical Moment for Roe, and the Supreme Court's Legitimacy,* N.Y. TIMES (Dec. 6, 2021), https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html.

fact that just four months after the Mississippi District Court held the Gestational Age Act to be unconstitutional, Mississippi enacted an even more restrictive ban on abortions at six weeks' gestational age.[187] The Senate sponsor of the six-week ban stated that the composition of the Court was "absolutely . . . a factor" in proposing the law.[188] Numerous studies have shown that the percentage of Americans who believe that the court is a primarily political institution has been increasing and public approval of the court has been decreasing.[189] This is particularly concerning, as the power of the Court is based on public trust in its legitimacy, but "like the character of an individual, the legitimacy of the Court must be earned over time."[190] Should the Court entirely cease to be legitimate, the Court may entirely cease to be, and with approximately 70% of Americans disapproving of attempts to overturn *Roe*[191] it is far from certain that the institution would 'survive the stench' of doing so.

B. Legal Implications

In *Casey*, the Court recognized that if respect for precedent deteriorates, the burden will be felt by anyone who endeavors to approve an unpopular constitutional decision, and by anyone who disapproves of a decision that they nonetheless accept out of respect for the rule of law.[192] If the Court overturns *Roe*, the Justices may be calling into question the fundamental rights relied upon in *Roe's* analysis, and the subsequent decisions based on the validity of *Roe's* central holding.[193] Aside from these more general implications, the Court's decision to uphold the Gestational Age Act would have immediate effects on the status of abortion laws across the nation. Many states responded to *Roe* and *Casey* with trigger laws: 8 states retained the abortion restrictions they had in place prior to *Roe* and *Casey* without enforcement; 12 states enacted abortion restrictions that will go into effect as soon as they can constitutionally do so; 9 states have unconstitutional abortion restrictions that are awaiting judgment; and 7 states have laws expressing their intent to limit abortion to the strictest degree permitted by the courts.[194] Furthermore, 4 states have already passed

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[187] Resp't's Br. 6.

[188] *Id.*

[189] Liptak, *supra* note 186.

[190] *Casey,* 505 U.S., at 894.

[191] *Us Public Opinions Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade,* PEW RESEARCH CENTER (Aug. 29, 2019), https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/.

[192] *Casey,* 505 U.S. at 867.

[193] Oral Argument at 22:44.

[194] *Abortion Policy in the Absence of Roe,* GUTTMACHER INSTITUTE, https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (last updated Apr. 1, 2022).

amendments explicitly declaring that their constitution does not secure or protect the right to abortion,[195] and a lack or limited degree of constitutional protection means that even states with liberal abortion policies could see them drastically changed as administrations change. As explained below, these immediate limitations on the extent to which women can access abortion will not come without consequence.

C. Societal Implications

The Supreme Court's decision to uphold the Gestational Age Act and lessen the extent to which abortion access is protected would have substantial negative impacts on women and on society at large. According to the World Health Organization, nearly half of all abortions are illegal and unsafe, and nearly all of these abortions occur in developing countries.[196] Unsafe abortions account for approximately 5-13% of the global annual maternal mortality rate.[197] Yet, as they have through history, abortions will continue regardless of their safety. This is especially true given that "it's well documented that working mothers" in America "face a 'motherhood wage penalty,' which entails lower wages than women who did not have a child."[198] Furthermore, with childcare subsidies only available to approximately 1 in 6 women and less than 60% of working women receiving coverage for maternity leave, "the U.S. lacks the infrastructure to adequately support mothers, and especially working mothers – making the prospect of motherhood financially unworkable for some."[199] Finally, it is worth noting that many of the aforementioned positive impacts of *Roe*, including the increase in college enrollment, the increased ability of women to participate in the workforce, and the decrease in youth and overall crime, would diminish as restrictions on abortion increase.

Conclusion

The Supreme Court is currently faced with the choice between rejecting the Gestational Age Act as unconstitutional or rejecting nearly 50 years of consistent precedent. The Court's holding that the right to abortion is a fundamental right was a holding based on legitimate legal reasoning that produced overwhelmingly positive results, and that millions

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[195] *Id.*

[196] *Abortion,* WORLD HEALTH ORGANIZATION, https://www.who.int/healthtopics/abortion#tab=tab_1 (last visited Jan. 6, 2022).

[197] *Id.*

[198] Myers, *supra* note 8.

[199] *Id.*

of women, spanning generations, have relied on. If the Supreme Court decides to uphold the Gestational Age Act, this article strongly believes that the Court will be endangering not only its own legitimacy, but it will be endangering the life of every woman in this country who is or could become pregnant.

Though the future of the fundamental right to abortion appears tenuous, the fight for abortion access is far from over. First, it is important to note that the Court itself does not have the authority to ban abortion, it can only rule that federal and state legislatures may do so. As several states currently protect abortion access beyond what they are constitutionally required to protect,[200] the fight for abortion rights may find success in various legislatures if not in the Court.

Second, as the extent to which women seek abortions has been relatively consistent throughout history,[201] any current or future actions that limit the legal protection of abortion access will certainly increase the number of illegal, unsafe abortions performed. Though studies show that nearly every abortion death and disability could be prevented by the provision of safe, legal abortion, and timely responses to abortion complications—adequate sexual education and effective use of contraceptives has been proven to contribute to a decrease in unwanted pregnancies and unsafe abortions.[202]

Finally, though the Court's decision and its consequences cannot yet be decisively determined, it is imperative to ensure that the Court does in fact 'survive the stench' of hearing this case. For these reasons, regardless of the Court's ultimate decision in the case of *Dobbs v. Jackson Women's Health*, this article strongly recommends: (1) an immediate lobbying effort aimed at the passage of H.R.3755, also known as the Women's Health Protection Act of 2021, which would federally protect abortion access by prohibiting "governmental restrictions on the provision of, and access to, abortion services;"[203] (2) immediate efforts to ensure access to comprehensive and inclusive sexual education and safe and effective contraceptives for both women and men, to begin to mitigate the consequences of unsafe abortion; and (3) further research into both the causes and effects of the Court's loss of actual and perceived legitimacy, and a serious consideration of proposals to reform

[200] Gold, *supra* note 29.
[201] Joyce, *supra* note 26.
[202] *Id.*
[203] Women's Health Protection Act, H.R. 3755, 117th Cong. (2021); (Or similar legislation proposed in State Legislatures or future Congresses).

the Court, including research into the effects of adding or removing seats, imposing term limits, controlling appointment schedules, and establishing a bipartisan nomination process, alongside other reform proposals.

A Review of the National Collegiate Athletic Association's Legal Impact on Athletes' Rights to Use Their Name, Image, and Likeness for Commercial Purposes

Zuha Hameed

Introduction: Does the Law Permit Compensation of Collegiate Athletes?

In the world of collegiate athletics, there are seemingly perpetual complaints criticizing the National Collegiate Athletic Association (NCAA). However, nothing has been more prevalent than criticisms of its regulation of college athletes' use and legal control over their name, image, and likeness (NIL). From the founding of the NCAA in 1906 until 2021, college athletes have been prohibited from profiting from their NIL.[1] This means they were unable to make money from any merchandise sold using their NIL or accept any endorsements or sponsorships from third parties.[2] Nevertheless, many prominent college athletes have their names plastered on jerseys that are sold to thousands of loyal fans. Such was the case for the popular college basketball player at the University of Oregon, Sedona Prince.[3] NIL laws did not allow her to accept any sponsorships or endorsements that were presented to her as a product of her large audience on social media.[4] Prince garnered millions of followers on TikTok last year, who came together to support her decision to sue the

[1] NCAA Media Center, *Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions*, NCAA, (Apr. 29, 2020), https://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions.

[2] Michelle Brutlag Hosick, *NCAA adopts interim name, image, and likeness policy*, NCAA, (Jun. 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

[3] NBC Sports, *Why Oregon WBB's Sedona Prince is Suing the NCAA*, NBC Sports, (Jun. 15, 2020), https://www.nbcsports.com/northwest/oregon-ducks/why-oregon-wbbs-sedona-prince-suing-ncaa.

[4] *Id.*

NCAA for profiting off her NIL.[5] Even though her massive following led to an increase in sales of her merchandise, Prince was unable to profit.[6]

The NCAA prohibited all college athletes from profiting from their NIL to protect the concept of 'amateurism' and prevent unfair recruiting methods.[7] It was believed that once a student-athlete was paid, they were considered to be a 'professional,' and thus no longer qualified for collegiate athletics.[8] Students had to comply with the NIL restrictions if they wanted to maintain their eligibility within the NCAA.[9]

Nevertheless, in the 2019-2020 fiscal year, the NCAA made $575 million.[10] Those revenues have only been increasing, with a large portion of that revenue stemming from the NCAA basketball championship "March Madness tournament" which resumed in 2021, following the COVID-19 pandemic.[11] While the NCAA was a system founded for athletes, the athletes were the ones who profited the least.[12] The dramatic imbalance between the NCAA's own earnings compared with the bar against athlete's NIL use prompted a call for change in the NIL restrictions.

A. NIL Exemptions

The NCAA has dealt with issues of fairness and equity in NIL exemptions. Prior to 2021, the NCAA offered exemptions to some student-athletes, allowing them to profit from their NILs.[13] For example, in 2018, Arike Ogunbowale was granted a waiver to compete on the television show 'Dancing with the Stars.'[14] Ogunbowale was a player for Notre Dame's women's basketball team at the time and her waiver was granted because the show was

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Media Center, *NCAA releases audited financial statement for fiscal year 2019-2020*, NCAA, (Jan. 28, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-releases-audited-financial-statement-fiscal-year-2019-20.
[11] Eben Novy- Williams, *March Madness Daily: The NCAA's Billion Dollar Cash Cow*, Sportico, (Mar. 26, 2022), *https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/*
[12] Katelyn Ohashi, *Everyone Made Money off My N.C.A.A Career, Except Me,* The New York Times, (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html.
[13] James Landry and Thomas A. Baker, *Change or be changed: a proposal for the NCAA to combat corruption and unfairness by proactively reforming its regulation of athlete publicity rights*, 9 NYU JIPEL. 1 (2019).
[14] Jacob Bogage, *Arike Ogunbowale on 'Dancing with the Stars' Forces NCAA into Trick Two-step,* Washington Post, (Apr. 19, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/04/19/arike-ogunbowale-on-dancing-with-the-stars-forces-ncaa-into-tricky-two-step/.

"unrelated to her basketball abilities."[15] However, the concept of 'unrelated' is extremely subjective, and this waiver created many problems for the NCAA.[16] Many requests that were seemingly more 'unrelated' were denied before Ogunbowale's, such as UCF's men's football kicker Donald De La Haye, who was forced to stop playing for the university because of his YouTube channel.[17] Thus, NIL exemptions were a controversial topic between the NCAA and its student-athletes.

B. Legality vs. Morality

Perhaps the most relevant issue with NILs to the everyday college sports viewer is the legality vs. morality of the topic. Whilst the NCAA has been operating adequately within the legal sphere with respect to NILs, there have been many objections pertaining to the morality of the NCAA's regulations.[18] In a multi-million-dollar industry that benefits the NCAA, schools, athletic staff and departments, the actual athletes themselves benefited the least until 2021.[19] This has had major implications on the student-athletes who were deprived of significant monetary figures and financial relief.[20] It is worth briefly mentioning that collegiate athletes face higher mental health issues arising from a variety of factors such as uncertainty in life after college.[21] Profiting from their NIL could offset some of the negative impacts.

C. Where We Are Now

As of July in 2021, the NCAA amended their by-laws to allow college athletes to profit from their NILs as long as this profiting adheres to the guidelines laid out by the state that their university resides in.[22] For states without guidelines, athletes were free to profit from commercialization of their NIL so long that they abided by university guidelines - if the university offered any.[23] Although the NCAA's historical 'pay-for-play' rules – paying a

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[15] *Id.*

[16] Landry and Baker*, supra* note 13.

[17] Jenna Lemoncelli, *Donald De La Haye's 'crazy' decision to quit college football turned him into a Youtube millionaire,* The New York Post, (Sep. 1, 2021), https://nypost.com/2021/09/01/donald-de-la-haye-quit-college-football-now-hes-a-youtube-millionaire/.

[18] Ohashi*, supra* note 12.

[19] *Id.*

[20] *Id.*

[21] Eric Lindberg, *Let's Talk About the Quiet Crisis in College Sports: Mental Health*, USC Trojan Family, (2021), https://news.usc.edu/trojan-family/college-athlete-mental-health-usc-sports-psychologists/.

[22] *Interim NIL Policy*, NCAA, (Jul. 2021), http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

[23] *Id.*

player to come to a university – and recruiting inducements rules are still in effect, the interim policy is a large step forward for college athletes.[24] As such, student-athletes are now able to benefit from sponsorships, endorsements, the sale of merchandise, etc.[25] These new guidelines suspend the rules on 'amateurism' on an interim basis.[26]

This article will examine case law and legal philosophy that make up the conception of NILs. It will argue that although the legal ramifications of NIL compensation in the NCAA are still being debated, the current interim policy enacted by the NCAA is indeed a foundational policy. This policy adheres to misappropriation standards both legally and ethically. Thus, it is imperative that this new policy is maintained through the future course of collegiate athletics and, through congressional legislation, is enacted as a national NIL policy for universal acceptance and interpretation. This article will begin by explaining the policy history and relevant cases, followed by an examination of the current legal status of NIL regulation. Next, an analysis of current and previous issues within NIL and the current status of state laws will be presented. Lastly, a recommendation to enact a NIL policy on a national level will be presented.

I. History of NIL Compensation Within the NCAA

A. Case Law Regarding NIL in Athletics

1. Prominent Collegiate Amateurism and Antitrust Cases

One of the largest cases surrounding NIL in the NCAA was *O'Bannon v. National Collegiate Athletic Association*.[27] Ed O'Bannon was a former Division I NCAA Men's basketball player at University of California, Los Angeles.[28] He argued that the NCAA's NIL restrictions violated antitrust laws when the athletes' NILs were being used for commercial purposes, such as video games.[29] The antitrust laws were implicated because the process to license an athlete's NIL involved commercial activity in which the athletes anticipated economic gain, and there was a "significant anticompetitive effect on the college education market."[30] The Court held that there were more restrictions than necessary to maintain

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015); *cert. denied*, 137 S.Ct. 277 (2016).
[28] *Id.* at 1056.
[29] *Id.* at 1057.
[30] *Id.*

amateurism in the NCAA.[31] O'Bannon's case was unique in that he argued that he should at least be paid for his NIL after he graduated, since he would no longer be playing in the NCAA or be considered an amateur.[32] Many former athletes and current professionals joined O'Bannon as plaintiffs, such as "all-time great" basketball players Bill Russell and Oscar Robertson.[33] The Court found that this restriction is a violation of the Sherman Antitrust Act, which prohibits any contract that unreasonably restrains trade or interstate or foreign commerce.[34] Notably from this case, it was established that student-athletes were permitted to have their full cost of attendance paid for by the university.[35] Previously, they were only allowed to be allotted a set amount of scholarship money.[36] However, it is important to note that at the time of this case, student-athletes were still not permitted to make any additional money from use of their NILs because of their status as amateurs.[37] Thus, while the athletes were permitted to reap the benefits of having educational and housing fees paid for through scholarships, this case did not further the issue of NIL compensation.

