THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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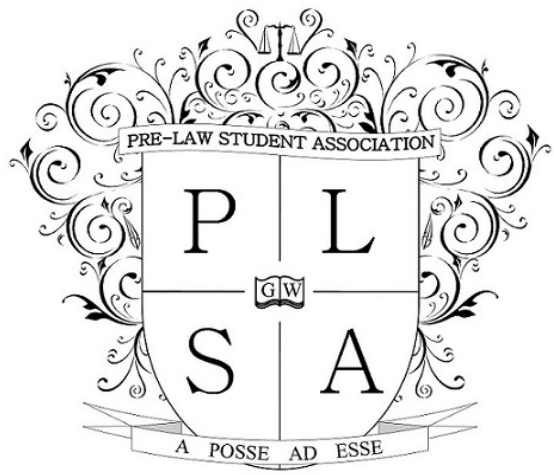

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THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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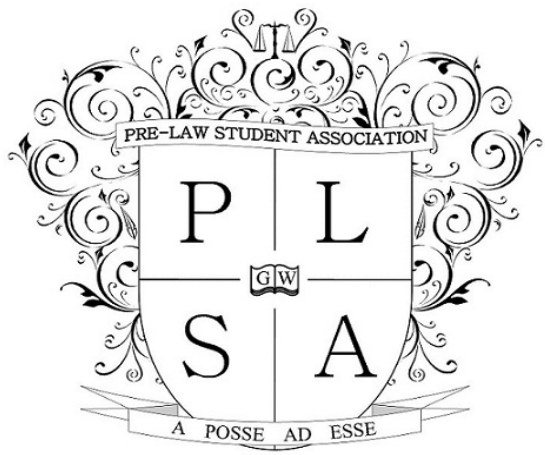

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Foreword

Dear Reader,

As President of The George Washington University Pre-Law Student Association, it is my pleasure to introduce the 2023 Undergraduate Law Review. Thank you to all the student writers, student editors, and legal professionals who put so much work into publishing the Undergraduate Law Review.

The George Washington University Undergraduate Law Review is a year-long writing and editing process to produce our annual publication that is entirely student-managed. Students learn how to write on current legal issues with Bluebook legal citations. The Undergraduate Law Review is unique in that it offers students the ability to start legal professional writing and be published prior to law school.

Since our beginning in 2010, the Undergraduate Law Review has published thirteen consecutive publications, through pandemics and online school years. It is because of the great dedication of so many students that the Pre-Law Student Association is able to print every year.

It is my honor to present to you the 2023 Edition of the GW Undergraduate Law Review.

Sincerely,

Allyson Bonhaus
President

Introduction

Dear Reader,

Over the past year, I had the privilege of watching 13 selected writers grow as they discussed and analyzed some of the most pressing legal issues seen today. I have been continuously impressed by the commitment and ambition that these writers have exemplified, especially as they navigated a new writing style and citation system in addition to addressing matters that range from juvenile life without parole and prosecutorial discretion to artificial intelligence to Morocco's occupation of the Western Sahara. As one of the only undergraduate law reviews in the country, this achievement is all the more admirable.

I would be remiss if I did not recognize the team of people assisting our writers' hard work and dedication. I would like to thank our nine editors, 14 technical editors, and 20 professional editors. The substantial feedback that they provided has been invaluable to refining and elevating our notes. I would also like to thank the Pre-Law Student Association, whose endless support has been vital to the Review. Finally, I would like to extend a special thank you to my three co-editors-in-chief: Kevin Zhang, Kelsey Marx, and Lauren Tepper. Their relentless attention to detail and flexibility has ensured this publication's success.

As first a writer and then the director of Undergraduate Law Review, I have grown immensely as a leader, an individual, and a prospective law student. This publication has given me a structured space to explore my interests in law outside of my undergraduate curriculum and has further developed my aspirations to attend law school. I hope any student involved in this publication receives the same clarity as I did.

To the readers, I hope this publication helps showcase the vast ways in which the law intersects with any subject and inspires you to consider how your unique interests may also converge with the law. With that, I am honored to present to you the 13th edition of the George Washington Undergraduate Law Review.

Best,

Samantha Lee
Law Review Director

NOTES

The Need for Multistate Cooperation for Taxation of Online Interstate Sales in the Aftermath of *South Dakota v. Wayfair*

Ty Brown

Introduction: The Dormant Commerce Clause, *Wayfair*, and Law and Economics

Technological change always has the potential to interact with existing laws and institutions, often in unexpected or unintended ways. One example of this is the interaction between the United States Constitution's Commerce Clause, which allows Congress to regulate commerce with other nations, between states, and with Tribes, and state governments' ability to tax online interstate sales.[1] The Commerce Clause has led to a parallel Dormant Commerce Clause, which is not explicitly contained within the United States Constitution but based upon it.[2] The Dormant Commerce Clause restricts the states' abilities to regulate interstate commerce because the Commerce Clause explicitly vests that power in Congress instead.[3] That means the Dormant Commerce Clause is only applied when Congress has not acted upon an issue, and that Congress can permit violations of the Dormant Commerce Clause.[4] Therefore, the lack of Congressional action has led to a situation in which judicial opinions and state policies have determined the treatment of online interstate sales. As a result, until the recent Supreme Court decision in *South Dakota v. Wayfair*, the United States Constitution's Due Process clause required that there be physical presence for a "sufficient nexus" for the seller to benefit from the state's services and for

[1] U.S. CONST. art. I, § 8, cl. 3.
[2] James M. McGoldrick Jr., *The Dormant Commerce Clause: The Origin Story and the 'Considerable Uncertainties' - 1824 to 1945*, 52 CREIGHTON L. REV. 243, 243 (2019).
[3] *Id.*
[4] *Id.*

the state to have reasonable warning of being taxed.[5] Similarly, the Dormant Commerce Clause required a nexus in order to prevent the state's taxation from unduly burdening interstate commerce.[6] Using a different interpretation of the Commerce Clause, *Wayfair* overruled that requirement and vastly expanded the policy options for state taxation of online interstate sales.[7] The precedent has allowed states to expand their taxation to include sales without the seller maintaining a physical presence in the taxing state.[8]

The post-*Wayfair* expansion of states' ability to tax online interstate sales means that each state now has significant flexibility to implement its own approach to taxation of online interstate sales. Finding an optimal policy option to exercise that flexibility requires a framework to evaluate policy options. The doctrine of Law and Economics is the best lens through which to examine state taxation of online interstate sales. The legal system provides both incentives for individual behavior and tools to implement policy.[9] Law and Economics then uses economics as a scientific theory to predict behavioral responses arising from the legal system.[10] Economics, as a part of Law and Economics, is an ideal basis because it provides an empirical framework to evaluate the consequences of the Dormant Commerce Clause and its restrictions on state taxation. This creates a framework to analyze the consequences of a specific legal and policy issue, here state taxation of interstate online sales.

Using that framework, this note examines the ongoing issue of state taxation of online interstate sales. First, it discusses the case history of the Dormant Commerce Clause and its application to state taxation of interstate sales. The next section explores ongoing issues with taxation of online interstate sales, including gaps in the *Wayfair* precedent. Those gaps include the lack of a decision on whether complex state tax systems discriminate against interstate commerce, and the legality of specific potential policies such as retroactive systems.[11] Building from the *Wayfair* decision, Law and Economics is then applied to analyze possible policy solutions for state taxation of online interstate sales, accounting for specific concerns such as state autonomy and economic efficiency. The economic literature around taxation is discussed in order to evaluate possible tax policies for states to adopt for online

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[5] ERIKA K. LUNDER, CONG. RSCH. SERV., TAXATION OF INTERNET SALES AND ACCESS: LEGAL ISSUES 1 (2015).
[6] *Id.*
[7] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 10 (U.S. June 21, 2018).
[8] *Id.*
[9] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 9 (Donna Battista ed., 6th ed, Addison-Wesley 2012).
[10] *Id.* at 3.
[11] *Id.* at 21–22.

interstate sales. The ongoing issues with state taxation of online interstate sales show that while *Wayfair* is a major step in the right direction, there is still work to be done to clarify how states can balance the concerns raised by this issue. To reach that balance, this note argues that states should focus on a voluntary agreement that includes standardization of tax base definitions. Doing so allows states to maintain policy autonomy, promote economic efficiency, and navigate existing precedents about multistate agreements.

I. The Development of the Dormant Commerce Clause and its Application to Online Interstate Sales

A. The Case History of the Dormant Commerce Clause

The Dormant Commerce Clause traces its existence to Chief Justice John Marshall's opinion in *Gibbons v. Ogden*.[12] *Gibbons* concerned a Constitutional challenge under the Commerce Clause to a New York state law that regulated navigation, granting two individuals exclusive rights to use steamboats to navigate New York waters.[13] In the case, the Court described how state laws regulating commerce must yield to laws passed by Congress.[14] The opinion also explained how the regulatory power vested in Congress by the Commerce Clause by its nature would not be useful if granted directly to the people, and must be exercised by agents such as Congress.[15] In other terms, the opinion stated that power to regulate commerce must remain with Congress, because divesting the power to individuals or smaller groups would deprive it of its value. *Gibbons* did not explicitly create the Dormant Commerce Clause, but it established the ideas of federal supremacy and that the Commerce Clause vests power to regulate commerce entirely within Congress, and that the power cannot be reverted to the people.[16]

Chief Justice Marshall's opinion in *Willson v. Black Bird Creek Marsh Co.* further developed the idea of the Dormant Commerce Clause. *Black Bird Creek* was concerned with a Delaware state law that allowed the Black Bird Creek Marsh Company to construct a dam across Black Bird Creek, making it unnavigable for shipping.[17] The Court ruled that the

[12] McGoldrick Jr., *supra* note 2, at 243.
[13] Gibbons v. Ogden, 22 U.S. 1, 1 (1824).
[14] *Id.* at 210.
[15] *Id.* at 189.
[16] *Id.*
[17] Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 246 (1829).