The other two relevant cases that paved the way for NIL rights are *NCAA v. Alston* and *House v. NCAA*.[38] In *Alston*, the plaintiff once again argued that the NCAA's NIL restrictions violated antitrust laws, as they placed restrictions on "non-cash education related benefits."[39] Prior to *Alston*, student-athletes had to pay for amenities such as computers and school equipment, as these were not provided for by the university.[40] The NCAA treated these amenities as 'pay-to-play' and felt that funding these items would stray away from their stance on amateurism.[41] However, in *Alston*, the Supreme Court ruled that this action did in fact violate federal antitrust laws by limiting education related compensation and violating the Sherman Antitrust Act by restraining commerce.[42] The second case, *House v. NCAA,* is a very recent suit that has gained a lot of media attention due to the notoriety of the plaintiffs,

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[31] *Id.* at 1053.

[32] *Id.* at 1065.

[33] Steve Eder and Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A*, The New York Times, (Jun. 9, 2014), https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html.

[34] *O'Bannon*, 802 F.3d at 1052-1053.

[35] *Id.* at 1053.

[36] *Id.*

[37] *Id.*

[38] Alston v. NCAA, 958 F.3d 1239, 1247 (9th Cir. 2020); *aff'd*, 141 S.Ct. 2141 (2021).

[39] *Alston,* 141 S.Ct. at 1247.

[40] *Id.* at 1251.

[41] *Id.* at 1251.

[42] *Id.* at 1253.

who became popular over social media.[43] Grant House and Sedona Prince, who are both NCAA student-athletes, argued that the NCAA was engaged in a 'conspiracy' to fix NIL compensation and prevent student-athletes from entering the market with their NILs.[44] It was amidst this case that the NCAA was pushed to enact its interim, revised NIL restrictions.[45] The interim policy, in which the NCAA directed schools to enact their own NIL policies or to follow state guidelines, was enacted while the case was ongoing.[46]

2. Misappropriation

The NCAA's current interim NIL policy changed the course of the movement for adequate pay for collegiate athletes, but it is important to note just how monumental this change was in the face of misappropriation claims. As stated earlier, prior to the interim policy, college athletes were prohibited from accepting pay in any form relating to their NILs.[47] The athletes were forced to sign waivers that effectively gave up their right of publicity to the NCAA, meaning they are unable to be compensated for their NIL and have no control over the commercial use of their identities.[48]

The NCAA has largely been concerned with the right of publicity since its inception. The International Trademark Association defines the right to publicity as "an intellectual property right that protects against the misappropriation of a person's name, likeness, or other indicia of personal identity—such as nickname, pseudonym, voice, signature, likeness, or photograph—for commercial benefit."[49] Student-athletes must sign form 21-1a (formerly 08-3a), which is the "Student Statement" detailing various rules and regulations the student-athlete is required to abide by.[50] However, misappropriation claims did emerge from this policy, and thus are part of the reason that the interim NIL policy exists today.

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[43] House v. NCAA, 545 F. Supp. 3d 804, 2021 U.S. Dist. (2021).

[44] *Id.* at 1.

[45] Fair Pay to Play Act, S.B. 206, 2019 Leg., Reg. Sess. (2019).

[46] Michelle Hosick, *NCAA adopts interim name, image, and likeness policy,* NCAA, (Jun. 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

[47] *Id.*

[48] Kristine Mueller, *No Control Over their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DePaul J.L. of Sports Law. 74 (2004).

[49] International Trademark Association, *Right of Publicity*, INTA, https://www.inta.org/topics/right-of-publicity/ (last visited Apr. 5, 2022).

[50] Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 Barry Law Review. 17 (2010).

The filing of the case *Jordan v. Jewel Food Stores* is when conversation on application of the right of publicity towards athletes really began to take place.[51] In this case, Jewel Food Stores claimed that they were using former professional basketball player Michael Jordan's name for noncommercial purposes, though the ad generated more business for the store.[52] Jordan consequently argued that if the store could use his NIL even in partial form, this would create a space for other companies to do the same thing.[53] In addition, he emphasized that this misappropriation infringed on his publicity rights under the Illinois Right of Publicity Act.[54] The court ruled that Jewel's ad "conspicuously" linked their product to Jordan in their advertisement, and it was therefore subject to commercial speech regulations due to its promotion of the Jewel brand.[55]

Following *Jordan*, Sam Keller – the former quarterback for the University of Nebraska – filed suit against Electronic Arts (EA Sports) for misappropriating him by creating a video game featuring his NIL.[56] For the first time in NIL cases with student-athletes, Keller and the plaintiffs that joined him received compensation for their right to publicity.[57] This case set the stage for *Alston*, which changed the course of collegiate athletics and compensation for NIL.[58] The current interim NIL policy from the NCAA finally resolves these misappropriation issues and lays a better legal groundwork for collegiate athletes to be compensated.

On a larger scale, nonspecific to the aforementioned cases, misappropriation can be applied to the NCAA's general marketing structure. It became apparent that the NILs of college athletes were being used for commercial purposes and that the NCAA did indeed profit from athletes' NILs.[59] Because the athlete was unable to accept the money due to NCAA guidelines, the NCAA kept all that revenue.[60]

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[51] Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 2014 U.S. App. 1789, 2014.

[52] *Id.* at 22.

[53] *Id.* at 30

[54] *Id.* at 11.

[55] *Id.* at 3.

[56] Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 2013 U.S. App. 1629, 2013 WL 3928293 (United States Court of Appeals for the Ninth Circuit July 31, 2013, Filed).

[57] *Id.* at 5.

[58] Alston v. NCAA, 958 F.3d 1239, 1247 (9th Cir. 2020); *aff'd*, 141 S.Ct. 2141 (2021).

[59] Darren Rovell, *NCAA President: No Pay for Players on Jersey Sales,* CNBC, (Dec. 22, 2011), https://www.cnbc.com/id/45768248.

[60] NCAA, *Where does the money go*, NCAA, https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx (last visited Apr. 5, 2022).

The student-athletes' NILs were also not used for 'newsworthy' purposes - a common defense for misappropriation. News and media outlets are traditionally free from the right to publicity.[61] Therefore, athletes and student-athletes who are shown on broadcast channels in a sporting game are considered 'newsworthy', and do not have a legitimate claim for misappropriation.[62] However, selling college sports memorabilia is not considered newsworthy.[63] Thus there is some leeway for the NCAA here when arguing 'newsworthiness,' but for the most part, broadcasting a sports game and advertising in relation to that broadcast is the extent to which they should be able to use NILs.[64]

B. NIL Legislation

The California Fair Pay to Play Act was monumental in the progression of NIL rights.[65] The Act held that no postsecondary educational institution can uphold a limitation that prevents students participating in collegiate athletics from earning compensation through their NIL.[66] Additionally, the Act prohibited such compensation from affecting an individual's scholarship eligibility.[67] This legislation also targeted the NCAA specifically, by stating that the association could not deem a student ineligible to participate in collegiate athletics if a student benefits from their NIL.[68] It states that the NCAA also must allow universities that house student-athletes who are benefitting from their NILs to be able to participate in intercollegiate athletics.[69] This Act went into effect in 2019, but only applied to the state of California.[70]

The NCAA Board of Governors unanimously agreed to implement the NIL rules by 2021 and delegate the responsibility to the states.[71] California enacted their Fair Pay to Play Act, but Florida added its own legislation that increased the pressure on the NCAA.[72] The Florida bill, titled "Intercollegiate Athlete Compensation and Rights," was enacted in

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[61] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562. (1977).

[62] Frank Ryan and Matt Ganas, *Rights of Publicity in Sports-media*, 67 Syracuse Law Review. 422. (2017).

[63] Marshall v. ESPN Inc., 111 F. Supp. 3d 815, 2015 U.S. Dist. 2015-1 Trade Cas. (CCH) P79,196, 43 Media L. Rep. 1877, 114 U.S.P.Q.2D (BNA) 1968, 2015 WL 3537053.

[64] *Id.* at 828.

[65] Fair Pay to Play Act, S.B. 206.

[66] Collegiate athletics: student athlete compensation and representation, SB- 206, § 67456 (2019).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Dan Murphy, *Everything you need to know about the NCAA's NIL debate,* ESPN, (Sep. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

[72]Intercollegiate Athlete Compensation and Rights, S. 0646 (2020).

2020 and effectively allowed for student-athletes to be paid for use of their NILs.[73] Additionally, Colorado created their own state NIL law.[74] The Colorado law essentially did the same thing as the California and Florida laws, by prohibiting the prevention of a student-athlete being compensated for their NIL.[75] The difference is that the Colorado law requires athletes to disclose their deals with the university, and prevents the athletes from entering into deals that conflict with their university sponsors.[76] These three states and their policies were foundational to collegiate athlete compensation. While legislation from these states added pressure on the NCAA to form a policy, it made it more difficult to enact a federal policy as states were already implementing their own regulations.[77] As a growing number of cases began to cite these acts' rationales for the removal of NIL restrictions, in 2019, the NCAA adopted its interim NIL policy.[78]

The NIL rules outlined in the interim policy are temporary until federal legislation is enacted.[79] There are three main proposed federal laws that are relevant to the issue. The first is the College Athlete and Compensation Rights Act (CACRA).[80] CACRA would require the NCAA to compensate the students up to market value for their NIL.[81] This bill is noteworthy because it would allow for the NCAA to approve or disprove of deals based on their cash value, ultimately giving the NCAA more control than what they are allotted in the current interim policy, in which the NCAA does not have a role in the amount of compensation.[82] Other important aspects of this proposal include the addition of requirements that a student-athlete must meet before they can take advantage of their NIL, such as a course credit requirement.[83] Importantly, this proposal would also permit the implementation of restrictions that would prevent an athlete from entering a future agreement that conflicts with a university's sponsors.[84]

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[73] *Id.*
[74] Compensation And Representation Of Student Athletes, CO S.B. 123 (2020)
[75] *Id.*
[76] *Id.*
[77] Intercollegiate Athlete Compensation and Rights, Fla. S. 0646.
[78] *Interim NIL Policy, supra* note 22.
[79] *Id.*
[80] Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong.§ 2D (2020).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

The second bill is the College Athletes Bill of Rights (CABOR), which would restrict endorsements for certain categories, so long as those categories were also restricted by the state.[85] Endorsements relating to illegal substances, gambling, or alcohol are common categories that are prohibited in this proposed bill.[86] Furthermore, it is important to note that CABOR would conflict with CARCA because CABOR does allow for students to engage in NIL agreements that conflict with their university sponsorships.[87] This bill is also different in that it addresses the overall well-being of student-athletes beyond regulation of NIL usage.[88] It would permit, for example, guaranteed pay for student-athletes and payment of medical expenses past graduation.[89] This bill comparatively allows for more leeway than CARCA in some respects, but places more restrictions in others.

The final bill is called the Student Athlete Level Playing Field Act (LPFA).[90] LPFA would allow for the NCAA to place some restrictions on student-athletes, such as the same categories in CABOR.[91] The main difference between LPFA and other proposals is that student-athletes would not be required to disclose their agreements and deals to the NCAA.[92]

II. Issues in Current NIL Regulation: Duress, Safety, and Federalism

A. Duress

The issue of signage under duress has not been adequately resolved by the interim policy. Amidst the topic of misappropriation and under the category of 'authorized permission,' the NCAA has had to navigate duress claims.[93] The NCAA mandates student-athletes to either sign documentation that signals their willingness to comply with the NCAA's standards or relinquish their opportunity to play collegiate sports.[94] Consequently, though signing an agreement to play for a university is a voluntary choice, most athletes did

[85] College Athletes Bill of Rights Act, S. 5062, 116th Cong. § 2D (2020).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. § 1 (2021).
[91] *Id.*
[92] *Id.*
[93] Erin McCarthy, *Court Strikes Down NCAA Argument Regarding Duress,* Daily Collegian, (Dec. 8, 2014), https://www.collegian.psu.edu/news/crime_courts/court-strikes-down-ncaa-argument-regarding-duress/article_83e89faa-7f34-11e4-b707-279e73a20e2f.html
[94] *Division I Compliance Forms,* NCAA, https://ncaaorg.s3.amazonaws.com/compliance/d1/2021-22/2021-22D1Comp_Form21-1a-StudentAthleteStatementForm.pdf (last visited Apr. 6, 2022).

not want to give up their NIL and thus felt 'forced' to sign so that they could play, as was the case in *O'Bannon.*[95] In this case, the plaintiff argued that the NCAA intentionally misled athletes and the student-athletes signed under duress without any informed consent.[96] The complaint alleged that the NCAA failed to inform student-athletes that they were giving up their legal right to their NIL.[97] Even though misappropriation claims were debated among scholars, they rarely arose in the legal system because the student-athletes signed these contracts to play.

The issue of duress prevails today in a different way after the passage of the interim policy. Now, athletes may not feel the coercion when signing with the NCAA amidst the new NIL policy, but there remains both a large lack of transparency and the persistence of issues addressed in *O'Bannon*, namely ambiguity.[98] For example, under the student-athlete campaign "Not NCAA Property," athletes spoke out against not being able to eat at certain restaurants because certain locations had a tendency to give student-athletes free food.[99] This was one instance of many amidst the campaign in which student-athletes felt uncomfortable and discontented with the impact of NIL rules on their daily lives.[100] This problem primarily stems from the NCAA compliance form 21-1a - the student-athlete statement.[101] The form makes no mention of NIL in its entirety.[102] Instead, under "Part III: Amateurism," the form states "I affirm that I have read and understand the NCAA amateurism rules."[103] This is the closest mention to NIL, though an indirect one. Under the amateurism section of the NCAA website, there is a link to frequently asked questions about NIL.[104] This section is the sole piece of information regarding NIL rights that student-athletes have to go off from, and similar to the case in *O'Bannon*, it can be confusing for many signees to understand what they are and are not allowed to do under the state and by the NCAA.

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[95] *O'Bannon*, 802 F.3d at 1055.

[96] *Id.*

[97] *Id.*

[98] *O'Bannon*, 802 F.3d at 1053.

[99] Jackson Thompson, *Athletes protest NCAA with #NotNCAAproperty campaign on March Madness eve, cite examples of unfair treatment,* Insider, (Mar. 17, 2021), https://www.insider.com/college-athletes-protest-the-ncaa-2021-3

[100] *Id.*

[101] *Division I Compliance Forms, supra* note 94.

[102] *Id.*

[103] *Id.*

[104] *Name, Image, and Likeness Policy Question and Answer,* NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (last visited Apr. 6, 2022).

B. Health and Safety

Under the present NCAA interim NIL policy, there are no standards for health and safety to protect student-athletes or the universities.[105] One aspect of this is that there are no provisions preventing prohibited recruiting methods (such as pay-for play or recruiting inducements), from coming towards the student-athlete by an endorser. Even though student-athletes and universities are restricted from engaging in these types of agreements, that does not stop brands from offering these deals amidst a murky aspect of NIL law. For example, both Brigham Young University and the University of Miami accepted 'whole-team' NIL deals for all their football players to benefit from.[106] Both schools are now being investigated for being involved in improper recruiting inducements or pay for play.[107] The current NIL policy does not do an adequate job of preventing these improper deals from being offered to student-athletes and universities. Additionally, as state laws are varied, only certain states provide category restrictions or rules against conflicting sponsors.[108] States that do not incorporate such restrictions could end up facilitating agreements that inadvertently harm the student-athlete's reputation or even the university's reputation. For example, the state of Florida does not prohibit student-athletes' engagement with traditional vice industries - a restriction that many other states have implemented.[109] They make no mention of prohibiting alcohol endorsements, rather only restricting deals that conflict with the athlete's team contract.[110] In 2021, N'Kosi Perry of Florida Atlantic University signed the first college contract to endorse alcohol with Islamorada Beer Company.[111] This deal prompted concerns from the NCAA and the university regarding the promotion of underage alcohol consumption.[112] In addition, some states also do not offer a standard to protect universities from improper use of their logo, mascot, or other identifying features.[113] One of the few states that provides strict regulation on this front is Oklahoma, who prevents the

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[105] *Interim NIL Policy, supra* note 22.

[106] Josh Moody, *Lack of Clear-Cut NCAA Rules Creates Confusion About NIL*, Inside Higher Ed, (Jan. 4, 2022), https://www.insidehighered.com/news/2022/01/04/lack-clear-ncaa-rules-creates-confusion-around-nil

[107] *Id.*

[108] *Interim NIL Policy, supra* note 22.

[109] Intercollegiate Athlete Compensation and Rights, FL S. 0646, (2020).

[110] *Id.*

[111] Jonathan Tillman, *Alcohol, the NCAA, & NIL's Upperclassman Advantage*, Boardroom, (Oct. 9, 2021), https://boardroom.tv/alcohol-nil-deals-nkosi-perry/.

[112] *Id.*

[113] *Interim NIL Policy, supra* note 22.

usage of their universities' logos and insignia in NIL advertisements.[114] On the contrary, New Mexico offers student-athletes a major exemption from representing apparel that conflicts with their university, namely footwear.[115] This law permits student-athletes to wear any shoe of their choice to official team gatherings, even if it conflicts with the school sponsors.[116] Finally, the interim NIL policy does not include standards to protect the financial and economic well-being for student-athletes or a clause to address mental health.[117] The new NIL regulations were instated so suddenly, leading to a lack of care towards the athletes as they navigate these newfound freedoms. Student-athletes are now brand managers, and for those who have limited resources (i.e. women, Division II or Division III schools, etc.), they "take on more day-to-day responsibilities associated with brand management and endorsement."[118] With student-athlete's placing more effort into their athlete identities and their personal brands, this may take out time for academic, social, and professional development.[119] Thus, negative consequences on a student-athlete's well-being such as social isolation, psychological difficulties, and stunted intellectual and education growth have a higher chance of materializing.[120] New York NIL laws are one of the few state laws that mandate access to mental health resources and support services to address the "unique issues and pressures student-athletes confront."[121] Similarly, Louisiana is part of the minority of states requiring financial literacy courses for student-athletes.[122] The current interim NIL policy insufficiently addresses these issues, creating pressures for an enactment of federal law.

C. Federalism

The current interim policy does an adequate job of compensating athletes and circumventing misappropriation claims. The largest issue in the current policy is one of

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[114] Student-Athlete Name, Image and Likeness Rights Act, OK S.B. 48, (2021).

[115] Student Athlete Endorsement Act, NM S.B. 94, (2021).

[116] *Id.*

[117] *Interim NIL Policy, supra* note 22.

[118] Hailey Harris, Natasha Brison, and Marlene Dixon, *Hidden Consequences: Examining the Impact of NIL on Athlete Well-Being,* 13 The University of Tennessee Knoxville Journal of Applied Sport Management. 29 (2021).

[119] *Id* at 31.

[120] *Id.*

[121] *See generally* New York Collegiate Athletic Participation Compensation Act, NY S05891, (2021-2022).

[122] Provides Relative to the Compensation of Intercollegiate Athletes for the Use of Their Name, Image, or Likeness, LA S.B. 60 (2021).

federalism. Currently, the states can implement NIL rules as they see fit, and student-athletes are expected to follow the guidelines of where their respective university is located.[123]

In the current state of the NCAA's NIL rules, there is confusion due to the differences in state-by-state implementation.[124] According to the NCAA, it is up to states to implement their own NIL policies.[125] This is problematic for athletes attending universities in states without a policy, such as universities located in Delaware and Indiana.[126] Similarly, different states will have varying levels of leniency in their policies.[127] Accordingly, what is allowed versus what's not allowed varies significantly across the nation.[128] For example, as of October 2021, only 28 states have passed NIL laws.[129] Of those 28 states, New Mexico and Arizona are the most lenient, and do not require their student-athletes to disclose partnerships with the university.[130] However some states, like Alabama, prohibit various industries–such as alcohol, tobacco, controlled substances, casinos, gambling, wagering, firearms, and adult entertainment– as well as anything that could negatively impact the school's reputation.[131] Varying levels of leniency in NIL not only creates complications for the athletes, but issues of fairness and equity. Additionally, state legislatures are incentivized to create more lucrative NIL laws, such that their universities can have a greater recruiting advantage.[132] These issues are a result of Congress not enacting federal legislation surrounding NIL. The NCAA themselves recognize the hardships associated with 50 different sets of laws, and they are primary supporters for the enactment of a federal policy.[133] The NCAA is advocating for a federal framework that ensures federal preemption

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[123] *Interim NIL Policy*, *supra* note 22.

[124] Murphy*, supra* note 71.

[125] *Interim NIL Policy, supra* note 22.

[126] Liz Clarke, *State-by-state rating system gives college recruits road map to evaluate NIL laws,* Washington Post, (Oct. 21, 2021), https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings./

[127] *Id.*

[128] *Id.*

[129] Murphy*, supra* note 71.

[130] Thomas Di Biasio, *Most States Pass 'Name, Image, and Likeness' Laws for Student Athletes,* MultiState, (Sep. 21, 2021), https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes

[131] Student Athletes, Compensation for use of Student Athlete's Name, Image, or Likeness Act, AL HB404 2021-227, 2021 Reg. Sess., repealed (2021).

[132] Braedon B. Morrow, *One – "NIL": A Score for Student-Athletes in their Fight for Name, Image, and Likeness Rights,* 82 Louisiana Law Review. 1 (2020).

[133] *NCAA Board of Governors, Federal and State Legislation Working Group Final Report and Recommendations,* NCAA, (2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf

over state NIL laws, establishes an antitrust exemption for the NCAA, safeguards the non-employment status of student-athletes, maintains the distinction between student-athletes and professional athletes, and upholds the NCAA's values including diversity, inclusion, and gender equity.[134]

III. Proposition for Clarity on the Student-Athlete Statement and a Recommendation for Federal Policy Offering Baseline Protections

Some of the aforementioned issues, the biggest being compensation, have been addressed through the NCAA's interim policy.[135] The most practical and best step forth in terms of compensation at this time would be the continued acceptance of the policy. Currently, the policy allows for the student-athletes to profit from their NILs so long as they adhere to state guidelines.[136] The interim policy strikes a healthy and fair balance on matching the NCAA's promotion of amateurism and giving the athletes more freedoms and opportunity to profit from their NIL.[137]

However, as seen through the complaints in *O'Bannon,* athletes have been unaware of what they are signing onto and of their legal rights with NIL.[138] The problem of unknowingly and unwillingly giving up publicity rights is virtually gone with the interim policy, but the issue now lies in individual state legislation leading to ambiguity in student-athletes' consent forms.[139] There needs to be direct statements on form 21-1a, the student-athlete consent form, that outline exactly what a student-athlete can and cannot do under state guidelines.[140] As argued in *Keller*, the form itself is vague and never obtained implicit consent from the signee; it uses the language: "You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities, or programs."[141] The issue could easily be rectified by

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134 *Id.*

135 *Interim NIL Policy, supra* note 22.

136 *Id.*

137 *Interim NIL Policy, supra* note 22.

138 *O'Bannon,* 802 F.3d at 1055.

139 Clarke*, supra* note 126.

140 Brian Welch, *Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away Their Image Right*s, 44 J. Marshall L. Rev. 533 (2011).

141 Carrabis, *supra* note 50 at 32-33.

introducing clearer language and an explicit outline of the NIL state guidelines for the university that the athlete intends to play at. Because the form is distributed to players on an annual basis, this would make it easy to modify the form to different state guidelines for transfer students, new students, etc.[142] Similarly, there needs to be a direct explanation on how the NCAA can still use the athletes' NIL, another common point of ambiguity.[143] This will alleviate the problem of 'unauthorized permission.'[144] Since the form is mandated by the NCAA, they would be required to include these modifications. Incorporation of these privacy matters will create more transparency whilst protecting all parties.

The largest issue at hand with the interim policy is the extreme power that states are allotted with the NCAA completely isolated from the rule.[145] With more than half of the nation partaking in the new NIL laws, it is becoming increasingly necessary for there to be some federal standards that the student-athletes can look toward.[146] As such, the passage of a federal law is necessary to make these state variations more uniform and put all players on an equal playing field.[147] Additionally, a federal framework would grant student-athletes baseline protections and economic rights, which the states can expand on to provide more specific protections. For example, a state that offers some different, state specific protections is Louisiana. Under their NIL law, Louisiana requires student-athletes to undergo a minimum of five hours of financial literacy and life skills training at the beginning of their first and third years.[148] Inclusion of this clause is necessary amidst the new NIL rules to ensure economical livelihoods for student-athletes post-graduation. One counterargument that is propagated by those who are against a federal policy is that state policies are more thorough and allow for the adoption of local, geographic ideals. For example, the state of Maryland added their 'health and safety' standards after the death of a former University of Maryland football player.[149] As such, one could argue that having individual state policies allows for

[142] Welch, *supra* note 140 at 557.

[143] *Id.*

[144] *Id.*

[145] *Interim NIL Policy, supra* note 22.

[146] Clarke, *supra* note 126.

[147] Ross Dellenger, *ACC Athletes Urge Congress to Pass National NIL Law,* Sports Illustrated, Sep. 23rd, 2021, https://www.si.com/college/2021/09/23/acc-athletes-letter-congress-nil

[148] Provides Relative to the Compensation of Intercollegiate Athletes for the Use of Their Name, Image, or Likeness, LA S.B. 60.

[149] Bernard G. Dennis & Gregg E. Clifton, *Maryland Adds Athlete Safety Provision As It Joins Growing List Of States To Enact Name, Image, And Likeness Law*, XII Nat. L. Rev. 1 (2021).

these states to have the flexibility to incorporate specific requirements.[150] While this argument has merit, a federal law would be able to provide baseline protections for all student-athletes, and states would still be able to implement further rules as they see fit. A good starting point would be the enactment of a standard baseline policy, such as CABOR, which would only remedy the current fragmented state laws. Ultimately, the NCAA should not be on the exterior of the enforcement of NIL rules.[151]

Within this proposed federal act, there are a few things that should be included. Firstly, there should be added standards for student-athletes' health and safety. Even though the NCAA still prohibits pay-to-play, this will not stop endorsers who can still intentionally or unintentionally impact the recruitment process.[152] Endorsers could inappropriately insert themselves into the agreements to provide enrollment inducements for prospective student-athletes.[153]

There are also more unique provisions that some individual states have already included but are worth enacting on the national level. For example, industry category restrictions have already been implemented in some states, and would be beneficial to all to protect the reputation of student athletes and their respective universities.[154] Both CABOR and Alabama's NIL law include sections with category restrictions, barring categories such as alcohol, tobacco, controlled substances, casinos, gambling, firearms, and adult entertainment.[155] Including a clause parallel to this would offer baseline protections to help maintain the reputations and integrity of the student-athletes, their respective universities, and the NCAA as a whole.

In line with this 'fairness' ideal, it should also be noted that the NCAA and schools need to protect their own interests. A national policy would benefit by including standards that prevent student-athletes from entering partnerships that conflict with their university's partnerships.[156] Similarly, the universities would be able to protect their school logo, mascot,

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[150] *Id.*

[151] Dellenger, *supra* note 147.

[152] *Interim NIL Policy, supra* note 22.

[153] *Id.*

[154] Student Athletes, Compensation for use of Student Athlete's Name, Image, or Likeness Act, AL HB404 2021-227.

[155] College Athletes Bill of Rights Act, S. 5062.

[156] *Id.*

etc. from unauthorized use by the student-athletes.[157] This provision would aid in protecting not just the student-athletes, but also the universities.

Furthermore, it is important to note that the proposed federal law would not commandeer power from the states. NIL regulations are accompanied by tax complications, and critics say that student-athletes with NIL deals should be considered self-employed.[158] Currently, NIL deals must be compliant with state, or if applicable, federal tax laws.[159] Though the NCAA argues for a federal framework in which student-athletes maintain their nonemployment status, the legal basis behind such a notion is questionable and is likely why Congress has yet to pass legislation to reinforce this idea.[160] Doing so would take away considerable financial figures from the state. If student-athletes are not classified as employed or even classified as self-employed, their tax would be considered on a federal level.