Delaware law allowing for the dam's construction did not intrude upon the power to regulate commerce "in its dormant state, or as being in conflict with any law passed on the subject."[18] In doing so, the Court recognized the existence of the Dormant Commerce Clause while simultaneously allowing a state law with clear impacts on interstate commerce to be sustained. *Black Bird Creek* demonstrates that state actions, even wholly within their borders, are restricted by the Dormant Commerce Clause based upon their potential to impact interstate commerce "in its dormant state."[19] However, the case did show that there were limits to the reach of the Dormant Commerce Clause.[20] *Black Bird Creek* demonstrated that congressional power and important state interests can take precedence over minor disruptions to interstate commerce.[21]

The *Case of the State Freight Tax* further built upon the Supreme Court's establishment of the Dormant Commerce Clause and connected it to state taxation. In the case, the Court found that a Pennsylvania state tax on freight that included commerce originating or traveling outside of Pennsylvania was unconstitutional, overruling the Supreme Court of Pennsylvania.[22] To come to that decision, the Court found that transportation is a critical part of commerce and that burdens placed upon it are effectively restrictions.[23] This case demonstrates the applicability of the Dormant Commerce Clause to state taxation through establishing that taxes can act as a restriction on commerce. In doing so, the *Case of the State Freight Tax* created a connection between the Dormant Commerce Clause and the specific issue of state taxation.

B. The Case History Applying the Dormant Commerce Clause to State Sales Taxes

With the general history of the Dormant Commerce Clause established, the question turns to how it impacts the specific issue of state taxation examined in *Wayfair*. Before *Wayfair*, the Supreme Court generally prohibited states from requiring companies without a physical presence in the state to remit taxes for purchases made within the state.[24] In *National Bellas Hess v. Illinois*, the Supreme Court ruled on the legality of a judgment from the Supreme

[18] *Id.* at 252.
[19] *Id.*
[20] McGoldrick Jr., *supra* note 2, at 291–292.
[21] *Id.*
[22] Case of the State Freight Tax, 82 U.S. 232, 271, 282 (1872).
[23] *Id.* at 281.
[24] *See, e.g.*, National Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967), Complete Auto Transit, Inc. v. Brady 430 U.S. 274 (1977), Quill Corp v. North Dakota, 504 U.S. 298 (1992).

Court of Illinois that required an out-of-state company to remit taxes to Illinois.[25] National Bellas Hess, the appellant, was a mail-order house that maintained no physical infrastructure, employees, or advertisements in Illinois.[26] The Court held that Illinois could not impose the use taxes on National Bellas Hess.[27] To reach that decision, the Court focused on the fact that National Bellas Hess had no retail outlets or property within Illinois and depended entirely upon postal mail to reach customers within the state.[28] The Court also expressed concern with the impediments to interstate transactions that could occur if it upheld Illinois' power to tax National Bellas Hess, as doing so would give localities the power to create an impossibly complex system of tax regimes.[29] The ruling contrasted with previous cases where the Court had upheld states' taxing power on sellers that had employees arranging the sales in the taxing state.[30] The Court's opinion in *Bellas Hess* concluded by reinforcing that the intention of the Commerce Clause is to protect the national economy from unjustified local intrusion, and reaffirming the power of Congress to regulate commerce.[31]

Complete Auto Transit, Inc. v. Brady built upon *Bellas Hess* by establishing a substantial nexus test for state taxation under the restrictions of the Commerce Clause.[32] The case concerned a Michigan corporation that transported vehicles within Mississippi from the railways used to import them from Michigan to dealers within Mississippi.[33] The Court ruled against Complete Auto Transit, as the application of the tax to interstate commerce was the only argument against its constitutionality, the tax was levied on activity clearly connected to Mississippi, and the tax did not discriminate against interstate commerce.[34] Notably, the ruling established a four-part test to determine the constitutionality of taxes under the Commerce Clause. The test included whether the taxed activity has a "substantial nexus" in the taxing state, is fairly apportioned, is not discriminatory towards interstate commerce, and is fair in the context of the services provided by the taxing state.[35] Of these requirements,

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[25] *National Bellas Hess, Inc.*, 386 U.S. at 754
[26] *Id.* at 754.
[27] *Id.* at 760.
[28] *Id.* at 758.
[29] *Id.* at 759.
[30] *Id.* at 757.
[31] *Id.* at 760.
[32] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 274 (1977).
[33] *Id.* at 276.
[34] *Id.* at 287, 289.
[35] *Id.* at 279.

the substantial nexus test is of particular note for state taxation of online interstate sales due to the ease of selling and shipping to out-of-state consumers made possible by the internet.

A pre-*Wayfair* challenge to *Bellas Hess* came to the Supreme Court through *Quill Corp. v. North Dakota*. The case involved a similar fact pattern to *Bellas Hess*. North Dakota attempted to compel Quill, a Delaware corporation, to remit taxes despite Quill only delivering merchandise to North Dakota via common carrier or mail.[36] Despite a clear precedent from *Bellas Hess*, the Supreme Court of North Dakota declined to overrule North Dakota's tax.[37] In its ruling, the State Supreme Court argued that the *Bellas Hess* ruling had become obsolete in the face of technical and economic changes between *Bellas Hess* in 1967 and *Quill* in 1992.[38] However, the United States Supreme Court declined to overrule *Bellas Hess* and found that Quill did not have the required substantial nexus in North Dakota that would allow the state to levy taxes under the Dormant Commerce Clause.[39] The *Quill* Court was somewhat critical of the *Bellas Hess* rule, describing it as "[appearing] artificial at its edges," but supported it as preferable to an unclear rule.[40] That idea contributed to an economic argument made in the opinion that a clear rule helps to fix future economic expectations, which encourages investment and therefore growth.[41] *Quill* reaffirmed *Bellas Hess* despite the critical view of the Supreme Court of North Dakota towards *Hess*, and is pertinent as it describes the benefits of clear rules and expectations for state taxation.

More recently, *Bellas Hess* and *Quill* have recently been overruled by *South Dakota v. Wayfair*, ending the physical presence rule established as part of the substantial nexus test in *Complete Auto*.[42] *Wayfair* was concerned with whether South Dakota could require remote sellers to remit sales taxes without an additional connection within the state beyond sufficient economic activity.[43] The *Wayfair* Court found that the physical presence rule was unjustified as an interpretation of the Commerce Clause.[44] In the absence of the physical presence rule, the Court found sufficient nexus for North Dakota's tax in the economic and virtual contact between Wayfair and customers in North Dakota.[45] The ruling has allowed for economic

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[36] Quill Corp. v. North Dakota, 504 U.S. 298, 302 (1992).
[37] *Id.* at 301.
[38] *Id.*
[39] *Id.* at 302.
[40] *Id.* at 315.
[41] *Id.* at 316.
[42] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 22 (U.S. June 21, 2018).
[43] *Id.* at 10.
[44] *Id.*
[45] *Id.* at 22.

nexus requirements, which require businesses meeting certain transaction thresholds within specific states to remit taxes to those states. Economic nexus requirements have replaced the physical presence rule as a determinant of which businesses states can tax.

The *Wayfair* opinion closely examined many of the specific characteristics of North Dakota's tax to justify upholding it.[46] One example is a specific minimum in the North Dakota law requiring a certain financial threshold or number of transactions in North Dakota to be taxed.[47] Another example is that the law was not retroactive. A third is that South Dakota is a member of the Streamlined Sales and Use Tax Agreement, a multistate tax streamlining and standardization agreement.[48] Each of those details of the law serve to protect small businesses doing business in North Dakota over the internet.[49] Ultimately, the *Wayfair* Court found that the risk of burdens for small businesses in the future did not justify the physical presence rule in *Quill* preventing states from capturing a vast amount of tax revenues from online interstate sales.[50] The *Wayfair* Court was critical of the economic argument of avoiding change in *Quill*, stating that the *Quill* precedent resulted in market distortions rather than resolving them, causing in effect a "judicially created tax shelter."[51] *Wayfair* serves as the current key Supreme Court precedent for state taxation of online interstate sales and is therefore essential to shaping potential policy options in the area.

C. Background of the Impact of Online Sales on State Taxation

The increasing scale of online sales makes taxation of them a significant potential source of revenue for states. Between the beginning of 2013 and midway through 2022, the share of United States retail sales taking place online rose from less than 6% to over 14%.[52] That equated to around $262 billion in online sales, adjusting for seasonal variation, in the second quarter of 2022 alone.[53] This shift towards online sales raises significant concerns for states' ability to collect sales tax revenue. As of fiscal year 2021, sales taxes made up

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[46] *See, e.g., Id.* at 22–23 ("The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis.").
[47] *Id.* at 22.
[48] STREAMLINED SALES AND USE TAX GOVERNING BOARD, INC., AN OVERVIEW AND GUIDE FOR STATE LAWMAKERS AND TAX ADMINISTRATORS EXPLAINING THE STREAMLINED SALES TAX PROJECT 4 (2021).
[49] *Wayfair, Inc.*, slip op. at 21.
[50] *Id.* at 22.
[51] *Id.* at 10–13.
[52] *Quarterly Retail E-Commerce Sales 2nd Quarter 2022*, U.S. CENSUS BUREAU, https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (Nov. 18, 2022, 10:00 AM).
[53] *Id.*

approximately 29.5% of state revenues, though the exact proportion varied between states from roughly half to twice that share.[54] Even prior to *Wayfair*, the Supreme Court held that states could levy use taxes on the usage of goods purchased from out-of-state sellers after the goods entered the taxing state.[55] While that meant states could choose to rely on use taxes levied on consumers instead, relying on consumers to remit taxes has led to rates of compliance estimated at around one or two percent.[56] The wide variety of different state tax systems also increases administrative complexity for companies interested in selling online to many different states. That means specialized software is necessary for multistate sellers to navigate the complexity of tax policies across different jurisdictions.[57] This software comes at a considerable cost for businesses, which have to implement, administer, and license the software.[58] A notable specific cost is mapping items to different states' tax schemes, which is labor-intensive.[59] The total cost of a tax system for its individual participants is a combination of the administrative burden of compliance, the reduction in economic efficiency from the tax, and the actual tax liability paid.[60] This means that the methods of tax remittance are an important part of determining the overall efficiency of a tax system.[61]