A potential solution comes in the NIL Scholarship Tax Act, in which student-athletes can choose between a tax-free scholarship towards a post-secondary degree or the opportunity for outside compensation.[161] If an athlete chooses to monetize their NIL, their scholarship could be subject to federal income tax.[162] Under this policy, the student-athlete would be allowed to make up to $20,000 from outside compensation before they would need to include their scholarship for federal income tax.[163] If the student-athlete makes less than $20,000 from outside compensation, their scholarship would receive the same tax treatment.[164] This Act strikes a good balance between the promotion of 'amateurism,' the concept of being a student-athlete first, and adding protection standards such that student-athletes will be provided with educational and professional opportunities after finishing their collegiate athletic career.[165] An ideal federal law would provide baseline protections for student-athletes and the NCAA and aid in control or maintenance, while states would still be able to expand on those protections.

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[157] *Id.*
[158] NIL Scholarship Tax Act, S.2897, 117th Cong. (2021).
[159] *Name, Image, and Likeness Policy Question and Answer, supra* note 104.
[160] *NCAA Board of Governors, supra* note 133.
[161] NIL Scholarship Tax Act, S.2897.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

Finally, there are certain provisions mentioned in one of the aforementioned bills that should be enacted federally. LPFA specifically offers provisions that do not prohibit suit against the NCAA and does not exclude antitrust litigation.[166] It is unlikely that Congress would pass a bill giving the NCAA blanket antitrust immunity by completely inversing the current roles and providing the NCAA with extreme power.[167] The provision in LPFA helps to maintain "recourse" if a student-athlete violates NIL rights; removing the issue of blanket immunity which would ultimately be more likely to be passed by Congress.[168] This bill, on its front, is focused on uniformity across the nation.[169] Another favorable provision offered by LPFA aligns with the NCAA's demand that student-athletes' employment status is not impacted by federal law.[170] This is done so that the athletes are not able to form a union and demand direct payments from the university.[171] The third provision mentioned in LPFA would require the athletes to notify their universities of any deals they intend on pursuing, and the Federal Trade Commission would be in charge of enforcing aspects of this new law.[172] However, LPFA does not include all the necessary provision for federal law. Nevertheless, category restrictions and restrictions on student-athletes for deals that conflict with university sponsors are listed in LPFA but are mentioned in CABOR.[173] An ideal federal law should take aspects from both these bills, as they are necessary for universalized protection standards.

Either of the three paths, or all of them, would be suitable for federal law. However, it is necessary that federal legislation be passed for the sake of uniformity and for the protection of student-athletes and universities.

Conclusion

As of 2021, NIL policies have changed drastically and student-athletes are benefitting more than ever now.[174] As such, sponsorships that were deemed impossible just a few months ago are all of a sudden a reality. Currently, 28 states have passed NIL laws with

166 Morrow, *supra* note 132, at 1.
167 *Id.*
168 *Id.*
169 Student Athlete Level Playing Field Act, H.R. 2841.
170 *Id.*
171 Morrow, *supra* note 132, at 1.
172 *Id.*
173 College Athletes Bill of Rights Act, S. 5062.
174 *Interim NIL Policy, supra* note 22.

11 states having proposed bills.[175] Nevertheless, it is necessary for the federal government to be involved in NIL regulation so that there is a unified code for student-athletes, universities, and endorsers to be guided by.[176] It seems that national law is plausible in the future stages of NIL in the nation, with the NCAA being primary advocates for a federal policy.[177] An ideal law would take elements of both CABOR and LPFA along with the NIL Scholarship Tax Act to create a standardized policy to benefit collegiate athletes and the NCAA.[178] Passing congressional legislation can help mitigate health and safety concerns and level the playing field for student-athletes across the nation. Additionally, changes must be made to form 21-1a to provide student-athletes with a detailed outline of how to navigate the new NIL rules.[179] As a result, 'amateurism' as a concept will need to be redefined in the NCAA's future in the face of changes in NIL laws.

[175] Clarke, *supra* note 126.
[176] Dellenger, *supra* note 147.
[177] Clarke, *supra* note 126.
[178] Student Athlete Level Playing Field Act, H.R. 2841.
[179] *Division I Compliance Forms, supra* note 94.

Legal Evolution and Implications of Voter Identification Requirements in the 20th and 21st Centuries

Nikolas Kluver

Introduction: Problem with Voter Identification Laws

Voter identification requirements come in various shapes and forms. Inherently, though, voter identification statutes exist at the state level to require providing identification before being allowed to vote — this identification can be photo identification (Photo ID), which seventeen states require, whereas nineteen more accept non-photo identification (Non-Photo ID).[1] Accepted Non-Photo IDs vary between states and can include mortgages or lease agreements, voter registration cards, insurance policies, and utility bills, among other items.[2]

This is further divided into two subcategories.[3] Restrictive States have the option of issuing provisional ballots when proper identification is not shown, but generally, they deny the voter's right to vote.[4] These states include: Georgia, Indiana, Mississippi, Kansas, Virginia, Tennessee, and Wisconsin.[5] Restrictive States' policy makes arbitrary disenfranchisement much more likely, since states have the prerogative to deny ballots to those without proper identification — it often falls to election officials to determine which identification conforms to statute.[6] On the other hand, Non-Restrictive States, such as North Dakota, Ohio, and Arizona, allow voters without identification to still exercise their voting rights at the discretion of the state.[7] There is no special permission required. Rather, whether

[1] *Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 7, 2021), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

[2] *Id.*

[3] *See* FindLaw Legal Team, *Voter Suppression and Voter ID Laws,* FINDLAW (2021), https://www.findlaw.com/voting/how-do-i-protect-my-right-to-vote-/voter-suppression-and-voter-id-laws.html.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

a voter exercises their rights in Non-Restrictive States is completely up to the election workers presented with identification. This prerogative also increases the propensity for the abridgement of a voters' right to vote. Election workers have enormous power in deciding who can, or cannot, vote.

Despite legislative and constitutional progress, regression has occurred in recent decades in making it more burdensome to exercise voting rights.[8] Much of the logic for voter identification revolves around the question that licenses and identification are needed for almost all other basics of civic life, and that it is reasonable to extend this requirement to voting.[9] Over sixty percent of Americans agree with this sentiment, as Republican United States House Representative Glenn Grothman (WI-06) articulated to a local broadcast station when questioned about the then-upcoming 2016 General Election.[10] He depicted Democratic candidate Hillary Clinton as "about the weakest candidate Democrats ever put up," and stated that voter identification would "make a difference as well" (referring to helping then–candidate Donald Trump win the Election).[11] Many in the upper echelons of the political sphere, including Republican Pennsylvania House Speaker Mike Turzai, have echoed this claim, quoting while secretly being filmed saying that "voter ID, which is going to allow Governor Romney to win the state of Pennsylvania: done," when referencing his accomplishments.[12] Turzai and Grothman's quotes substantiate the common political tactic gained from instituting voter identification: if demographics that lack identification do not serve a political advantage, i.e., votes, political actors can attempt to repress their turnout to skew results in their favor.

However, this logic (which often channels into such legislation) is quite dangerous. Eleven million, or twenty-one percent, of all registered voters nationally simply lack the "proper photo identification," because of their unaffordability or inaccessibility.[13] Even more importantly, voter identification laws are discriminatory. While twenty-five percent of

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[8] *Oppose Voter ID Legislation - Fact Sheet*, AMERICAN CIVIL LIBERTIES UNION (Jan. 31, 2022), https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet.

[9] *Id.*

[10] *See* Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting,* GALLUP POLLING (Aug. 22, 2016), https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx.

[11] Aaron Blake, *Republicans Keep Admitting That Voter ID Helps Them Win, For Some Reason,* WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/.

[12] *Id.*

[13] *Voter ID Laws, supra* note 1.

African Americans lack photo identification, only five percent of Caucasians do, pointing to a clear racial disparity in this regard.[14]

Per most legislators that are proponents of voter identification, such laws are often instituted for purposes of preventing voter fraud, but this is not founded. It is merely a "Solution in Search of a Problem," founded on the misconception that fraud is a regular occurrence, when it is not — it is instituted as a supposed solution to a nonstarter issue.[15] According to an ACLU Study, only thirty-one actual cases of voter fraud have occurred in a nation of 330 million in the last two decades.[16] This includes the divisive 2000, 2016, and 2020 Elections, which all featured widespread claims of irregularities.[17] The same study stipulated that "fraud," even then, is generally an honest mistake, either through election workers or voters making administrative errors, filing ballots incorrectly, or voters punching the wrong candidate's name.[18]

This article, having outlined what voter identification laws are, will move into discussing why they exist, the inherent problems with them (political, racial, and economical), and how to rectify these problems. Supporting case law and the implications of voter identification legislation on civil rights will be examined as substantive evidence for the argument.

I. Constitutional Underpinnings & Background of Voting Identification Legislation

A. Chronological History of American Voter Identification Law

The underpinnings of voter identification requirements in the United States are extensive and complicated. Article I, Section IV, Clause I of the United States Constitution provides that states are responsible for overseeing federal elections, quoting that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[19]

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[14] *Oppose Voter ID Legislation - Fact Sheet, supra* note 8.

[15] *See* Catherine Walker-Jacks, *H.R. 1, Voter ID, and The Myth of Voter Fraud,* HARV. L. SCH. EQUAL DEMOCRACY PROJECT (Apr. 11, 2021), https://orgs.law.harvard.edu/equaldemocracy/2021/04/11/h-r-1-voter-id-and-the-myth-of-voter-fraud/.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] U.S. CONST. art. I, § 4, cl. 1.

More broad voting eligibility has been granted to the citizenry over time, starting with the strike down of pre-Jacksonian property requirements to vote in the 1820s.[20] Subsequently, the concept of a voting-eligible person has evolved with increasing eligibility. Despite this fact, many states have taken their Article I prerogative and interpreted it to allow state laws which claim to support "election integrity" through the institution of voter identification laws.[21]

Nationally, the first major voter identification law was the 1950 Omnibus Law in South Carolina, signed by then-Governor — and future segregationist Senator — Strom Thurmond. This law has its roots in discriminatory, unconstitutional practices, altering requirements for candidacy to include a literacy test,[22] which made it disproportionately difficult for African American candidates who wished to run to do so.[23] Per the National Assessment of Adult Literacy, African American literacy was lower than the national average at this time, and Caucasian illiteracy was so low it was not even measured at this time.[24] The Thurmond Omnibus package enabled states such as Hawaii, Texas, Florida, and Alaska to follow suit with similar legislation in the following decades.[25]

Virginia, too, shares much of the same history as South Carolina. Political power historically passed from well-born father to son in the State, and poll taxes and literacy tests were rife.[26] Turnout was overall, at maximum, ten to eleven percent of eligible voters in elections from 1900-1965.[27] This manifested itself into the late 20th century, with the 1999 Jim Gilmore Initiative in Virginia. The Gilmore Initiative paved the way for tightening voter identification requirements that extended into the 2000s.[28] Per the statute, residents of Arlington and Fairfax Counties were required to show identification when voting.[29] Both

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[20] *See e.g.,* U.S. CONST, art. I, § 4, cl. 1.

[21] Richard P. McCormick, *New Perspectives on Jacksonian Politics,* U. CHI. PRESS J. (1960), http://mr.crossref.org/iPage?doi=10.2307%2F1842870.

[22] *See The Decline of Voter Suppression in South Carolina, 1900-1965,* CHARLESTON COUNTY PUBLIC LIBRARY (2020), https://www.ccpl.org/charleston-time-machine/decline-voting-suppression-south-carolina-1900-1965.

[23] *Id.*

[24] *120 Years of Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/naal/lit_history.asp (Jan. 31, 2022).

[25] *Id.*

[26] *See* R.H. Melton, *Virginia High Court Panel Bars Voter ID Plan*, WASH. POST (Oct. 23, 1999), https://www.washingtonpost.com/wp-srv/local/daily/oct99/voting23.htm.

[27] *Id.*

[28] *Id.*

[29] *Virginia Population 2021,* WORLD POPULATION REVIEW (2021), https://worldpopulationreview.com/states/virginia-population.

counties are historically reliably Democratic areas which contain most of the state's voting population, with densities of 10,000 people per square km.[30] After this policy was opposed by Democrats and NAACP as anti-civil rights, the Supreme Court of Virginia eventually deemed it unconstitutional in a five-to-one decision.[31] Per the court's majority, the program was crafted with more political intentions, rather than to actually "constitutionally protect election integrity." The overwhelming partisan nature of Arlington and Fairfax Counties, in addition to the program's lack of coverage to any other Virginia counties, was the primary rationale cited. The sole dissent was Republican Justice Cynthia Kinser, who stated in her opinion "nor do I believe the public interest is served by the issuance of an injunction...which seeks to further the public good by preventing voter fraud."[32] She, like Speaker Turzai and Representative Grothman, based her legal stance on the nonstarter that is voter fraud.[33]

The "Virginia Trend" of the early 2000s was even affirmed by the United States Supreme Court decision in *Crawford v. Marion County Election Board* (2008), which upheld an Indiana 2005 Law (SEA 483) that obligated photo identification as a precondition for voting in the State.[34] If a voter lacked such identification, per the statute, they could cast a provisional ballot. However, the voter would have to visit the appropriate government office within ten days of Election Day with valid photo identification in order to have their ballot counted.[35] Writing for the majority, Justice John Paul Stevens stated that the "law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation."[36] According to Justice Stevens, this balance was justified in SEA 483, with no unreasonable burden placed on voters to acquire identification.[37] In *Crawford*, the majority saw the necessity for such legislation in overseeing election integrity, and that such supervision would not lead to an unconstitutional restriction of voting rights. This rationale echoes Justice Kinser's dissent in the Gillmore Initiative case and was present in the countless challenges to voter identification statues in the succeeding years.

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[30] *Id.*

[31] *See* R.H. Melton, *Virginia High Court Panel Bars Voter ID Plan*, WASH. POST (Oct. 23, 1999), https://www.washingtonpost.com/wp-srv/local/daily/oct99/voting23.htm.

[32] *Id.*

[33] *Id.*

[34] Crawford v. Marion County Election Board, 553 U.S. 181, 185 (2008).

[35] *Id.* at 183.

[36] *Id.*

[37] *Id.* at 202.

Unfortunately for Stevens, though, in the succeeding years, a slew of often vague identification laws were passed in the 2000s and into the early 2010s, during the Obama Administration (which were met with court challenges, as described in the previous paragraph).[38] This was like the logic many states adopted post-*Plessy v. Ferguson* (1896): if the United States Supreme Court says a statute is acceptable, then who is to stop its implementation? There is no higher court to challenge the United States Supreme Court or their rulings' constitutionality. States knew that the United States Supreme Court would be unwilling to strike down identification laws, so they implemented them at a rapid pace.[39]

B. Background of Constitutional Provisions and Legislation Contradictory to Voter Identification

Constitutionally, there are many still-standing provisions that are contrary to the existence of voter identification requirements.[40] The Fourteenth Amendment, for instance, guarantees that no state can "deny to any person within its jurisdiction the equal protection of the laws."[41] And the Fifteenth Amendment ensures no "vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[42] And if voter identification leads to a clear racial disparity in guaranteeing voting rights, as previously mentioned, how can it be said that all citizens are equally protected under the law?

In addition, the Twenty-Fourth Amendment banned poll taxes as a precondition for voting nationally. Just as voter identification is made a prerequisite for voting today, so too were poll taxes in the Postbellum South for African American and Native American voters after the Compromise of 1877. If an African American voter was unable to pay the poll tax, there was a strong chance they would be turned away from the polling place.[43] Grandfather Clauses may have existed for poor Caucasians who had ancestors vote pre-1865, which allowed *them* to cast ballots, but no such exceptions existed for African Americans.[44]

Most importantly and explicitly, the Twenty-Sixth Amendment ensured "the right of citizens of the United States, who are eighteen years of age or older, to vote shall not be

[38] *Oppose Voter ID Legislation - Fact Sheet, supra* note 8.
[39] Plessy v. Ferguson, 163 U.S. 537 (1896).
[40] U.S. CONST. art. I, § 4, cl. 1.
[41] U.S. CONST. amend. XIV, § 1.
[42] U.S. CONST. amend. XV, § 1.
[43] U.S. CONST. amend. XXIV, § 1.
[44] *Id.*

denied or abridged...on account of age."[45] This Amendment provided the most clear-cut guarantee of voting rights — if you are over eighteen years old and registered to vote, you have that right to vote.[46]

Voting Rights Legislation of the 1960s further affirms the Fourteenth, Fifteenth, and Twenty-Fourth Amendments. The Voting Rights Act of 1965 Section 4(b) and Section 5 are especially relevant.[47] Section 4(b) features the Coverage Formula, a test incorporated into the legislation to apply the legal provisions set in the legislation's previous section.[48] Section 4(b) stipulates that if turnout was less than fifty percent prior to November 1, 1964 in a state, that state must adjust its voting system to comply with the fifty percent preclearance requirement.[49] This was proved to massively increase turnout among previously disenfranchised groups, like African Americans, per a North Carolina Case Study on Changes in Enfranchisement Post-1965.[50] Section 5 goes on to promulgate that "no person shall be denied the right to vote [because of] failure to comply with such qualification, prerequisite, standard, practice, or procedure."[51]

Even beyond this, two notable United States Supreme Court cases uphold the Voting Rights Act: *South Carolina v. Katzenbach* (1966) and *Allen v. State Board of Elections* (1969). The United States Supreme Court heard the *Katzenbach* case under its authority of original jurisdiction, stipulating that the Fifteenth Amendment explicitly backs the Voting Rights Act.[52] *Katzenbach* served as a precedent for any future potential court challenges to the Voting Rights Act, like in *Allen*, a suit arising out of Virginia's refusal to count handwritten votes, and Mississippi's alteration of the process which enabled independent candidates to run.[53] The Court similarly decided in *Allen*, with Chief Justice Earl Warren writing that "no person can be deprived of the ballot for failing to comply with a new provision in a covered jurisdiction."[54] So, even if a voter identification statute is adopted (such as in *Allen*), failure

[45] U.S. CONST. amend. XXVI, § 1.
[46] *Id.*
[47] Voting Rights Act of 1965, 52 U.S.C. §§ 10101-10702 (1965).
[48] *Id.* at § 10302.
[49] *Id.*
[50] Adriane Fresh, *The Effect of the Voting Rights Act on Enfranchisement: Evidence from North Carolina,* U. CHI. PRESS J. (2021), https://www.journals.uchicago.edu/doi/10.1086/697592.
[51] Voting Rights Act of 1965, 52 U.S.C. § 10303 (1965).
[52] South Carolina v. Katzenbach, 383 U.S. 301 (1966); Allen v. State Board of Elections, 393 U.S. 544 (1969).
[53] *See Katzenbach*, 383 U.S. at 301.
[54] *Id.*

to comply with said provision is acceptable — because the provision is inherently unconstitutional.

II. Inequities Caused by Voter Identification Requirements and the Importance of Addressing Them

Despite the implicit and explicit inequities caused by voter identification requirements, concrete steps have not been taken to rectify the issue. Even when steps were taken in the past, the inequities caused by said requirements remained or intensified.

The inequities caused by voter identification requirements can be classified into two levels: political and economic.[55] Addressing them is fundamental to ensuring that every American citizen is constitutionally guaranteed their democratic right to vote.

Most notably, voter identification requirements lead to the development of political inequities, often having adverse effects on certain races.[56] These effects abridge the 'One Man, One Vote' Principle as created in *Reynolds v. Sims* (1964), a year before the Voting Rights Act solidified voting rights in America.[57] Per *Reynolds*, according to Justice Earl Warren, "one man's vote in a congressional election is to be worth as much as another's."[58] Voter identification, albeit implicitly, violates this.[59] As previously mentioned, not all voters have access to necessary identification, or in many cases, identifications. This is especially true of certain minority races, who have an unreasonable burden imposed upon them if voter identification is required (since their rates of owning prerequisite identification is noticeably lower across the board). Thus, "one man's vote in a congressional election" is NOT worth as much as another's, if voter identification is in place.

According to a Washington Post survey, states with higher African American populations, such as Mississippi, South Carolina, and Georgia, are more likely to implement voter identification restrictions.[60] This is not merely a coincidence. Statistically, voter identification laws are passed in states with high minority populations and a high degree of

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[55] *Allen*, 393 U.S. at 548.

[56] Keith Bentele and Erin O'Brien, *States With Higher Black Turnout Are More Likely To Restrict Voting,* WASH. POST (Dec. 17, 2013), https://www.washingtonpost.com/news/monkey-cage/wp/2013/12/17/states-with-higher-black-turnout-are-more-likely-to-restrict-voting/.

[57] Reynolds v. Sims, 377 U.S. at 533 (1964).

[58] *Id.* at 559.

[59] Todd Donovan and Shaun Bowler, *Strict Voter ID Laws Make Republican Voters*, https://blogs.lse.ac.uk/usappblog/2016/02/17/strict-voter-id-laws-make-republican-voters-more-confident-about-elections/ (Jan. 15, 2022**)**.

[60] *See* Bentele and O'Brien, *supra* note 56.

political competition, as a method of reducing that competition for one Party — a Party whose primary voting blocs are older Caucasian males, and not in line with demographic voting trends (i.e., increasing minority numbers, who tend to vote Democratic).[61]

A more recent University of Chicago Press Survey echoes this perspective, concluding that "we also find that voter ID laws skew democracy toward those on the political right."[62] Data from this survey is available on turnout in jurisdictions with Restrictive Voter ID laws, and specifically analyzed patterns in fifty-one elections (twenty-six general elections and twenty-five primary elections) across ten states (AZ, GA, IN, KS, MS, ND, OH, TN, TX, VA).[63] The general consensus of the survey is that the Restrictive category of states have diverse voting demographics, and thus, voter identification inevitably skews voting access in favor of Caucasians (who statistically vote Republican) because Caucasians are more likely to have the proper identification.[64] Twenty-five percent of African Americans and ten percent of Hispanics may lack photo identification, but the same fact is true for only five percent of Caucasians.[65]

In many cases, American voters are completely unaware of the detrimental effects this legislation causes.[66] Professors Todd Donovan and Shaun Bowler from Western Washington University and The University of California Riverside, respectively, highlighted that at least fifty percent of voters see voting illegally as "very common" in their city or county.[67] Meanwhile, "voting more than once, pretending to be someone else when voting, voters who are not US citizens voting" were all sentiments viewed as highly prolific by Republican voters, with over eighty percent in agreement with them.[68] This could translate to voter identification's overwhelming institution in Republican states.

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[61] Zoltan Hajnal, et al., *Voter Identification Laws and the Suppression of Minority Votes,* U. CHI. PRESS J. (2014), https://www.journals.uchicago.edu/doi/full/10.1086/688343?journalCode=jop.

[62] *Id.*

[63] *See* Sari Horwitz, *Getting A Photo ID So You Can Vote Is Easy Unless You're Poor, Black, Latino, Or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html.

[64] *See* Bentele and O'Brien, *supra* note 56.

[65] *E.g.,* Vanessa Perez, *Americans with Photo ID: A Breakdown of Demographic Characteristics,* PROJECT VOTE (Feb. 2015), http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf.

[66] Todd Donovan and Shaun Bowler, *Strict Voter ID Laws Make Republican Voters*, https://blogs.lse.ac.uk/usappblog/2016/02/17/strict-voter-id-laws-make-republican-voters-more-confident-about-elections/ (Jan. 15, 2022).

[67] *Id.*

[68] *Id.*

This obliviousness can be shown by voters who lack proper identification as well. In many cases, those who lack proper identification which would translate to their voting rights being abridged are completely unaware of this fact.[69] Matt Bareto and Gabriel Sanchez conducted a 2014 survey on this issue in Texas, on the heels of *Veasey v. Perry* (2014). Over half, 50.2 percent, of all registered Texas voters who lacked photo identification (required in the State to vote) did not know they lacked the valid identification.[70] This, in turn, diminishes election trust and other parties' ability to be accurately represented and must be rectified.[71]

Examining the inequities caused by voter identification requirements from an economic standpoint assists in illustrating the importance of addressing them. Low-income voters are unfairly impacted by voter identification requirements, just as minority voters are. The acquisition of underlying prerequisites for appropriate identification is often impossible for low-income individuals.[72] *Spirit Lake Tribe v. Jaeger* (2020), filed in the United States District Court for North Dakota, perfectly exemplifies this.[73] *Spirit Lake Tribe* overturned North Dakota statute ND Cent. Code § 16.1-01-04.1, because members of the Spirit Lake Tribe in that state were required to present purported "supplemental documentation" if they lacked the proper photo identification as required by the Statute — otherwise, the voter would lose their right to vote.[74] The Court held that such requirements place "undue economic burden on the Plaintiffs' right to vote in violation of the Fourteenth Amendment."[75] The far distance to the nearest identification issuers, which is especially an issue in remote North Dakota where many Spirit Lake Tribemembers do not own vehicles, prevent those with low-incomes (often without a car) from voting. That said, many individuals do not hold Drivers' Licenses or the necessary photo or "supplemental documentation" to cast a ballot.[76] Furthermore, these rural areas rarely have a reliable bus or public transport system, if one at all.[77] Thus, there are thousands of voters who are potentially disenfranchised because of their lack of a vehicle or reliable public transportation.

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[69] Matthew Bareto and Gabriel Sanchez, *Accepted Photo Identification and Different Subgroups in the Eligible Voter Population, State of Texas, 2014,* LATINO DECISIONS (Jun. 27, 2014), https://latinodecisions.com/wp-content/uploads/2016/07/Texas-Voter-ID-Expert-Report_Barreto_Sanchez.pdf.

[70] *Id.*

[71] *Id.*

[72] Spirit Lake Tribe v. Jaeger, 1:18-cv-00222 (D.N.D. Feb. 10, 2020).

[73] *Id.*

[74] N.D. CODE ANN. § 16.1-01-04.1(2021).

[75] U.S. CONST. amend. XIV, § 1.

[76] *Spirit Lake Tribe*, 1:18-cv-00222.

[77] *Id.*

Inadvertent low-income discrimination once again opens the door for state authorities to arbitrarily accept — or not accept — identification. State authorities can easily deny identification or supplements as unsatisfactory, and approve it for others, a major issue not addressed in almost all voter identification statutes.[78] For instance, North Dakota Tribal IDs, like those possessed by members of the Spirit Lake Native American tribe, were often rejected because they lacked residential addresses on them.[79] The most obvious group affected by voter identification requirements economically is, however, the *unhoused*.[80] For them, the lack of state residency requirements does not prevent voting — but "lack of access to a physical mailing address or required forms of identification" does.[81] An unhoused person may have an ID, but with a residential address that is no longer theirs, and thus unacceptable in the eyes of an election worker at a polling place.[82] The subsequent result of this fact is that unhoused, yet registered, voters are frequently turned away at the polls, per a Georgetown Law article on the topic.[83]

The unreasonable expectation of state legislatures that implement voter identification to comply with identification results in the restriction of voters' rights. Subsequently, this abridgement translates into poor governance, which further pushes down economic lower classes. Having the economic lower classes included in governance would not only improve its quality, but also the lower classes' economic condition. They would be able to elect representatives working *for their interests*, instead of being forced to elect the ultra-rich who can afford to run.[84] Having the economically powerful effectively control governance results in the current development of the lower classes' trapping state: "Cyclical

[78] Todd Donovan and Shaun Bowler, *Strict Voter ID Laws Make Republican Voters*, https://blogs.lse.ac.uk/usappblog/2016/02/17/strict-voter-id-laws-make-republican-voters-more-confident-about-elections/ (Jan. 15, 2022).

[79] *E.g.,* Camila Domonoske, *Many Native IDs Won't Be Accepted At North Dakota Polling Places,* NAT'L PUB. RADIO (Oct. 13, 2018), https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places.