In the wake of the *Wayfair* ruling, 47 states and the District of Columbia now have policies requiring online sellers meeting different thresholds to remit taxes to the state or localities.[62] Many of these requirements were implemented rapidly after the *Wayfair* ruling was issued, with some states imposing new requirements for remote sellers to remit taxes as soon as a few weeks after the ruling.[63] Specific economic nexus requirements vary

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[54] Jared Walczak, *State Sales Tax Breadth and Reliance, Fiscal Year 2021*, TAX FOUND., https://taxfoundation.org/state-sales-tax-base-reliance/ (last visited Jan. 5, 2023).
[55] Gen. Trading Co. v. State Tax Comm'n, 322 U.S. 335, 338 (1944)
[56] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-114, STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 14 (2017); Scott T. Allen, *Adapting to the Internet: Why Legislation Is Needed to Address the Preference for Online Sales That Deprive States of Tax Revenue*, 66 THE TAX LAW. 939 (2013).
[57] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 17.
[58] *Id.* at 17.
[59] *Id.* at 19.
[60] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105359, FEDERAL LEGISLATION COULD RESOLVE SOME UNCERTAINTIES AND IMPROVE OVERALL SYSTEM 33 (2022).
[61] Joel Slemrod, *Does it Matter Who Writes the Check to the Government? The Economics of Tax Remittance*, 61 NAT'L TAX J. 251, 272 (2008).
[62] *Remote Seller Nexus Chart*, SALES TAX INST., https://www.salestaxinstitute.com/resources/remote-seller-nexus-chart (May 4, 2021).
[63] FEDERAL LEGISLATION COULD RESOLVE SOME UNCERTAINTIES AND IMPROVE OVERALL SYSTEM, *supra* note 60, at 7–8.

significantly between jurisdictions. For example, the smallest economic nexus requirements are $100,000 or 200 separate transactions.[64] Meanwhile, the largest are $500,000 and 100 separate transactions.[65] Most remote sellers are small businesses, with over eighty-five percent having fewer than ten employees, and the Bureau of Labor Statistics estimated the presence of around 68,000 businesses primarily selling their goods online in the fourth quarter of 2021.[66] These numbers demonstrate that tens of thousands of small businesses in the United States primarily operate online. Almost all states have also adopted marketplace facilitator requirements, requiring online marketplaces such as eBay to collect and remit taxes from sales on their platforms rather than requiring the individual sellers using the platforms to do so.[67] To summarize the current state of post-Wayfair state policy, states are taxing online interstate sales although exact policies vary between states. Additionally, requirements such as economic nexus thresholds mean that there are significant exceptions to which businesses need to remit taxes.

II. The Rise of e-Commerce as a Replacement for Other Sales and How *Wayfair* Falls Short of Resolving the Ongoing Taxation Issue that Raises.

A. Law and Economics and the Prescriptions of Economic Literature for Ideal State Taxation

Law and Economics includes economic analysis of specific laws and examination of the influence of the legal system on the economy.[68] Specifically, Law and Economics is chosen as a doctrine because economics provides a guide for how consumers and businesses are expected to react to states' tax policies. That means that Law and Economics demonstrates that a proposed solution to state taxation of online internet sales is both legally and economically sound, allowing for states to collect revenue while avoiding incentivizing inefficient or reduced economic activity. The field of economics adds to legal thinking because it includes specific mathematical theories and empirical methods, such as statistical modeling and econometrics, that allow for empirical analysis of the behavioral incentives

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[64] *See, e.g., Sales & Use Taxes*, ILL. DEP'T. OF REVENUE, https://tax.illinois.gov/research/taxinformation/sales/rot.html (last visited Dec. 30, 2022).
[65] *See, e.g., California Tax Matrix for Remote Sellers*, CAL. DEP'T. OF TAX AND FEE ADMIN., https://www.cdtfa.ca.gov/formspubs/cdtfa758.pdf (last visited Dec. 30, 2022).
[66] FEDERAL LEGISLATION COULD RESOLVE SOME UNCERTAINTIES AND IMPROVE OVERALL SYSTEM, *supra* note 60, at 16–17.
[67] *Id.* at 7.
[68] R.H. Coase, *Law and Economics and A.W. Bran Simpson*, 25 THE J. OF LEGAL STUDIES 103, 103–04 (1996).

that laws create.[69] As this note examines the issue of state taxation of online interstate sales, the economic literature on taxation illuminates both the flaws of the current system and the criteria for an optimal system. The *Wayfair* decision has allowed states broad authority to tax online interstate sales, and Law and Economics provides a guide for how states can optimally utilize that authority.[70]

The specific field of optimal taxation began with Frank Ramsey's 1927 paper "A Contribution to the Theory of Taxation."[71] Ramsey's thesis was that to raise revenue from the taxation of a set of different goods, taxes should be levied proportionally to the degree to which they diminish the production of each good.[72] For example, consider a scenario where a government is setting tax rates for a luxury good and an essential good. Using Ramsey's approach, the government would tax the luxury good lightly because its production is likely dramatically affected by its cost, while the essential good would be taxed more heavily because its essentiality prevents a significant drop in its production in response to the tax. However, this does raise distributional concerns. Taxing the essential good appears efficient under Ramsey's approach but raises other concerns, such as the impact of the tax on those who depend on the essential good and may not be able to afford the additional cost of the tax. While Ramsey presents an elegant and widely applicable approach to optimal taxation, the paper includes the simplifying assumption of homogenous individuals, or that different individuals behave in similar ways in response to taxes.[73]

Ramsey also includes several applications of his approach in "A Contribution to the Theory of Taxation." One is the assertion that it would be efficient to tax the same commodity manufactured in separate locations differently, specifically inversely proportional to the elasticity of supply at the locations, as long as factors of production are not mobile between the locations.[74] However, discriminating between goods or taxing them based on the state they are produced in is unconstitutional under the Commerce Clause, preventing states from adopting this approach.[75] That leaves Ramsey's conclusion that taxes should be

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[69] COOTER & ULEN, *supra* note 9, at 3.
[70] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 22 (U.S. June 21, 2018).
[71] Joseph E. Stiglitz & F.P. Ramsey, *In Praise of Frank Ramsey's Contribution to the Theory of Taxation*, 125 THE ECON. J. 235, 235 (2015).
[72] F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 THE ECON. J. 47, 47 (1927).
[73] Stiglitz & Ramsey, *supra* note 71, at 241.
[74] Ramsey, *supra* note 72, at 58.
[75] *See, e.g.*, Railroad Company v. Husen, 95 U.S. 465, 468 (1877); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

levied proportionally to their impact on the quantity of production of each good as his main lesson for state taxation of online interstate sales.[76] Because each good must have the same supply elasticity, or change in quantity produced in response to taxation, as itself, Ramsey's result also indicates that each individual good should be taxed at a single, consistent rate. This clearly applies to instances in which the same good is taxed differently based upon whether it is purchased from a business that is required to remit taxes for an online sale or one that is not. That suggests that any sort of exception on which businesses must remit taxes is an imperfection in the tax system, and a potential market distortion.[77]

In "Optimal Taxation and Optimal Tax Systems," Joel Slemrod expands upon Ramsey's findings.[78] Slemrod finds that taxes should be levied inverse to elasticity, or the change in production of a good in response to a tax on it.[79] As with Ramsey's approach, this means that taxes on goods should be balanced so that goods whose quantities are most responsive to taxation are taxed the least. Together, these prescriptions for an optimal tax system account for the fact that the size of the market distortion in response to a tax depends on the change in consumption in response to the tax. The lessons from Slemrod and Ramsey about optimal taxation provide guidelines for states to tax online interstate sales and demonstrate the flaws in the pre-*Wayfair* system of physical presence. While *Wayfair* reduced the size of the distortion, its economic nexus requirements led to some businesses, such as those delivering less than $100,000 of goods and services into North Dakota, under the law at issue in *Wayfair* not being required to remit taxes, creating a new distortion.[80]

B. The Limitations of and Arguments Against the Wayfair Ruling

The precise scope and specificity of the *Wayfair* ruling has left significant ambiguities for states to navigate. While justifying its ruling, the *Wayfair* court pointed out several specific characteristics of the North Dakota law.[81] Specifically, the *Wayfair* Court mentions the law's inclusion of an economic nexus threshold and that the law is not retroactive.[82] The opinion also mentions that South Dakota is a party to the Streamlined Sales and Use Tax

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[76] Ramsey, *supra* note 72, at 47.
[77] *E.g., Id.*
[78] *See* Joel Slemrod, *Optimal Taxation and Optimal Tax Systems*, 4 THE J. OF ECON. PERSP. 157 (1990).
[79] *Id.* at 159.
[80] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 22-23 (U.S. June 21, 2018).
[81] *Id.* at 21.
[82] *Id.*

Agreement,[83] a multistate agreement intended to modernize and simplify sales and use tax remittance.[84] The *Wayfair* decision's focus on these details of North Dakota's law makes its application to different states' tax policies more ambiguous, and states' policies differ on the details specified in the decision. For example, only twenty-three states are full members of the Streamlined Sales and Use Tax agreement.[85] Additional complexity arises from how economic nexus requirements also vary between states' tax laws.[86] The ruling acknowledges specific related issues that could arise in the wake of *Wayfair*.[87] Those issues include that retroactive tax systems could result in double taxation and that complex tax systems could be discriminatory towards interstate commerce.[88] For the North Dakota law in *Wayfair,* the Court found that there were methods implemented to simplify the collection of taxes in the state, thereby avoiding a broader ruling on whether complex tax systems would discriminate against interstate commerce.[89] These consequences of the fact pattern and Court's argument in *Wayfair* mean that some ambiguities remain about how future cases could treat the policies that states implement in the wake of the decision.