[80] Gregory Herrigel, *Consistent Lack of Access the Polls: The Plight of the Homeless American Citizen,* GEO. J. ON POVERTY L. & POL'Y (Sep. 21, 2020), https://www.law.georgetown.edu/poverty-journal/blog/consistent-lack-of-access-to-the-polls-the-plight-of-the-homeless-american-citizen/.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

Disadvantagement." Without voter ID, the economically disadvantaged could more easily run for office themselves, become community activists, and much more.[85]

In more contemporary times, the Biden Administration has pledged their commitment to closing the political and economic inequities in American voting, conducting their own set of research on the issue. Through their research, it was revealed that waiting times to cast a ballot in primarily African American neighborhoods were almost one-third longer than in primarily Caucasian neighborhoods.[86] Most importantly, they expounded upon the strong correlation that "expanded voting rights and voting protections have played a crucial role in enhancing voter turnout" — an expansion that must be fundamentally guaranteed to ensure the healthy functioning of democracy.[87]

III. Solutions to & Future of Voter Identification Legislation

Although the Voting Rights Act Section 5 has slightly increased turnout in presidential elections since 1976 by temporarily halting certain unconstitutional voting procedures, per the Biden Administration statement, there are alternative, more effective methods of rectifying the issues caused by voter identification requirements.[88]

The most fundamental solution has manifested itself within the United States Supreme Court, who has fundamentally changed its perspective on voter identification requirements as of 2016.[89] The Court has come to the realization that they are unfairly abridging people's rights, despite previous precedent affirming the opposite, like in the 2008 *Crawford* case.[90] In 2016, the Supreme Court affirmed this "change of heart" in *Veasey v. Abbott* (2016), which overturned Texas voter statute Senate Bill-14.[91] Before *Veasey*, per the Texas Senate statute, a handgun license was a valid form of identification in Texas, but a government-issued identification (federal or state) was not — only Drivers Licenses were accepted.[92] In addition, two of the following four potential proofs were also needed, in addition to valid photo identification: an original birth certificate issued either domestically

[85] Cecilia Rouse, et al., *The Importance of Protecting Voting Rights for Voter Turnout and Economic Well-Being*, WHITE HOUSE (Aug. 16, 2021), https://www.whitehouse.gov/cea/written-materials/2021/08/16/the-importance-of-protecting-voting-rights-for-voter-turnout-and-economic-well-being/.

[86] *Id.*

[87] *Id.*

[88] *See Id.*

[89] Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2018).

[90] *Crawford,* 553 U.S. at 181.

[91] *Veasey*, 830 F.3d at 216.

[92] *Id.*

or abroad, citizenship/naturalization documentation, or a court document with the voter's name and birthday.[93] Naturally, because of Texas Senate Bill-14, name change certificates or lack of birth certificates could disenfranchise voters forever, even if this was not the fault of the actual voter themselves.[94] This is similar to how many voters in low-income areas are mistaken as "dead" and prevented from voting because of their inactivity or lack of proper identification, even if they are fully and properly registered.[95]

Especially with the outbreak of the COVID-19 Pandemic and the hurried, underprepared transition to a virtual reality, there has been a sharp resurgence in diminished trust in the election system.[96] This is especially evidenced by the 2020 Presidential Election results and President Biden's victory, with the Trump-backed "Stop the Steal" movement acting full force to clamp down on "irregularities" in the Voting-by-Mail (VBM) Process.[97] There has been a plethora of legal cases filed by this movement and its allies — over sixty cases at the state level — to overturn the results on grounds of electoral issues, only two of which were decided in favor of plaintiffs (with those cases not resulting in tangible alteration of election results).[98] On the heels of the 2020 Results, states like Georgia (with Senate Bill-202) have been passing nonsensical restrictions which could be the new norm.[99] This includes preventing voters from being brought bottled water in lines, tightening acceptable photo identification, replacing signature requirements (which are seen as inefficient), and reducing the number of ballot drop boxes.[100] This has led to nearly one in five voters nationally who stated they had to wait over 30 minutes to vote in the 2020 Election, with the most substantial portion of voters having issues with submitting mail-in ballots.[101] The difficulty voting encountered in 2020 flagrantly violates cases like *Veasey*, and the unfulfilled progress that has been attempted to correct voter identification inequities.[102]

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[93] *Id.*

[94] *See Cases & Actions: Veasey v. Abbott,* CAMPAIGN LEGAL CENTER, (Apr. 13, 2021), https://campaignlegal.org/cases-actions/veasey-v-abbott.

[95] *See, e.g.,* Herrigel, *supra* note 80.

[96] *See* Drew Desilver, *Many Mail and Provisional Ballots Get Counted in Past U.S. Elections — But Many Did Not,* PEW RSCH. CTR. (Nov. 10, 2020), https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not/.

[97] National Election Commission, *Official 2020 Presidential General Election Results* (Nov. 3, 2020), https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf.

[98] Standing Committee on Election Law, *Current Litigation*, AM. BAR ASSOC. (Apr. 30, 2021), https://www.americanbar.org/groups/public_interest/election_law/litigation/.

[99] *Election Integrity Act of 2021*, O.C.G.A. § 21-2-419 (2021).

[100] *Id.*

[101] Desilver, *supra* note 96.

[102] *Id.*

Besides cases like *Veasey v. Abbott* (2016), much more drastic measures must be taken in the long term to close the political and economic inequities caused by voter identification requirements in the United States. The primary solution lies in overturning voter identification laws in state and federal court through lawsuits filed by groups like the American Civil Liberties Union, to prevent the next Georgia Senate Bill-202 or 2020 Election fiasco. A model example is *Berger v. North Carolina State Conference of the National Association for the Advancement of Colored People* (2016).[103] Here, the United States Fourth Circuit Appellate Court found a North Carolina state statute, obligating all voters to display photo identification, as deliberately "targeting African-Americans with almost surgical precision."[104] Ballots previously invalidated for being "mistaken votes" had to be counted, as a result.[105] The courts are the primary mechanisms of voter identification enforcement, so they should have the prime say in rectifying the illegal wrongs the requirements cause.[106]

In addition, proposing legislation at the state or even federal level, like the For The People Act (H.R. 1) in the 117th Congress — with said legislation *mandating* state enforcement of the bill's provisions — could serve as an alternative or concurrent solution.[107] This mandate could come in the form of a *South Dakota v. Dole* (1987) scenario: withholding federal funding from states to incentivize them to abandon legislation that is harmful to the public, like voter identification requirements.[108] Expressly outlining and/or expanding voting rights, eliminating the impact of "big money" in the political sphere, and banning partisan gerrymandering are key tenets of proposed federal legislation like H.R. 1, but the Bill was and remains stalled in the bureaucratic clutter of Congress (as it has only passed the House of Representatives).[109]

Previous legislative guarantees for fundamental voting rights, such as in Section 5 of the 1965 Voting Rights Act, have clearly been ineffective in guaranteeing that voting rights will not be abridged, because they still have been. Even though the Coverage Formula of Section 4(b) was struck down, the basic structure of the 1965 Voting Rights Act remains.[110]

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[103] *E.g.,* Alan Blinder and Michael Wines, *Federal Appeals Court Strikes Down North Carolina Voter ID Requirement,* N. Y. TIMES (Jul. 29, 2016), https://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html.

[104] North Carolina State Conference of NAACP v. Berger, 970 F.3d 489 (4th Cir. 2020)

[105] *Id.*

[106] *Veasey*, 830 F.3d at 216.

[107] For The People Act of 2021, H.R. 1, 117th Cong. (2021).

[108] South Dakota v. Dole, 483 U.S. 203 (1987).

[109] For The People Act of 2021, H.R. 1, 117th Cong. (2021).

[110] Voting Rights Act of 1965, 52 U.S.C. §§ 10101-10702 (1965).

The Act was crafted to reaffirm legislative guarantees of rights as per the Fifteenth Amendment— and there needs to be, once and for all, a piece of federal legislation (perhaps H.R. 1) that guarantees *and* oversees these rights.[111]

Conclusion

Examining voter identification requirements, and now the obstructions placed against Voting-By-Mail (VBM) in light of 2020, helps trace voting precedent in the United States. The legal evolution of voter identification only really started in the 1950s, with South Carolina's Omnibus Law, but ramps up into the modern day. The requirements have consistently been surrounded with tinges of political and economic inequities, unconstitutionally impeding the right of every American citizen to cast their ballot. The United States Supreme Court and lower courts, too, had a complacent role in upholding these unconstitutional provisions until cases such as *Crawford* and *Veasey*, but even they have become increasingly hostile to it. There has been increasing rhetoric that voter identification requirements are instituted for partisan gain or discriminatory reasons, which is unconstitutional per *Reynolds*, *Veasey*, and other minor state and appellate court cases (like the case which overturned the 1999 Gilmore Initiative).

These requirements have a direct impact on every Americans' life and will continue well into the future (especially after the 2020 Election). The current precedent that diminishing ballot access through identification is acceptable, constitutionally, legislatively, or otherwise, cannot be established — every American must enjoy equal rights to vote. The solution lies in ridding unconstitutional requirements through the courts and legislatively guaranteeing voting rights once and for all, with full state compliance. Only then will true, tangible change be seen.

[111] U.S. CONST. amend. XV, § 1; For The People Act of 2021, H.R. 1, 117th Cong. (2021).

Unsecular/Unconstitutional Characteristics of the Citizen Amendment Act 2019 in India: A Call for its Elimination

Deetiya Singh Shah

Introduction: Secularity and Problems Concerning the Citizenship Amendment Act and National Register of Citizens

Religion has played a sizeable role in Indian politics since its establishment from the Jain and Buddhist *Maurya empire*[1] (321 BC-185 BC) to the largely Islamically ruled *Mughal empire* (14th-17th century).[2] Nevertheless, India's history has been enshrined with stories of religious diversity with a number of prominent Indian rulers, namely Shivaji or Ashoka, being avid promoters of early secularism.[3] This diverse history was taken into account in the creation of the Indian constitution which outlined the secular characteristics of post-colonial India. Prominent members of the constituent assembly such as the economist Prof T.K. Shah recognized secularism to be a fundamental step towards the establishment of the Republic of India.[4] The clause for secularism was added to the Preamble of the Indian constitution and as a fundamental right of every citizen through the 42nd amendment by Indira Gandhi.[5]

[1] Mani Shankar Aiyar, Politics and religion in India, JSTOR (2007), https://www.jstor.org/stable/23006045.

[2] *Mughal Empire,* Oxford Reference (Jan 1, 2022), https://www.oxfordreference.com/view/10.1093/acref/9780195305135.001.0001/acref-9780195305135-e-0549.

[3] Sayan Ghosh, *Secularism Existed in India From the Ancient Time*, Pol'y Times (Feb. 2, 2018), https://thepolicytimes.com/secularism-existed-india-ancient-time-2/.

[4] Shefali Jha, *Secularism in the Constituent Assembly Debates*, 37 Econ. & Pol. Wkly. 3175, 3176-77 (2002).

[5] *Id.*

The *Bharatiya Janata Party* (BJP) holds an overwhelming majority in the Lok Sabha, the lower parliamentary house, with a negligible opposition.[6] The campaign for the 2014 election before the *Lok Sabha* election was largely centered around the idea of *nirmaan* (development) that focused mainly on economic and administrative advancements.[7] However, since their sweeping win in 2014, BJP's primary political discourse has been alarmingly intertwined with religion.[8] This phenomenon has been widely referred to in the Indian political sphere as the *Hindutva* agenda.[9] A loose translation of the word Hindutva from Hindi is hinduness and it implicitly holds more of a fanatic or nationalistic connotation than the word Hinduism, which simply implies adherence to the Hindu religion.

The BJP has executed this agenda in Indian legislation through the passage of smaller bills such as the beef ban in 2017.[10] India was the largest exporter of beef globally in 2014 and therefore this move gave a considerable hit to the economy.[11] Since most of the beef and leather industry in India has been dominated by minority Muslim communities, this 2017 law[12] had visible negative repercussions not only on Indian exports, but also on Muslim communities in particular.[13] Since cows are considered sacred in Hinduism, this ban could clearly be interpreted to have had a theocratic connotation. Nevertheless, the BJP claimed that this law was implemented to regulate cattle trade in India.[14] The law's adverse impact on exports[15] is discordant with the promise of economic development that

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[6] Tariq Thachil, *India's Election Results Were More Than a Modi Wave*, Wash. Post: Monkey Cage (May 31, 2019), https://www.washingtonpost.com/politics/2019/05/31/indias-election-results-were-more-than-modi-wave/.

[7] *BJP's Election Manifesto: 15 Salient Points Of Its 5-Year Road Map For India*, Econ. Times Online (Apr. 7, 2014), https://economictimes.indiatimes.com/news/politics-and-nation/bjps-election-manifesto-15-salient-points-of-its-5-year-road-map-for-india/articleshow/33376625.cms.

[8] Manveena Suri, Swati Gupta & Omar Khan, *India Election Results: Modi Declares Victory*, CNN (May 23, 2019, 8:02 PM), https://www.cnn.com/asia/live-news/indian-election-latest-may-23-intl/h_558453f371996114a6babc13038bee16).

[9] Milan Vaishav, *Religious Nationalism and India's Future*, Carnegie Endowment for International Peace (April 4, 2019) https://carnegieendowment.org/2019/04/04/religious-nationalism-and-india-s-future-pub-78703.

[10] Jesse Pesta & Saptarishi Dutta, *With Beef Bans India Moves to Protect Sacred Cows*, WALL ST. J. (Aug. 6, 2015), https://www.wsj.com/articles/in-india-beef-bans-ignite-debate-over-religion-and-politics-1438853401.

[11] Virginia Harrison, *Holy Cow! India is the World's Largest Beef Exporter*, CNN BUS. (Aug. 5, 2015), https://money.cnn.com/2015/08/05/news/economy/india-beef-exports-buffalo/.

[12] *India Supreme Court Suspends Cattle Slaughter Ban*, BBC NEWS (July 11, 2017), https://www.bbc.com/news/world-asia-india-40565457.

[13] *Indian Beef Ban Will Cost Jobs and Harm Economy, Warn Critics*, THE GUARDIAN (Mar. 23, 2015), https://www.theguardian.com/world/2015/mar/23/india-beef-ban-jobs-economy-maharashtra-cows.

[14] Chetan Chauhan, *Centre Bans Sale Of Cows for Slaughter at Animal Markets, Restricts Cattle Trade*, HINDUSTAN TIME July 9, 2017), https://www.hindustantimes.com/india-news/centre-bans-cow-slaughter-across-india-cows-can-be-sold-only-to-farmers/story-8sFXJxiNmZ8eD6NXDgbvnL.html.

[15] *Id.*

constituted BJP's campaign, and instead represents what could be interpreted as a religious agenda.

Similarly in 2019, in further pursuit of Hindutva, the BJP passed the Citizenship Amendment Act (CAA). The central aim of which is to fast-track the process of obtaining citizenship for any individual that is a part of the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian community from Afghanistan, Bangladesh, or Pakistan.[16] The law was introduced in the Lok Sabha by home minister Amit Shah (a member of BJP) and was passed with an overwhelming majority of 311 seats of the 543 occupied seats.[17] This majority could be primarily attributed to the 301 seats held by the BJP.[18] Ultimately, the passing of the CAA led to massive protests all over India. Fifty-three people lost their lives as a result of injuries from these protests, many of which were attributed to police violence.[19]

Many Indian citizens saw the CAA as a discriminatory and anti-secular move that was intended to target the largest immigrant population in India who come from Afghanistan and Myanmar.[20] The CAA presents itself as a challenge to the commandments of the Indian constitution by disregarding a fundamental principle of the Constitution. India is a developing country where nearly 134 million people live below the poverty line[21] and many cannot afford the due process needed to obtain citizenship documents.[22] Nevertheless, under the CAA, citizenship is not available to illegal migrants who are Muslim.[23] In contrast, illegal immigrants who are Hindu, Jain, Sikh, Buddhist, Parsi, or Christian with valid documents are stripped of their status as illegal[24] and are accepted as citizens.[25] Furthermore, the introduction of the National Register of Citizens (NRC) declared any citizen that cannot

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[16] The Citizenship Amendment Act, 2019 § 2.

[17] Vijata Singh, *Two Years After CAA Was Passed, Rules Governing It Yet To Be Notified*, THE HINDU (Dec. 9, 2021), https://www.thehindu.com/news/national/two-years-after-caa-was-passed-rules-governing-it-yet-to-be-notified/article37916342.ece.

[18] Becky Dale & Christine Jeavans, *India General Election 2019: What Happened?*, BBC NEWS (May 24, 2019), https://www.bbc.com/news/world-asia-india-48366944.

[19] *Id.*

[20] U.N. HIGH COMM'N FOR REFUGEES, *India factsheet 2022*, U.N. REFUGEE AGENCY (FEB. 2022) https://reporting.unhcr.org/document/1995.

[21] Richard Mahapatra, *Mass Poverty is Back in India*, DOWN TO EARTH (April 7, 2015), https://www.downtoearth.org.in/blog/governance/mass-poverty-is-back-in-india-76348.

[22] *What is NRC: Documents Required*, THE TIMES OF INDIA (Dec 22, 2019, 10:47 AM), https://timesofindia.indiatimes.com/india/what-is-nrc-national-register-of-citizens-documents-required/articleshow/72922238.cms.

[23] The Citizenship Amendment Act, 2019 §2.

[24] *Id.*

[25] *Id.*

prove their citizenship through certain documentation as an illegal immigrant.[26] Therefore, as there is no way for a Muslim who is declared an 'illegal migrant' by the NRC to obtain citizenship in India, that individual would be declared to be stateless.[27] It is critical for the Supreme Court of India to declare the CAA as unconstitutional and subject to amendment not only because of its discriminatory character but also its effect on the Indian Muslims when combined with the NRC. Indian Muslims in particular, could be grossly discriminated against by the CAA and the NRC as the Muslims who do not have the documents required to prove their citizenship in a nationwide NRC could lose their residential status and be declared illegal immigrants.[28]

This article will explore in further detail why the CAA is a discriminatory act. In particular, part one will establish the legal history of secularism in India through the description of Article 15, Article 25, the case precedents of *Kesavnanda Bharati v. the State of Kerala* and *Kamil Siedczynski v. Union of India,* and the Preamble to the Constitution of India. Part two of this article will then analyse all these components under a legal lens taking into account the implications of NRC and CAA on the secularity of India. Lastly, part three of this article will address the counterarguments held by the BJP government in support of this legislation as well as argue what steps are to be taken to address India's migrant crisis while also preserving the commandments of the Indian Constitution.

I. Introduction of Indian Secularity and International Human Rights Act

A. Secularity of India

The secularity of India was adopted via the Indian Constitution in 1949, by which India was declared a sovereign, socialist, and secular state.[29] The Preamble established the framework of the Indian Constitution and is near universally understood to be used as a lens that resolves ambiguity arising in the interpretation of the articles of the Constitution.[30] Secularism in political philosophy can be summarized as the separation of state and religion on different levels: institutions of the state, laws/public policies of the state, the ultimate

[26] *What is NRC: Documents Required*, THE TIMES OF INDIA (Dec 22, 2019, 10:47 AM), https://timesofindia.indiatimes.com/india/what-is-nrc-national-register-of-citizens-documents-required/articleshow/72922238.cms.

[27] Arun Sagar & Oishik Sircar, *The Crisis of Citizenship in Our Time*, 12 JINDAL GLOB. L. REV. 1 (2021).

[28] Anna Payton, *Legalized Discrimination: India's NRC and CAA*, BERKELEY POL. REV. (Feb 6, 2020), https://bpr.berkeley.edu/2020/02/06/legalized-discrimination-indias-nrc-and-caa/.

[29] India Const. Pmbl.

[30] Abhinav Gaur, *Is Preamble Part of the Constitution*, (April 21, 2021) (unpublished manuscript).

sovereignty of the state, and symbolic dimensions of the state.[31] Which implies that a secular nation, a state should not recognize nor differentiate between people based on religion. The use of faith as a basis of segregation of incoming refugees at a federal level sets a precedent for the Indian legislature to make laws that undermine the secular nature of the constitution. This is because precedents are binding to future legislation[32] and any decision passed in court has to adhere to constitutional amendments such as the CAA.

B. Equality provided by Article 15 and Article 25

Unlike the Preamble of the Constitution, which is considered a framework and can be subject to interpretation, Article 15 and Article 25 constitute the fundamental rights of every citizen of India.[33] Under Article 13 of the constitution, any law or act that infringes on the fundamental right of the citizen is to be declared void,[34] which implies that any new legislation is subject to the adherence of the fundamental rights of all citizens and if found to not comply with them, should be subject to revision. Clause 1 of Article 15 states that, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."[35] Furthermore, Article 25 guarantees the right to practice and profess any religion one may choose[36] and guarantees to all citizens ``*Liberty* of thought and belief" and "*Equality* of status and opportunity."[37] This implies that the state does not sponsor one or more religions or that citizens are not discouraged from following any religion or belief.

C. Case Law to Display Judicial Standing on Religious Segregation and Equality

The landmark case of *Kesavananda Bharati v. State of Kerala,*[38] also known as the "fundamental rights case," led to a series of amendments to the Constitution where the Supreme Court clarified specific areas of the Constitution that were earlier subject to

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[31] Miklos Zala, *Secularism in Political Philosophy*, OXFORD RSCH. ENCYCLOPEDIA OF POL. (Oct. 30, 2019), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1388?fbclid=IwAR3n10mAB_deWkfeJV2wUvrjC1FJOY-BmqA0Snooe48qHpuIp4BXsr7LhgE

[32] India Const. art. 141.

[33] Anirudh Gupta, *Article 15 of the Indian Constitution: An Insight*, LEGAL SERV. INDIA, https://www.legalserviceindia.com/legal/article-3493-article-15-of-the-indian-constitution-an-insight.html (last visited Apr. 11, 2022).

[34] India Const art 13.

[35] India Const. art. 15, cl. 1(a).

[36] India Const. art 25.

[37] *Id.*

[38] (1973) 4 SCC 225.

interpretation.[39] Through this case, the litigant, Kesavananda Bharati, challenged the Land Reform Act of 1970 under article 26, stating that it undermines the right to manage religious property without government interference.[40] In this process, Justice Shelat, the senior-most Supreme Court Judge, and Justice A. N. Grover "stated 'secular and federal character of the Constitution were among the main ingredients of the basic structure enumerated therein."[41] Similarly, Justice Jagan Mohan Reddy stated that "Liberty of thought, expression, belief, faith and worship" could not be amended at any cost as they are part of the basic features of the Constitution."[42] The case of *Kamil Siedcynski v. Union of India & Another*,[43] decided on March 18, 2020, reviewed the fundamental rights granted to non-citizens. The petitioner, Kamil Siedcynski, is a Polish citizen who was granted a student visa to study in India.[44] Mr. Siedcynski was issued a Leave India Notice (LIN) on the grounds that he was a part of two protests on the same day and, being a foreigner, did not have rights to protest against the Union's legislature under Article 19.[45] The High Court of Calcutta subsequently overturned the LIN on the grounds that the Polish National possessed a visa issued by the government.[46] However, the court also reiterated that "it is evident from the language of the Constitution that Articles 14, 20, 21 and 22 apply to all human beings living in India and are not restricted to her citizens only" (quoting *Bharati v State of Kerala*, 4 SCC 225).[47] These rights include that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[48] Even though this case pertained to an individual on a student visa, it cannot be ignored that the judge mentioned "all human beings" while making this statement. The above facts affirm that all human beings are entitled to equality before the law in India. A controversial case in this subject that may be used to justify the classification of the refugee communities based on religion or birthplace is the case of *Anwar Ali Sarkar v. The State of West Bengal*.[49] In this case, the judgment holds

[39] Arvind P. Datar, The case that saved Indian democracy, THE HINDU (April 7, 2022) https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article62107496.ece

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Kamil Siedcynski v. Union of India, WP No. 4432(W), 2020 (India).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] India Const. art. 14.

[49] West Bengal v. Anwar Ali Sarkar, 1952 AIR 75 1952 SCR 284 (India).

that: "The State must possess the power of (…) classifying persons or things (…), and in making a classification, the legislature must be allowed a wide latitude of discretion and judgment."[50] Using this argument, the legislative body may argue that the state holds the constitutionally granted power to exercise its discretion with respect to how they would classify the incoming refugees.[51] This would be considered an example where the framework conferred by the Preamble may be used to interpret that this classification undermines the character of the constitution. Furthermore, the judgment itself limits the discretion the state may exercise by stating that "the mere fact that the inequality has not been made with the special intention of prejudicing a particular person or persons but in the general interest of administration will not validate a law if it results in inequality of treatment." [52]

II. Analysation of Legal precedent to Claim the Unconstitutionality of the CAA

A. Unconstitutionality of the CAA

The CAA includes religion as a criterion for a facilitated process of citizenship and a mechanism to categorize immigrants. This not only ignores the secularity of India's democracy guaranteed by the preamble,[53] but also the fundamental rights that are guaranteed to all people under the Article 15,[54] which prohibits discrimination of the grounds of religion, race, caste, sex or place of birth, and Article 25,[55] which grants every person the freedom to practice, profess and propagate any religion of their choosing. Furthermore, the consequent introduction of the NRC that targets the demographic population unequally, allows the government to practice a sort of "legalized discrimination" against the Indian and non-Indian Muslims.

Furthermore by this Act the government shows preferential treatment in the law towards specific communities from Pakistan, Afghanistan, and Bangladesh.[56] The failure of the legislators to address this issue while drafting the CAA is a consequential flaw that should be addressed by the judiciary. The State uses religion to give preferential treatment in the

[50] Jdmnt, West Bengal v. Anwar Ali Sarkar, 1952 AIR 75 1952 SCR 284 (India).
[51] *Id.*
[52] J. West Bengal v. Anwar Ali Sarkar, 1952 AIR 75 1952 SCR 284 (India).
[53] India Const. pmbl.
[54] India Const. art 15.
[55] India Const. art 25.
[56] Syantani Chatterjee and Natasha Raheja, India's Citizenship Amendment Act (CAA): Citizenship and Belonging in India, Polar: Pol. & Legal Anthropology Rev. (Sept. 7, 2020), https://polarjournal.org/2020/09/07/indias-citizenship-amendment-act-caa-citizenship-and-belonging-in-india/.

form of facilitated citizenship to only specific religious communities, which does not conform with Article 25 that allows free practice and propagation even to non-citizens of India.[57] In doing so, the state essentially showcases a sponsorship for those religious communities. This practice goes against Article 25 and hence should be held unconstitutional. In allowing refugees from only certain countries to obtain facilitated citizenship, the CAA discriminates against refugees (from states that are not included) on the basis of birthplace. The CAA states that individuals will be stripped of their status as illegal immigrants on the grounds of their religion, this implies preferential treatment given by the state to these religious communities, which seriously challenges the liberty of faith and belief in India and is thus privy to judicial review by the Supreme Court.

Furthermore, since the CAA puts certain Indian Muslims at a disadvantage as a result of their beliefs on God and who would consequently be denied their opportunity to and rights of citizenship due to these beliefs, the CAA undermines both of these commandments of the Preamble. This shows that the CAA is arguably at odds with the framework provided by the Preamble that outlines the fundamental characteristics of Indian Law. This alone gives the Supreme Court ground to strike down the law as unconstitutional through judicial review.[58]

Therefore, by using religion as a method for categorization of incoming refugees, this Act undermines the secular nature of the nation itself. This shows that even if the CAA is deemed to categorize the refugees in the general interest of the administration or with a special prejudice, the law is still unconstitutional. When looking at the CAA through the lens of BJP's established *Hindutva* agenda, it can be argued that this categorization came about as a result of the party's prejudice against the Muslim community.

B. CAA and NRC as an Organ for Legalised Discrimination

The National Register of India, mandated by a 2003 Amendment to the 1955 Citizenship Act, has only been enacted in the State of Assam, where each citizen has to validate their citizenship with proof or will be declared illegal immigrants.[59] This can include

[57] India Const. art 25.

[58] V. Nageswara Rao & G.B. Reddy, *Doctrine of Judicial Review and Tribunal*s, 39 J. INDIAN L. INST. 411, 413-14 (1996).

[59] Susan Ostermann, *India's Winter of Protests: A Potential Constitutional Crisis in the Making,* U. NOTRE DAME: CONTENDING MODERNITIES (May 4, 2020), https://contendingmodernities.nd.edu/global-currents/indias-constitutional-crisis/.

a birth certificate or property deeds.[60] If not able to prove citizenship, the individual will be declared a non-citizen or illegal immigrant and essentially become stateless. Even though the NRC is not discriminatory on its face, it effectively targets, unequally, the low economic class of India. India's poverty line is set at an income of Rs. 32-44 per day, which equates to a mere 44 cents in the United States.[61] More than 256 million Indians live below the poverty line, and most if not all of them cannot afford the necessary documents needed to prove citizenship[62] as most of the ancestral land in India is undocumented and intense red tape/corruption is involved in attaining these documents.[63] These residents will be declared illegal immigrants and be devoid of their right to live in their homes through the NRC.

Furthermore, it has been evident that Muslims are being targeted unequally through this process in Assam. Field research by Rohini Mohan found that 9 out of 10 cases were introduced in an NRC tribunal against Muslims and "almost 90% of those Muslims were declared illegal immigrants — as compared with 40% of Hindus tried."[64] Individuals in communities listed under the CAA have the opportunity to review their illegal immigrant status and may request citizenship on the basis of naturalization and will obtain citizenship if they have lived in India before 2014.[65] Since the Muslim communities are not mentioned in the CAA, they cannot apply for citizenship on the grounds of naturalization even if they have been residents in India from before 2019. This leads any Muslim in India who cannot show property deeds or proof of birth to be subject to allegedly biased tribunals and displacement from their homes. This displays the catastrophic effects of the CAA when combined with the enactment of a nationwide NRC.