Many of the potential difficulties in the aftermath of *Wayfair* are contained within Chief Justice Roberts' dissent in the case. The core of Roberts' argument is that the Court's decision would dampen the growth of e-commerce into new markets.[90] While online sales have continued to increase as a proportion of overall sales since the *Wayfair* decision,[91] Chief Justice Robert's concern about the increased complexity for businesses required to remit taxes to new jurisdictions is not nullified. The dissent observed that online sales established themselves as a major portion of the economy under the pre-*Wayfair* system of taxation, so any change to the existing rules would have the potential to disrupt a significant portion of the economy.[92] Due to the potential consequence of allowing states to shift away from the physical nexus standard, Roberts argued that such a change should be undertaken by

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[83] *Id.*
[84] AN OVERVIEW AND GUIDE FOR STATE LAWMAKERS AND TAX ADMINISTRATORS EXPLAINING THE STREAMLINED SALES TAX PROJECT, *supra* note 48, at 3.
[85] STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/ (last visited Dec. 30, 2022).
[86] *See, e.g., Sales & Use Taxes*, *supra* note 64; *California Tax Matrix for Remote Sellers*, *supra* note 65.
[87] *Wayfair, Inc.*, slip op. at 21–22.
[88] *Id.*
[89] *Id.* at 22.
[90] *Id.* at 6–7 (Roberts, C.J., dissenting).
[91] FEDERAL LEGISLATION COULD RESOLVE SOME UNCERTAINTIES AND IMPROVE OVERALL SYSTEM, *supra* note 60, at 6.
[92] *Wayfair, Inc.*, slip op. at 1 (Roberts, C.J., dissenting).

Congress rather than the judiciary and that the end of the physical presence rule in *Wayfair* disrupted Congress's ongoing consideration of the issue.[93] Finally, the dissent noted that tax software is not capable of automatically determining what taxes businesses need to remit in different jurisdictions, complicating the process of remitting taxes for small businesses selling online.[94] Chief Justice Robert's observations about the economic backdrop of e-commerce are relevant to the economic analysis of state taxation of online interstate sales, even though they do not have legal force.

C. Use Taxes on Consumers are Insufficient as a Replacement for State Sales Taxes

Use taxes are taxes imposed on the storage, consumption, or usage of a good, generally goods brought into the state by consumers that were not covered by sales tax.[95] Use taxes can require remittance by companies, such as the one at issue in *Bellas Hess*.[96] They can alternatively require consumers to remit the tax themselves.[97] A use was at issue in *General Trading Co. v. State Tax Comm'n*, which established the constitutionality of an Iowa use tax that applied to items purchased from out-of-state sellers despite the then-present restrictions on requiring out-of-state businesses to remit taxes.[98] Theoretically, relying on use taxes would avoid businesses having to remit taxes to each state they sell to consumers in because the consumers would remit the taxes themselves. *General Trading Co.* confirms the constitutionality of requiring individuals to remit use taxes, which means that analyzing their use can focus on economic grounds.[99] In theory, that makes use taxes appear as an ideal solution, combining reduced administrative burden for businesses with clear constitutionality.

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[93] *Id.* at 1, 4.
[94] *Id.* at 6.
[95] *See, e.g., Sales and Use Tax*, STATE OF N.Y., https://www.tax.ny.gov/bus/st/stidx.htm#:~:text=Sales%20tax%20applies%20to%20retail,it%20within%20New%20York%20State (last visited Dec. 30, 2022); *What is Subject to Sales and Use Tax?*, GA. DEP'T. OF REVENUE, https://dor.georgia.gov/taxes/business-taxes/sales-use-tax/what-subject-sales-and-use-tax (last visited Dec. 30, 2022); *Sales/Use Tax*, MO. DEP'T. OF REVENUE, https://dor.mo.gov/taxation/business/tax-types/sales-use/ (last visited Dec. 30, 2022).
[96] National Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 754 (1967).
[97] Charles E. McLure, *Sales and Use Taxes on Electronic Commerce: Legal, Economic, Administrative, and Political Issues*, 34 THE URBAN LAW. 487, 489 (2002).
[98] General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 336 (1944).
[99] *Id.* at 336.

The problem is that use taxes levied on consumers are almost never remitted, making them ineffective at simulating a sales or use tax remitted by businesses.[100] Use taxes are more likely to be remitted for goods that have to be registered with the state, such as cars, but that type of good does not include the vast majority of online purchases.[101] The market distortions that existed even in states with use taxes prior to the *Wayfair* decision were, in part, the result of the ongoing failure of consumers to pay use taxes.[102] This is shown by *Wayfair* itself, which has served as a natural experiment on the impacts of moving tax liability and enforcement to businesses rather than consumers.[103] It did so by creating a sudden policy change by allowing states to require large out-of-state sellers and then marketplace facilitators to remit sales taxes, creating an exogenous change in state policies.[104] The effect of the policy change created by *Wayfair* was a 7.8 percentage point increase in the probability that an online transaction incurs taxation, offsetting much of the 9.4 percentage point decrease in the probability of an online transaction being taxed compared to an in-person one.[105] Overall, *Wayfair* has shown that shifting responsibility to retailers to remit taxes increases revenue, which is consistent with the existing economic theory that centralizing the responsibility to remit taxes reduces evasion.[106]

Additionally, levying use taxes on consumers does not take advantage of the economies of scale of tax remittance by businesses.[107] Businesses tend to have existing systems for record-keeping and accounting, which can be leveraged to remit sales or use taxes more efficiently.[108] Working with businesses also minimizes the number of organizations that the relevant tax authority has to work with, simplifying collection.[109] For an example of the difficulty of remitting use taxes for consumers, consider New York's system. New York residents are generally required to remit use taxes on items that they purchase from out of state that would have been covered by New York's sales tax if they

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[100] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 14.
[101] McLure, *supra* note 97, at 489.
[102] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 20 (U.S. June 21, 2018).
[103] William F. Fox et al., *Statutory Incidence and Sales Tax Compliance: Evidence from Wayfair*, J. OF PUB. ECON, Aug. 11, 2022, at 2.
[104] *Id.*
[105] *Id.* at 9.
[106] *Id.* at 13.
[107] Slemrod, *supra* note 61, at 266.
[108] *Id.*
[109] *Id.*

were purchased in New York.[110] For purchases over $1000, New York requires its residents to calculate the exact amount owed using a combined state and local rate.[111] For purchases under that amount, residents may either do that or use an income-based tax chart.[112] This is further complicated by credits for sales taxes paid on purchases outside of New York, and rules allowing for the depreciation of property used outside of New York and then brought into the state.[113] This demonstrates the difficulty for consumers of remitting use taxes themselves. Use taxes levied on consumers are an inadequate means of collecting revenue from online interstate sales, as they are rarely remitted in practice.[114] Furthermore, even in a theoretical state where consumers remitted use taxes, they would nevertheless be inefficient due to the difficulty of each consumer individually remitting taxes on each purchase.[115] This means that solutions for state taxation of online interstate sales should focus on sales taxes instead of use taxes.

III. Proposing a Multistate Agreement to Standardize Tax Base Definitions for State Taxation of Online Interstate Sales

A. Overview of a Proposed Interstate Agreement to Standardize Tax Base Definitions

To manage state taxation of online interstate sales, an interstate agreement to standardize tax base definitions best manages the competing economic, legal, and political concerns. Such an agreement would standardize the definitions used by different states to determine their tax bases and the rates charged for each item without mandating which goods are taxed and the rates levied. This agreement would be implemented by each individual state, rather than congressional action or other federal intervention. While complete buy-in from states would be ideal, a multistate agreement would avoid the all-or-nothing nature of federal legislation. An example is the Streamlined Sales and Use Tax Agreement operating

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110 *Use Tax for Individuals (including Estates and Trusts)*, STATE OF N.Y., https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/use_tax_for_individuals.htm (last visited Dec. 30, 2022).
111 *Id.*
112 *Id.*
113 *Id.*
114 STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 14.
115 Slemrod, *supra* note 61, at 266.

with participation from only around half of states.[116] The agreement in its entirety is therefore not dependent on the continued support of a single legislature in the same way as a congressionally implemented solution. Traditionally, multistate compacts have resulted from attempts to avoid federal control, political accidents, or as a last resort.[117] In this case, the fact that Congress has not taken action to resolve the issue justifies a multistate agreement as a form of last resort. Should Congress decide to act in the future, federal legislation could supplement an existing interstate agreement.

The core of the proposed agreement is standardization of tax base definitions. For an example of tax base definitions, consider the definition of food and food ingredients used by Washington State to exempt those items from sales taxes.[118] The definition includes, "substances... that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value," but then explicitly excludes a series of items such as alcoholic beverages.[119] Washington does not tax candy, as it is included in the list of tax-exempt foods by the law.[120] In comparison, New Jersey's sales tax law explicitly defines candy as, "a preparation of sugar, honey, or other natural or artificial sweeteners in combination with... other ingredients or flavorings,"[121] and does not exempt candy from sales tax as it does other foods.[122] The difference in these definitions means that the tax base is different in Washington and New Jersey, as New Jersey businesses have to remit taxes on candy sales but not Washington businesses. Therefore, it also creates an additional burden for businesses expanding their operations between the states. Those businesses have to manage whether they distinguish candy sales from other foods and the ways in which they do so. A business previously selling a wide variety of foods in Washington expanding its operations to New Jersey would have to determine which of its foods are considered candy under New Jersey law.

To add to the issues that arise without standardized definitions, the precise and literal nature of tax definitions can lead to edge cases that illustrate the resulting complexities.

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[116] *State Information*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/Shared-Pages/State-Detail (last visited Dec. 30, 2022).
[117] Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1, 34 (1997).
[118] WASH. REV. CODE. § 82.08.0293 (2022).
[119] *Id.*
[120] *Id.*
[121] N.J. ADMIN. CODE § 18:24-12.2.
[122] *Sales of Food and Food Ingredients, Candy, Dietary Supplements, and Soft Drinks Sold by a Grocery Store*, STATE OF N.J. (May 13, 2013), https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb70.pdf.

One example is that under the definitions used by the Streamlined Sales and Use Tax Agreement, different brands of what a layperson would consider candy bars can be classified as candy or food, and therefore have different rates of taxation, based on specific ingredients in the bars.[123] This demonstrates the importance of standardization. Differences in what type of item each individual good is considered between states require additional product mapping work for businesses, which is a labor-intensive and expensive process.[124]

In order for states to adopt a common set of definitions, that set of definitions has to be created for them to use. The definitions could be pulled from a variety of existing sources. The Streamlined Sales and Use Tax Agreement contains tax base definitions that could serve as a starting point for a broader agreement.[125] One example is a list of items that are considered clothing, including items such as aprons, belts, boots, and neckties, and excluding items such as costume masks.[126] Another example is defining computer software as, "a set of coded instructions designed to cause a 'computer' or automatic data processing equipment to perform a task."[127] Using the Streamlined Sales and Use Tax Agreement definitions comes with the political and logistical benefits of around half of states already having adopted the agreement and its definitions. Alternatively, states could either base a common system off one state's existing system, or develop a new set of definitions entirely if none of the existing options can achieve a broad consensus. There is no federal sales tax, which means that states standardizing their sales tax cannot base definitions on those used by the federal government.[128] Any of these methods can achieve the fundamental goal of standardizing tax base definitions in order to allow for lower administrative costs of compliance. The most important part is simply that the definitions be standardized across as many states as possible.

B. Concerns to Address for the Proposed Interstate Agreement

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[123] Janelle Fritts, *Tax Treatment of Groceries, Candy, and Soda Can Get Tricky*, TAX FOUND. (Oct. 28, 2020), https://taxfoundation.org/halloween-candy-tax-groceries-soda-sales-tax/ (Noting that Hershey's and Twix bars are considered candy and food respectively under the definitions used by the Streamlined Sales and Use Tax Agreement).

[124] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 17.

[125] STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/ (last visited Dec. 30, 2022).

[126] STREAMLINED SALES AND USE TAX GOVERNING BOARD, INC., STREAMLINED SALES AND USE TAX AGREEMENT 106–107 (2022).

[127] *Id.* at 110.

[128] *Id.*

The proposed interstate agreement for state taxation of online interstate sales must be consistent with a variety of existing legal precedents in order to protect it from challenges. First, any solution should be consistent with the intent of the Commerce Clause and existing rulings concerning multistate agreements. The Court emphasized that the Dormant Commerce Clause prohibits discrimination in interstate commerce in the 1877 case *Hannibal & St. J.R. Co. v. Husen*, which concerned a Missouri law explicitly preventing the offloading of Texan, Mexican, and Indian cattle.[129] In its opinion, the *Husen* Court observed that the purpose and effect of the law at issue was to discriminate against interstate commerce based on its state of origin.[130] The Supreme Court likewise later struck down a Michigan law that discriminated against out-of-state alcohol through additional taxation on dormant commerce clause grounds.[131] These cases show that the Commerce Clause has repeatedly been found to prohibit state laws that use taxes or other burdens on interstate commerce to discriminate against other states. The Court has also focused on where the economic burden of taxes falls rather than just which party is directly required to remit the tax.[132] In *Case of the State Freight Tax*, the Court mentioned that it has repeatedly been held that the constitutionality of state taxes depends on where its burden falls, not on the method of tax collection.[133] Similarly, the Court in *Complete Auto Transit* stated that Commerce Clause taxation cases "have considered not the formal language of the tax statute, but rather its practical effect."[134] Together, these cases show that new approaches to state taxation of online interstate sales must avoid placing discriminatory economic burdens, as opposed to just statutory burdens, on commerce based on whether or not it originates from out of state.

The legal restrictions the Constitution's Compact Clause places on interstate agreements must also be accommodated. The Compact Clause forbids states from entering "any Treaty, Alliance, or Confederation" without the consent of Congress.[135] This is a potential roadblock for any multistate agreement, as Congress could choose to withhold its approval if the agreement is considered a treaty under the Compact Clause.[136] However, it is

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[129] McGoldrick Jr., *supra* note 2, at 269.
[130] Hannibal & St. J.R. Co. v. Husen, 95 U.S. 465, 470 (1877).
[131] McGoldrick Jr., *supra* note 2, at 270.
[132] *See, e.g.*, Case of the State Freight Tax, 82 U.S. 232 (1872), Complete Auto Transit, Inc. v. Brady, 430 U.S. 279 (1977).
[133] *Case of the State Freight Tax*, 82 U.S. 232.
[134] *Brady*, 430 U.S. 279.
[135] U.S. CONST. art. I, § 10, cl. 1.
[136] United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–461 (1978).

unclear what the exact definition is, as the Constitution and Constitutional Convention's records do not provide a precise set of requirements for treaties.[137] A precedent for interstate agreements about tax policy is the Multistate Tax Commission, which serves as a pertinent example of the constitutionality of such agreements. The Multistate Tax Commission drafts and disseminates uniform rules and regulations for states to adopt in order to promote uniformity and fairness of taxation.[138] It also focuses primarily on taxes collected from businesses that operate across state lines.[139] Notably, each member state is freely able to reject any or all parts of a recommendation for rules or regulations made by the commission.[140] That means that any recommendation only has legal force once passed into law by a state.[141]

The Multistate Tax Compact was challenged in the Supreme Court case *United States Steel Corp. v. Multistate Tax Comm'n*, in which the Court found that the Multistate Tax Compact did not contain any provisions that impinged upon Federal power.[142] The Court also noted that the compact did not give or deny any powers to member states.[143] As the compact did not challenge existing federal powers or existing states' powers, the Court ruled against the challenge.[144] The Court's decision in *United States Steel Corp. v. Multistate Tax Comm'n* indicates that there is leeway to avoid any issue from the Compact Clause as long as a proposed agreement does not redelegate states' powers, has fully voluntary compliance and does not impinge upon federal powers. This means that a fully voluntary interstate agreement is a viable approach to improving the process of state taxation of online interstate sales, using a similar framework as the Multistate Tax Commission.

Returning to economic concerns, empirical evidence from existing state tax policy changes made after the *Wayfair* decision has shown that the newly imposed taxes on sellers have almost entirely been passed through to consumers, with little change in pre-tax prices.[145]

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137 *Id.*
138 *About the Compact and Suggested Enabling Act*, MULTISTATE TAX COMM'N, https://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/About-the-Compact-and-Suggested-Enabling-Act.pdf.aspx (last visited Nov. 13, 2022).
139 *Id.*
140 *United States Steel Corp.*, 434 U.S. at 457.
141 *Id.*
142 *Id.* at 472.
143 *Id.* at 473.
144 *Id.* at 479.
145 William F. Fox et al., *supra* note 103, at 9.

This confirms that failure to tax online interstate sales properly would lead to market distortions. That is because sellers passing along most or all of the tax increase to consumers means that there is a de facto price reduction for untaxed goods based on the amount of the tax. An additional issue to address is the treatment of small businesses. Exempting small businesses reduces their costs because they only have to verify that they meet the criteria to be exempt from taxation rather than incurring the costs of remitting taxes.[146] The *Wayfair* decision allowed for substantial nexus for taxation to be found based upon virtual and economic contact between consumers and out-of-state businesses,[147] leading to states passing laws that require sellers to remit taxes if they meet a certain sales threshold within the state.[148] Proposed federal legislation allowing for state taxation of online interstate sales has included an exemption for small businesses, generally defining them using thresholds of total annual sales.[149] Under that definition of small business, they are less likely to be required to remit taxes.

However, allowing for exemptions for small businesses is more complicated than it may appear. The initial step of defining small businesses is a complex process. As an example of current definitions, the criterion to qualify as a small business used by the Small Business Administration varies between $2 million and $41.5 million of annual receipts for industries measured financially or from 100 to 1500 employees for industries measured by the number of employees.[150] This suggests that any small business threshold for exemption from taxes set across industries would need to differ significantly between industries. Additionally, the requirements to remit based on economic nexus in individual states mean that businesses are taxed based on the scale of their operations in each state, not their overall size or ability to remit taxes.[151] Small business exemptions protect less-resourced companies from the

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[146] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 25.

[147] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 22 (U.S. June 21, 2018).

[148] *See, e.g.*, *Remote Sellers*, WASH. STATE DEP'T. OF REVENUE, https://dor.wa.gov/taxes-rates/retail-sales-tax/marketplace-fairness-leveling-playing-field/remote-sellers (last visited Dec. 30, 2022); *Remote Sellers, Marketplace Facilitators, and Economic Nexus*, VA. DEP'T. OF TAXATION, https://www.tax.virginia.gov/remote-sellers-marketplace-facilitators-economic-nexus (last visited Dec. 30, 2022).

[149] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 25.

[150] *U,S, Small Business Admin. Table of Small Business Size Standards*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/sites/default/files/2022-09/Table%20of%20Size%20Standards_NAICS%202022%20Final%20Rule_Effective%20October%201%2C%202022.pdf (last visited Dec. 30, 2022).

[151] *See, e.g.*, *Remote Sellers*, *supra* note 148; *Remote Sellers, Marketplace Facilitators, and Economic Nexus*, *supra* note 148.

difficulties of tax compliance because they only have to demonstrate that they ought to be exempt rather than undergoing the entire process of remitting taxes.[152] However, they only apply to some companies, creating market distortions and leaving larger businesses with the full cost of compliance unless additional policy action is taken.