C. BJP's Political Agenda Engendering Discriminatory Legislation

[60] NHS Bureau, *Documents You May Need, If There's NRC Nationwide*, NAT'L HERALD, (Dec 13, 2019), https://www.nationalheraldindia.com/india/documents-you-may-need-if-theres-nrc-nationwide.

[61] Seema Gaur & N. Srinivasa Rao, *Poverty Measurement in India*, MINISTRY OF RURAL DEV. (Sept. 2020), https://rural.nic.in/sites/default/files/WorkingPaper_Poverty_DoRD_Sept_2020.pdf

[62] *Id.*

[63] Shoaib Daniyal, Red Tape is being weaponized in India to declare millions stateless (April. 2022) https://www.theguardian.com/commentisfree/2019/aug/15/india-millions-stateless-assam-red-tape-illegal-immigrants.

[64] Rohini Mohan, *Inside India's Sham Trials*, VICE NEWS (July 29, 2019), https://www.vice.com/en/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship.

[65] Billy Perrigo, 4 Million Indian Citizens could be made Stateless Tomorrow, TIME (April. 2022), https://time.com/5665262/india-national-register-of-citizens-stateless-assam/.

The election of 2019 was the ninth time that any party in the history of India has won more than three hundred seats of the total 545 in the Lok Sabha.[66] The BJP, led by Narendra Modi as Prime Minister and Amit Shah as home minister, currently hold 301 seats which are 55.5% of the strength of the house.[67] Since the Lok Sabha requires only a simple majority or 272[68] seats in favour of a particular motion to pass it, this overwhelming majority gives the leaders of the BJP dangerously high power in the legislative process of India. The BJP could be looked at as inherently biased as it is known to have held strong ties with the Hindu nationalist party, Rashtriya Swayamsevak Sangh (RSS).[69] Furthermore Mr. Narendra Modi faced several allegations for being inadvertently prejudiced against the Muslim minority community in India even before elections.[70] Though this was not apparent before Modi won the Lok Sabha elections in 2014, the BJP has since openly favoured the Hindu majority of the country to allegedly increase their vote bank potential. Therefore, the CAA inherently codifies the government's ability to practice "legalized discrimination." As established by the case of Kamil Siedcynski, the Polish visa holder,[71] even non-citizens hold the right to equality and freedom of expression. Therefore, the discrimination of Muslims, even those who are not citizens, should be deemed unconstitutional.

Though a grave allegation, this statement may be substantiated by the situations seen in Assam. The BJP came into power in 2014 after which they introduced the National Register of India in Assam in 2015 in the hope that it would filter out any illegal immigrants and foreign nationals.[72] However, the NRC excluded more than 4 million residents of Assam from the polls and was shown to unequally target the lower economic classes and the minority Bengali-speaking populations of Assam which manifests the discriminatory allegations faced by the NRC and CAA since their conception. The districts of Karimganj

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[66] *Ninth Time a Single Party Crosses 300 Mark in the Lok Sabha*, NEWS 18 (May 24, 2019), https://www.news18.com/news/politics/ninth-time-a-single-party-crosses-300-mark-in-lok-sabha-2158637.html.

[67] *Party-Wise Representation of Members of Seventeenth Lok Sabha*, Parliament of India-Lok Sabha, NIC http://loksabhaph.nic.in/Members/PartyWiseStatisticalList.aspx

[68] *Id.*

[69] *History*, BHARATIYA JANATA PARTY, http://www.apbjp.org/eng/history/ (Jan. 1, 2021).

[70] Mail Today Bureau, *Centre Targets 'Unsecular' Modi, Submits Affidavit in Supreme Court Blaming Gujarat CM for Alienation of Muslims in the State*, INDIA TODAY (Aug. 17, 2013), https://www.indiatoday.in/india/story/congress-launches-two-pronged-attack-on-modi-174039-2013-08-17.

[71] Kamil Siedczynski v. Union of India, WP No. 4432(W), 2020 (India)

[72] NHS Bureau, *Documents You May Need, If There's NRC Nationwide*, Nat'l Herald, https://www.nationalheraldindia.com/india/documents-you-may-need-if-theres-nrc-nationwide (Dec 13, 2019).

and Hailakandi, which were the only districts with a Muslim majority in the state, were shown to have the highest number of exclusions by the NRC.[73] Furthermore, after the final NRC was published in 2019, 1.9 million people were excluded, 1.18 million of which were Muslims and 670,657 were indigenous communities.[74] These people are now sent to tribunals and detention camps and face horrible conditions where they are treated as illegal immigrants.[75] Even though Hindus constitute a fraction of these people, they are not facing statelessness because of the introduction of the CAA although they should be subjected to the same process. The Chief Minister of West Bengal, Mamta Banerjee, blamed the BJP for playing "vote bank politics,"[76] which can be described as when "parties start favouring only certain groups that form the core of their support, thereby hampering the overall societal development."[77]

As shown above, the NRC and the CAA is a mechanism for a way for the BJP to forward their political agenda, which completely undermines the democratic idea that a political party works for all the people of India. Instead, as seen here, they are using their power in the Lok Sabha and Rajya Sabha to follow appeasement to increase their vote bank. Therefore, the Supreme Court should consider the implications of such legislation if it ever comes to question.

D. Discussions of communities not provided for by the CAA and international concern

The BJP claims that the CAA grants asylum to religiously persecuted communities that require help in the surrounding theocratic states of Afghanistan, Bangladesh, and Pakistan that face religious persecution. [78] This is a fallacy, as it ignores Muslim minority

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[73] Joyeeta Bhattacharjee, *Impact Of NRC Assam Amongst People Observation From the Ground*, OBSERVER RSCH. FOUND. (Sept. 27, 2019), https://www.orfonline.org/expert-speak/impact-nrc-assam-amongst-people-observation-ground-55910/.

[74] Angana P. Chatterji et al., *Detention, Criminalisation, Statelessness: The Aftermath of Assam's NRC*, THE WIRE (Sept.9, 2019), https://thewire.in/rights/detention-criminalisation-statelessness-the-aftermath-of-assams-nrc.

[75] Wahida Parveez, *Graveyards of the Living dead: Former inmates on life in Assam's detention centers*, THE WIRE (FEB 20 2021) https://thewire.in/rights/assam-goalpara-detention-centre-nrc-citizenship.

[76] Mohua Chatterjee, *BJP Indulging in Vote Bank Politics, NRC Will Affect Many*, THE TIMES OF INDIA (Aug.2018), http://timesofindia.indiatimes.com/articleshow/65234299.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[77] Team Ulauch, *Vote-Bank Politics in India*, ULAUNCH: POLITICALLY INCORRECT (Apr. 15, 2021), https://web.archive.org/web/20220109200952/https://ulaunch.in/2021/04/15/vote-bank-politics-in-india/.

[78] Express News Service, *PM Modi Launches Social Media Campaign in Support of CAA*, THE INDIAN EXPRESS (Dec. 31, 2019), https://indianexpress.com/article/india/pm-modi-launches-social-media-campaign-in-support-of-caa-6192200/

communities like the Hazaras, Rohingyas,[79] Ahmadis[80] and the Atheists that face rigorous persecution in the above mentioned countries. However, the inclusion of religion as a criterion not only is unsecular but also provides a vague explanation for segregation since religion is necessarily an abstract "choice." One may find a loophole here: a person can choose to convert religion and have no way for the legislature to verify it. Furthermore, Article 15 gives the freedom to anyone to recognise their own religion and CAA does not outline a clear criterion to identify the religion of an individual. If the legislature decides to identify religion by birth, it will be against the freedom of expression and belief guaranteed by Article 15.[81]

In addition, there are Muslim-minority communities like the Ahmadis and Rohingyas that have faced rampant persecution in the countries of Pakistan, Afghanistan, and Bangladesh for over 50 years.[82] The CAA was established to rid India of illegal immigrants in an effort to address India's rising population problems however, the government is yet to explain why Hindus, Jains, Parsis, Christian, and Sikh illegal immigrants are not being persecuted, and instead only indigenous and minority communities are facing the brunt of this piece of legislation. The case of *Kamil Siedcynski v. Union of India & Another*[83] made it apparent that all people irrespective of nationality are entitled to the rights provided by Article 14 that guarantees every individual equality under the law.[84] The only preferential treatment provided by the constitution is by Article 46[85] to the Scheduled Castes and Scheduled tribes. Since there is no provision for Hindus, Jains, Parsis, Christians, and Sikhs, it is legally unjustifiable to add such a provision to these sects.

The United States Commission on International Religious Freedom (USCIRF) has recognized this problem, and has categorized India as a country for particular concern, as they believe "the BJP's 'nationalistic' ideology is synonymous with their Hindutva

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[79] *Rohingyas in India*, STITCHING THE LONDON STORY (2019), https://www.ohchr.org/Documents/Issues/Religion/IslamophobiaAntiMuslim/Civil%20Society%20or%20Individuals/RitumbraM1.pdf.

[80] *"When the Blood Starts": Spike in Ahmadi Persecution in* Pakistan, AL Jazeera (July 26, 2021), https://www.aljazeera.com/news/2021/7/26/ahmadi-persecution-pakistan-blasphemy-islam.

[81] India Const. art. 15, cl. 1(a).

[82] Riveé Friedberg, *Discriminatory Citizenship Legislation and Migration: The Cases of Myanmar and India* (Dec. 2020) (M.A. thesis, Johns Hopkins University) (on file with Johns Hopkins University).

[83] West Bengal v. Anwar Ali Sarkar, 1952 AIR 75 1952 SCR 284 (India).

[84] India Const. art. 14.

[85] India Const. art. 46.

Ideologies."[86] These infarctions to the Muslim communities in India violate the International Religious Freedom Act[87] (IRFA) by placing "restrictions that negatively impacted religious freedom."[88] The United Nations recognizes how the BJP may be using their overwhelming parliamentary majority to institute national level policies that violate religious freedom across India, especially for Muslims. This holds grave implications to India's democracy, where political ministers are using India's legislature to pursue agendas of their own.

III. A Response to Counterarguments and a Recommendation for a Path Forward

The main argument by the legislature for the CAA is that the CAA itself does not deprive Indians of their right to citizenship.[89] However, when combined with NRC, CAA can deny citizenship to Muslim immigrant families and individuals who have been residents of India for a number of years and are unable to provide sufficient evidence for any number of reasons. Currently, only the Supreme Court of India holds power to strike down any law, through its right of judicial review,[90] that is proven unconstitutional, or that contradicts the Indian constitution. Even after a law is adopted into the constitution, the Supreme Court will be in its power to strike it down once challenged. Through the above argument I believe that the Citizenship Amendment Act of 2019 should be subjected to judicial review and either be struck down or amended to meet the constitution's requirements of equality and secularity. The Home Ministry of India has claimed that it will provide a more precise, more comprehensive set of guidelines and execution of the CAA by July of 2021.[91] However, no such announcement has been made as of April 2022, and this can be seen as the negligence of the government at the expense of the people of India.

Taking this set of arguments into account, one cannot ignore that India has a rising population problem that is in need of immediate attention. The traffic of incoming illegal

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[86] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, at 22 (Apr. 2021), https://www.uscirf.gov/sites/default/files/2021-04/2021%20Annual%20Report.pdf.

[87] Pub. L. No. 105-292.

[88] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 64, at 20–22.

[89] Shiv Sahay Singh, *CAA meant to give citizenship not take it away Narendra Modi says,* THE HINDU (April. 10, 2022) https://www.thehindu.com/news/cities/kolkata/pm-modi-says-caa-is-aimed-at-giving-citizenship-not-taking-it-away/article30548665.ece

[90] *Judicial Review in India*, INDIAN LEGAL SERVS., https://www.legalserviceindia.com/legal/article-746-judicial-review-in-india.html (last visited Apr. 11, 2022).

[91] Bharti Jain, *Home Ministry Gets Time till July to Frame Citizenship (Amendment) Act Rules*, THE TIMES OF INDIA (Feb. 3, 2021) https://timesofindia.indiatimes.com/india/second-extension-granted-to-home-ministry-for-framing-citizenship-amendment-act-rules/articleshow/80654085.cms.

refugees is a rising issue for the economy and it is lucid that the legislative intent for a law such as the CAA was to control this crisis. As of March 2021, India recorded 41,315 documented refugees, most of which were from Afghanistan and Myanmar.[92] This article in no way ignores this problem, nor does it suggest that there should be no law to address this. However, religion or birthplace should not be a criterion to give preferential asylum to specific communities. Through the process of judicial review, India may look at refugee screening processes from other countries worldwide. The U.S. immigration law system may be used as a basis to determine non-discriminatory methods of categorization to incoming immigrants. For example, the Immigration and Nationality act[93] states that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[94]

Any state may be entitled to disallow immigrants from countries that are politically controversial based on diplomatic/security reasons. Methods of background screening/observation instead of generalising and singling out certain religious communities is legally more suitable in democratic nations such as India and can be a more effective tool to curb the current population crisis.

Conclusion

As of January of 2022, the complete effects of the Citizenship Amendment Act with or without the NRC cannot be gauged as the government has yet to release the complete guidelines behind the establishment and execution of the CAA and a nationwide NRC has not yet been put into place. The government missed its second deadline in July 2022 and there has been no news on this front ever since. If the CAA and NRC were to be put into place nationwide, it would be natural to assume that all of India will be under the same conditions that Assam witnessed in 2019. There will be massive displacement, loss of employment, accommodation, and overflowing detention centers.

If the government wishes to place restrictions on the immigrant and incoming refugee population of India, it should be asked to do so in a constitutional manner that is

[92] U.N. HIGH COMM'N FOR REFUGEES, *India fact sheet 2022*, U.N. REFUGEE AGENCY (FEB. 2022) https://reporting.unhcr.org/document/1995.

[93] Immigration and Nationality Act, 8 U.S.C, §1152 (2006).

[94] *Id.*

allowed to them by Article 253.[95] It has been established through this article that such a situation will be against the secular, democratic character of the Indian constitution and the judiciary is responsible for striking these laws down. However, making these laws should not contradict the Preamble or any fundamental rights guaranteed by the Indian constitution as they are the bedrock of Indian democracy.

[95] India Const. art. 253.