C. Justification for an Interstate Agreement Concerning Tax Base Definitions

In the absence of Congressional action, multistate agreements and simplification provide the best path forward for making tax compliance less complex and costly.[153] Simplification involves steps to streamline the tax remittance and administration process, such as standardizing tax bases and definitions, and establishing centralized methods of tax remittance.[154] Simplification has benefits for both governments and businesses.[155] Governments benefit from reduced administrative burden, and businesses benefit from reduced compliance costs and potential amnesty from previous tax liabilities.[156] Implementation could be done through federal action or multistate agreements, although a federal solution risks overriding states' unique interests, and a state-level approach does not ensure uniformity.[157] However, simplification comes at the cost of local autonomy, and many jurisdictions have significant local support for independent tax bases and administrative authority.[158]

To observe the tradeoffs of simplification policies in practice, consider a similar simplification effort for income taxes. Most states have previously standardized their income tax bases using federal policy.[159] Evidence from income tax standardization shows that standardization reduces compliance costs, as taxpayers can use a single income calculation for state and federal taxes.[160] It also means that state legislatures do not have to spend legislative resources establishing and maintaining their own definitions of taxable income and that state governments can utilize rulings and interpretations about the relevant parts of

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[152] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 25.
[153] *Id.* at 24.
[154] John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605, 610–11 (2005).
[155] *Id.* at 612.
[156] *Id.*
[157] *Id.* at 607.
[158] *Id.* at 613.
[159] Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L. J. 1267, 1269 (2013).
[160] *Id.* at 1279.

the federal tax code.[161] Additionally, standardization discourages protectionist taxation and facilitates interstate commerce by increasing predictability and mitigating barriers to entry for interstate sales.[162] The observed costs are similar to those expected of sales and use tax standardization, specifically that states lose policy autonomy, including some ability to set their own tax incentives.[163] Lack of policy autonomy also hampers states from being able to conduct their own policy experiments.[164] While this evidence comes from an examination of income tax policy standardization, they still are indicative of the tradeoffs states can expect from standardization and simplification efforts for sales taxes involving the same process of standardizing definitions. The costs to state policy autonomy are meaningful, but the evidence shows clear potential for reduced administrative costs for both government and businesses from simplification.

D. Implementation of an Interstate Agreement Concerning Tax Base Definitions

To best balance those costs and benefits of simplification, states should work to implement an interstate agreement standardizing tax definitions but not tax rates. Doing so would minimize administrative burden while maintaining as much policy autonomy as possible. An imperfect starting point for this approach can be seen in the Streamlined Sales and Use Tax Agreement, an administrative simplification agreement that applies to almost all sales and use tax administered by participating states.[165] Those participating states must maintain simplified tax rates, with one statewide and one local rate based upon ZIP codes allowed, and use the same tax base for all jurisdictions within each state.[166] The Streamlined Sales Tax Project drafted the agreement as a means of administrative simplification of state sales and use taxes.[167] In order to make the agreement politically feasible to implement, the Streamlined Sales and Use Tax Agreement only exists as a series of suggestions, and state governments must independently take action to implement its recommendations in order for them to have legal force.[168] As a result, there are currently 23 member states in full compliance with the agreement and one Associate Member State in, "substantial compliance

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[161] *Id.* at 1281.
[162] *Id.* at 1282–85.
[163] *Id.* at 1289.
[164] *Id.* at 1304.
[165] AN OVERVIEW AND GUIDE FOR STATE LAWMAKERS AND TAX ADMINISTRATORS EXPLAINING THE STREAMLINED SALES TAX PROJECT, *supra* note 48, at 4.
[166] STEVEN MAGUIRE, STATE TAXATION OF INTERNET TRANSACTIONS 11 (Congressional Research Service 2013).
[167] Swain & Hellerstein, *supra* note 154, at 609.
[168] *Id.* at 611.

with the terms of the Agreement, but not necessarily with each provision as required by the Streamlined Sales and Use Tax Agreement".[169]

The agreement provides a baseline for what standardization agreements could look like. However, its strict rules about common tax bases and requirement of only one statewide and one local rate for each jurisdiction deprive states and localities of policy autonomy. Therefore, broader adoption of the Streamlined Sales and Use Tax Agreement would not be an optimal solution to state taxation of online interstate sales after the *Wayfair* decision. However, that does not prevent individual aspects of the agreement such as its tax base definitions from serving as a useful starting point for a new agreement. The issues of the Streamlined Sales and Use Tax Agreement are highlighted by the economic literature on optimal taxation. To review, the literature finds that taxes should be levied on individual goods inversely proportional to the change in quantity produced in response to the tax of those goods.[170] While the wide range of elasticities for different goods makes this an aspirational goal rather than a realistic objective, it demonstrates why states may want the flexibility to charge different tax rates for different items to manage the economic distortions created by taxes.[171] The Streamlined Sales and Use Tax Agreement's restrictions on rates demonstrates why broader adoption of the Streamlined Sales and Use Tax Agreement is not an optimal policy option.[172]

Finally, to assist in balancing the tradeoff between simplification and policy autonomy it is important to consider the capabilities and limitations of tax compliance software for businesses. These capabilities inform which simplification policies significantly reduce administrative costs for businesses, and where state policies can differ without generating additional costs for businesses. Existing software is capable of automating the process of determining the amount of taxes that need to be remitted for a specific basket of goods that a consumer has purchased, even before the sale is made.[173] However, non-uniform tax base definitions and categories lead to significant effort for each new jurisdiction

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169 *State Information*, *supra* note 116.
170 *See, e.g.*, Slemrod *supra* note 78, at 159.
171 *See, e.g.*, Tatiana Andreyeva et al., *The Impact of Food Prices on Consumption: a Systematic Review of Research on the Price Elasticity of Demand for Food*, 100 AM. J. PUB. HEALTH 216 (2009).
172 STREAMLINED SALES AND USE TAX AGREEMENT, *supra* note 126, at 19–20.
173 STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 19.

in which a seller must remit taxes.[174] Businesses using tax compliance software still have to complete labor-intensive initial product mapping before the software can be used, and the initial mapping process is more difficult for businesses that sell goods that different states treat differently.[175] A separate burden comes from the fees charged for tax software, which can be prohibitive for some businesses as they can be as high as $200,000 per year, depending on user needs.[176] Because of these limitations of tax compliance software, the need for an agreement to standardize tax base definitions beyond the Streamlined Sales and Use Tax Agreement is clear. Software can conveniently determine the amount of tax that needs to be remitted as a customer is shopping as long as the goods they are shopping for are categorized.[177] Standardizing definitions and streamlining the setup process across states allows states to maintain policy autonomy while minimizing unnecessary costs to businesses.

In summary, the best approach to optimize the system of state taxation of online interstate sales is to encourage states to adopt a voluntary agreement standardizing the definitions used for taxation across states but not restricting the rates that states are allowed to charge. Doing so minimizes compliance costs while maintaining states' policy autonomy. The voluntary nature of this approach uses the Compact Clause precedent from *United States Steel Corp. v. Multistate Tax Comm'n* to avoid possible constitutional issues. Adopting uniform product definitions through an interstate agreement would assist with developing tax compliance software for online interstate sales.[178] Complexity with product definitions and mapping can make it more difficult for businesses, especially less well-resourced small businesses, to expand their operations into different states. It can also discourage interstate commerce because errors while mapping products can lead to liability for businesses if they fail to properly pay taxes as a result of the error.[179] Using a voluntary structure centered on standardizing tax base definitions without restricting the policies states can enact with the agreed-upon definitions also encourages compliance with the agreement by avoiding the political opposition that can arise from those restrictions.[180]

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[174] *Id.* at 17.
[175] *Id.*
[176] *Id.* at 19.
[177] *Id.*
[178] Swain & Hellerstein, *supra* note 154, at 607.
[179] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 18.
[180] *See, e.g.*, Swain & Hellerstein, *supra* note 154, at 613.

Conclusion: The Importance of Taxing Online Sales, and How a Multistate Agreement Balances Competing Interests

Online sales are a large and growing portion of the economy.[181] That means that proper taxation of online sales is essential to both state revenue and economic efficiency. Prior to *Wayfair*, the physical presence standard from *Bellas Hess* and *Quill* meant that state tax policy was dependent upon whether companies chose to locate physical operations in each state, severely restricting states' policy options.[182] By overruling the physical presence rule for substantial nexus from *Bellas Hess* and *Quill* and moving the precedent to an economic nexus standard, *Wayfair* has returned policy autonomy for state taxation of online interstate sales to the states.[183] This has resulted in a new reality in which states have a freer hand to tax online interstate sales to customers within their borders and there is no longer a disincentive for companies to expand their physical operations into additional states.[184]

State taxation of online interstate sales has to balance the competing interests of simplification, compliance costs, and policy autonomy. Tax systems inherently come with compliance costs,[185] which can be minimized through proper design, sufficient simplification, and economies of scale of the tax system.[186] Local governments are likely to oppose simplification that they view as depriving them of policy autonomy, especially simplification that restricts the tax rates that local governments are able to set.[187] Simplification may struggle to gather sufficient political support without demonstrating its merits, as state governments are unlikely to embrace simplification on principle alone.[188] However, avoiding mandating how states set rates on specific categories of goods circumvents many of those political concerns.

This note has argued for standardizing the definitions used for taxation through an interstate agreement, as it prevents many of the significant costs businesses incur by

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[181] *Quarterly Retail E-Commerce Sales 2nd Quarter 2022*, *supra* note 52.
[182] National Bellas Hess v. Dep't of Revenue of Ill., 386 U.S. 758 (1967); Quill Corp. v. North Dakota, 504 U.S. 302 (1992).
[183] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 22 (U.S. June 21, 2018).
[184] Jennifer Mendez Lopez, *Wayfair or No Fair: Revisiting Internet Sales Tax Nexus and Consequences in Texas*, 51 ST. MARY'S L. J. 743, 759 (2020).
[185] FEDERAL LEGISLATION COULD RESOLVE SOME UNCERTAINTIES AND IMPROVE OVERALL SYSTEM, *supra* note 60, at 57.
[186] *See* Slemrod, *supra* note 61.
[187] McLure, *supra* note 97, at 496.
[188] *Id.*

expanding their operations in a way that requires remitting taxes in a new state.[189] While definitions are a potential policy tool, as shown by some states excluding candy from foods that are exempt from taxation, focusing on definitions rather than rate simplification allows states to adopt their own version of the system of optimal taxation described by the economic literature. That balance between simplifying the administrative costs of tax compliance, especially in light of the capabilities and flaws of tax software,[190] is why a multistate agreement focusing on standardization of tax base definitions without restrictions for state tax rates is the best path forward to manage state taxation of online interstate sales.

Sales taxes made up approximately 29.5% of state revenues as of fiscal year 2021,[191] and online sales accounted for over 14% of sales as of mid-2022.[192] Together, these statistics show that states remain dependent on sales taxes, and that the rise of internet sales as a share of purchases means that states must properly tax online sales in order to generate revenue and to avoid economic distortions from dissimilar tax treatments of equivalent goods. State laws passed in the wake of the shift towards economic nexus requirements enabled by *Wayfair* have allowed states to close much of the gap of taxation of online and in-person sales.[193] However, an interstate agreement to standardize tax definitions and enable easier compliance with different state tax systems while allowing states policy autonomy over how they set rates would further improve state taxation of online interstate sales.

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[189] STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESS ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, *supra* note 56, at 19 ("Some tax practitioners that we interviewed said that mapping and system integration related to the necessary software for multistate collection are the most costly of the start-up activities").

[190] *Id.*

[191] Walczak, *supra* note 54.

[192] *Quarterly Retail E-Commerce Sales 2nd Quarter 2022*, *supra* note 52.

[193] *See, e.g.,* William F. Fox et al., *supra* note 103, at 9.

The Historical Practices and Understanding of Religious Establishment in a Post-Lemon World

Alexander E. Lucero

Introduction

Religion has played a significant role in shaping America's history, culture, and national identity. Many early settlers to the Americas were religious refugees and outcasts, searching for a new land where they could practice freely. However, the history of America as a religious refuge is complex and multifaceted. While many early colonists were religious minorities, many subscribed to the Old World theory that sanctioned religious persecution as a necessity to maintain a peaceful and cohesive state. As a Puritan minister remarked, their mission "was not Toleration, but [they] were the professed enemies of it."[1] Yet some, such as Puritan leader Roger Williams, envisioned the potential of this New World as quite the opposite.[2] The worldview of pluralists like Reverend Williams would eventually win the day. This complicated debate would climax during the drafting of the United States Constitution. James Madison famously declared that:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, Unless the preservation of equal liberty and the existence of the State are manifestly endangered; And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[3]

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[1] Persecution in America, *America as a Religious Refuge: The Seventeenth Century*, LIBRARY OF CONGRESS, (Feb. 5, 2023, 10:03 PM) (The minister is unnamed). https://www.loc.gov/exhibits/religion/rel01-2.html.
[2] *See* ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION 19 (1644).
[3] *Madison's Amendments to the Declaration of Rights, [29 May–12 June 1776]*, FOUNDERS ONLINE (Feb. 5, 2023, 10:08 PM), https://founders.archives.gov/documents/Madison/01-01-02-0054-0003.

The Founders believed that religious practice was something that the federal government had no business regulating.[4] Yet the Founders also understood the need for religion and government to be fundamentally separate. They felt the best way to protect religious liberty was to enshrine a prohibition against religious establishment.[5] 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;"[6] protecting Free Exercise,[7] upholding Free Speech,[8] and prohibiting establishment therein.[9] Eventually, the Court would extend the prohibition against "an establishment of religion or prohibiting the free exercise thereof"[10] to the states under the Fourteenth Amendment.[11] However, the contours of this freedom would remain contested throughout America's history.

Contemporary debates about religious liberty largely concern the extent to which religious entities can benefit from government programs.[12] Today, state and federal governments spend more than ever on community programs and entitlements.[13] The Court has tried to maintain a clear separation between religious and civic life without relegating religious practitioners to second-class citizens.[14] Adjudicating under what circumstances religious groups and individuals may benefit from government programs has been a challenge for Courts.[15] Past tests have looked at elements such as legislative motive, the government's effect, and the appearance of religious entanglement.[16] However, the

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[4] *See* VINCENT PHILLIP MUNOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING, NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 31 (2022).
[5] *See* Alexander Hamilton, *A Full Vindication of the Measures of the Congress, &c., [15 December] 1774*, COLUMBIA UNIVERSITY PRESS, (Apr. 10, 2023, 9:25 PM) ("Remember civil and religious liberty always go together…") https://founders.archives.gov/documents/Hamilton/01-01-02-0054.
[6] U.S. CONST. amend. I.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *See* Everson v. Bd. of Educ. & the Twp. of Ewing, 330 U.S. 1, 15 (1947).
[12] *See* Agostini v. Felton, 521 U.S. 203, 211 (1997) (Government may provide secular aid to religious schools for secular purposes); *See also* Bowen v. Kendrick, 487 U.S. 589, 611-612 (1988) (Upheld publicly funded private and religious programs to reduce teen pregnancy); *Cf.* Shurtleff v. City of Boston. Dist., No. 20-1800, slip op. at 1 (U.S. May 2, 2022) (State cannot discriminate solely on religious status).
[13] *See* Fiscal Data.Treasury.gov, DEP. OF THE TREASURY, (April. 10, 2023, 10:38 PM) https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/#key-takeaways
[14] *See Shurtleff*, slip op. at 2 (Gorsuch, J., concurring).
[15] *See* Aguilar v. Felton, 473 U.S. 402, 421 (1985) (O'Connor, J., dissenting). (Argues the element of excessive entanglement between church and State is ill-defined).
[16] Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

government's fear of entanglement with religious entities, may lead the it to alienate religious individuals from the public square. This tension becomes especially apparent when the intent of a government action aligns with religious values.

Most religious individuals believe that their charity and deeds make the world a better place. In Judaism, for example, a guiding principle is *Tikkun Olam*, or "for the sake of repairing the world."[17] As Justice Ginsburg noted in an interview, "growing up Jewish, [there was] the concept of tikkun olam, repairing tears in the community and making things better for people less fortunate."[18] The drive to bring justice to the world is by no means restricted to one community; many religions mandate certain acts of kindness and charity. This does not mean that all those who profess faith have good intentions; it is to say that their intentions are no worse (or better) than the irreligious and agnostic. Many of the services provided by private charities, nonprofits, and the government have also been provided by religious institutions for thousands of years. However, the Constitution places limits on the relationship between church and state. So how, then, should the government understand the role of religious entities in providing religious services or expressing religious beliefs within or with government support?

Until recently, the Lemon Test, adopted by the Supreme Court in *Lemon v. Kurtzman (1971*), governed Establishment Clause analysis.[19] The Lemon Test held that any government action must serve a secular purpose, cannot promote or hinder religion, and must not result in excessive entanglement between government and religion.[20] However, on June 27th, 2022, the Supreme Court released its ruling for *Kennedy v. Bremerton School District (2022)*. The Court upheld the quiet and personal prayer delivered by Coach Kennedy on a public school's football field immediately after the end of a game.[21] The Court explained that the school district mistakenly thought a reasonable observer would see Coach Kennedy's prayer as the school endorsing his faith.[22] The Court disagreed that the school district had an interest in

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[17] *Cf.* M. Gittin 4:2-4:9 (A common interpretation of this principle is for one to do what is just in their dealing with others in order to build the world into a better place).
[18] Sam Sokol, *In Jerusalem, Ruth Bader Ginsburg celebrates her commitment to tikkun olam*, JEWISH STANDARD, Jul. 12, 2018, https://jewishstandard.timesofisrael.com/in-jerusalem-ruth-bader-ginsburg-celebrates-her-commitment-to-tikkun-olam/.
[19] *But cf.* Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 22 (U.S. June 27, 2022).
[20] *Lemon*, 403 U.S. at 612-613.
[21] *See Kennedy*, slip op. at 1.
[22] *See Id.*

maintaining disestablishment and ruled that the Establishment Clause does not "require the government to single out private religious speech for special disfavor."[23] With Justice Neil Gorsuch writing for the majority, the Court effectively abandoned the Lemon Test in favor of the *historical practices and understanding approach*: "[That] the line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers."[24] The Court characterized the Lemon Test as an aberration compared to the long-standing rule of judging incorporated rights by their original meaning and history.[25] However, this presents a problem for advocates of government funding for religious and private secular organizations alike. As Justice Sotomayor aptly identified in her dissent, "the Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound."[26]

Examples of colonial religious establishments provide a valuable guide to interpreting First Amendment controversies.[27] Still, distinguishing how the Founders understood religious liberty from how the ratifiers of the Fourteenth Amendment understood incorporation is essential to understanding what constitutes religious establishment. Until recently, the Lemon Test often mistakenly characterized free exercise as Establishment Clause violations.[28] While Justice Gorsuch is correct that the Court has no place defining religious establishment in a way that does not honor its historical context, the application of the Establishment Clause has not always been consistent or clear. The Court should explicitly address how the incorporation of the First Amendment will affect their historical analysis. While there is no single throughline in Religion Clauses jurisprudence, this note draws on historical practice, discussions of religion by the Founders, and legal precedent to show that the Establishment Clause was drafted with *substantive neutrality* in mind. This note presents a brief history of colonial-era religious establishments and the Founders' views

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[23] *Id.*
[24] *Kennedy*, slip op. at 23.
[25] *See Id.* at 24.
[26] *Id.* at 29.
[27] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 WILLIAM & MARY L.R. 2105, 2131 (2003) (Discussing religious establishment in the colonies).
[28] *Id.* at 24.

on religious liberty, demonstrating how both influence how we should understand the First Amendment. It also argues that while *Kennedy* presents a departure from four decades of precedent, it is rooted in a method of examination with a long historical foundation. Finally, this note proposes a new constitutional test to address Establishment Clause controversies.

I. Kennedy v. Bremerton: Departure or Return?

A. The Conventional Compromise of Conscience

Even at its founding, the United States was rich in its religious diversity. Anglicans occupied the South, Roman Catholics resided in Maryland, Quakers lived in Pennsylvania, Puritans populated New England, and Jewish congregations gathered from Rhode Island to Georgia. The Church of England was the established religion in many of the Southern colonies, and in the Northern colonies Puritans held immense sway.[29] In the North and the South, the established churches bitterly fought the dissenting Baptists and Evangelicals on whether these churches should receive governmental aid.[30] Some felt that aid to religious institutions was always wrong, whereas others believed that assistance need only be available to all.[31] Established churches had government-appointed clergy, colonists paid religious taxes, and some colonies even compelled attendance at church services.[32] Religious dissenters ardently opposed these practices, arguing in favor of a *wall of separation*; first outlined by evangelical pastor Roger Williams in 1644.[33] Williams believed the Church was above the mundane workings of the world and that injecting religion into politics debased religious observance.[34] To illustrate this, Williams used the metaphor of the walled garden, alluding to the walled Garden of Eden as the ideal of religion.[35] He argued that the Church is at its best when it is walled from the politics of the world. Biblical allusions, and especially

[29] *See* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 689 (W. W. Norton & Company eds., 10th ed. 2011).
[30] *See Id.*
[31] *See Id.* at 688.
[32] *See* McConnell, *supra* note 27, at 2110-2131. (Discussing examples of colonial establishment).
[33] *See* O'BRIEN, *supra* note 29, at 688
[34] *See Id.* at 691.
[35] *See Id.*

the "wall" between church and state, were commonplace in many of the Founders' writings on religious liberty.[36]

In 1788, the First Congress of the United States ratified the Constitution, but some ratifiers worried that the lack of enumerated rights for the citizenry would inevitably lead to political and possibly religious tyranny.[37] Baptist preacher John Leland published his objections to the Constitution, where he argued, "What is dearest of all---Religious Liberty, is not Sufficiently Secured...if a Majority of Congress with the prsedent [sic] favour one Systom [sic] more then [sic] another, they may oblige all others to pay to the Support of their System as much as they please."[38] Religious minority groups, such as colonial-era Jews, who were less involved in politics hoped to secure religious freedom under the new government.[39] The only petition on the topic of religious liberty submitted to the 1787 Constitutional Convention in Philadelphia was from Jonas Phillips, a German Jewish immigrant who wrote, "The Israeletes [sic], will think them self-happy to live under a government where all Relegious [sic] socieities [sic] are on Eaquel [sic] footing."[40] With James Madison as their representative, the First Amendment that was introduced by the states to protect religious liberty, stating: "the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner or on any pretext infringed."[41] Not long after, Congress adopted a version of this statement enshrining religious liberty, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[42] These clauses would become known respectively as the Establishment Clause and the Free Exercise Clause.

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[36] *See* O'BRIEN, *supra* note 29, at 691.; *See also* Letter from Thomas Jefferson, President, U.S., to Nehemiah Dodge & Ephraim Robbins & Stephen S. Nelson, committee members, Danbury Baptist Association (Jan. 1, 1802) (on file with the Library of Congress).

[37] *But cf.* THE FEDERALIST NO. 84 (Alexander Hamilton) (on file with the Library of Congress) (Hamilton addresses the concerns of Anti-Federalists that the Constitution does not enumerate rights).

[38] Letter from Joseph Spencer, Member, Connecticut Council, to James Madison, President, U.S., (Feb. 28, 1788) (on file with the Library of Congress).

[39] Jonathan D. Sarna, *American Jews and Church-State Relations: The Search for Equal Footing,* AMERICAN JEWISH COMMITTEE PAMPHLET, 1989, at 1.

[40] *Id.*

[41] James Madison, *Speech in the House of Representatives*, N.Y. DAILY ADVERTISER, June 8, 1789, at A1.

[42] U.S. CONST. amend. I.

While not instructive, correctly characterizing the role of religious liberty at the time of the founding is useful to understanding the original meaning of the Establishment Clause. Identifying what religious liberty is helps illuminate when government action does and does not constitute religious establishment. In a 1790 letter, George Washington writes what may be one of the most important articulations of what living in a religiously diverse society means. Addressed to the Hebrew Congregation in Newport, Rhode Island, Washington thanked them for their hospitality, saying that:[43]

> It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support…every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.[44]

Washington draws upon the Prophet Micah of the Hebrew Bible, who describes a world without war in which "[al]though all the people walk each in the name of its gods, we will walk in the name of the LORD our God."[45] While that vision of "each under his own vine and fig tree"[46] is an ideal rather than a realistic arrangement, there has long been a recognition that one of the foundational principles of America was religious diversity.

Thomas Jefferson's 1802 letter to the Danbury Baptist Association alludes to Williams' famous articulation of the necessity of a *wall of separation* between church and state but justifies this view it from a different perspective:[47]

> Believing with you [Danbury Baptist Association] that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole of the American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[48]

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[43] From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790.
[44] *Id.*
[45] Micah 4:4-4:6.
[46] Letter from George Washington to Hebrew Congregation, *supra* note 43.
[47] Letter from Thomas Jefferson, President, U.S., to Nehemiah Dodge & Ephraim Robbins & Stephen S. Nelson, committee members, Danbury Baptist Association (Jan. 1, 1802) (on file with the Library of Congress).
[48] *Id.*

Both Williams and Jefferson advocated for a *wall of separation.*[49] Further, Jefferson's Virginia Statute for Religious Freedom outlined that the government cannot compel attendance to a house of worship, nor can it harass or punish citizens for their religious beliefs.[50] Disestablishment protects citizens against the government coercing them into activities they find immoral.[51] Neither Jefferson nor his intellectual predecessor Williams explicitly called for a ban on what we would now characterize as the appearance of entanglement between religious and civic symbols. In fact, on July 4th, 1776, Congress appointed Jefferson, John Adams, Benjamin Franklin, and Pierre Eugene du Simitiere to the first committee to design the official seal of the United States.[52] While Congress would ultimately not adopt their design, the committee's final report to Congress consisted of a two-part design, with Lady Liberty on one side and imagery from the biblical Exodus on the other.[53]

> On the other side of the said Great Seal should be the following Device. Pharoah sitting in an open Chariot a Crown on his head & a Sword in his hand passing through the divided Waters of the Red Sea in Pursuit of the Israelites: Rays from a Pillow Fire in the Cloud, expressive of the divine Presence & Command, beaming on Moses who stands on the shore and extending his hand over the Sea causes it to overwhelm Pharoah.
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> Motto. Rebellion to Tyrants is Obedience to God.[54]

However, Congress had more pressing matters, and rather than debate this new design, Congress tabled the First Committee's proposal.[55] However, it should be noted that the final design that Congress adopted in 1782 did not contain any reference to the biblical figure Moses or the Israelites Exodus from Egypt.[56]

Not all the Founders were as comfortable with religious iconography as Jefferson and Franklin. In an 1822 letter to Edward Livingston, James Madison laments the practice of paying Congressional Chaplains from the National

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[49] *See* O'BRIEN, *supra* note 29, at 691.
[50] *See* WILLIAM WALLER HENNING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84-86 (1823).
[51] *See Id.*
[52] *See* RICHARD S. PATTERSON ET AL., THE EAGLE AND THE SHIELD 51 (Off. Historian, Bureau of Pub. Aff., Dep't of State eds, 1976).
[53] *See Id.* at 71.
[54] *Id.* at 72.
[55] *See Id.*
[56] *See Id.*

Treasury.[57] Madison also notably opposed the use of Executive Orders to declare religious holidays.[58] Madison writes, "[Executive Proclamations] have lost sight of the equality of *all* Religious Sects in the eye of the Constitution."[59] While Madison publicly called for a stricter separation between church and state than Jefferson, both agreed that "the legitimate powers of government reach actions only, and not opinions[.]"[60] Madison wrote in his letter to Livingston that "[I am pleased] you have taken of the immunity of Religion from Civil Jurisdiction, in every case where it does not trespass on private rights or the public peace."[61] And while Madison did lament the use of religious icons in government, he wrote that "As the precedent [of Congressional Chaplains] is not likely to be rescinded, the best that can now be done may be, to apply to the Constitution, the maxim of the law, *de minimis non curat*."[62] In other words, Madison believed that it is best to ignore the insignificant details and combat religious establishment pragmatically. The prohibition against establishing a state religion initially only pertained to Congress, but by popular demand, all states had disestablished religion by 1833.[63] Outlining founding debates about the line between church and state helps contextualize current controversies surrounding the Court's application of the Religion Clauses.

B. The Lemon Test: The Wall Between Church and State

By the 20th century, the Court affirmed that the Free Exercise Clause applied to the states, but the Court had yet to opine on whether the same was true of the Establishment Clause.[64] This changed in *Everson v. Board of Education (1947)*, where the Court ruled on a state program that reimbursed the busing of students to overwhelmingly Catholic private schools.

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[57] Letter from James Madison, President, U.S., to Edward Livingston, Lawyer, N. Y. Bar (Jul. 10, 1822) (on file with the National Archives).
[58] *See Id.*
[59] *Id.*
[60] Letter from Thomas Jefferson, President, U.S., to Nehemiah Dodge & Ephraim Robbins & Stephen S. Nelson, committee members, Danbury Baptist Association (Jan. 1, 1802) (on file with the Library of Congress).
[61] Letter from James Madison to Edward Livingston, *supra* note 57.
[62] *Id.*
[63] *See* Marci A. Hamilton & Michael M. McConnell, *Common Interpretation*, NAT'L CONSTITUTION CTR. (Jan. 9, 2023, 5:51 PM), https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264#:~:text=Congress%20shall%20make%20no%20law,for%20a%20redress%20of%20grievances.
[64] *See* Reynolds v. United States, 98 U.S. 145, 167-168 (1879).

The Court first looked to the Founders' intent, citing the works of James Madison and Thomas Jefferson, who drafted the First Amendment. The Court pointed to the Virginia Bill for Religious Liberty, drafted by Jefferson, to see another example of what the founders meant by religious liberty.[65] The Virginia bill disestablished the Church of England, the first among many states to do so over the coming century.[66] Additionally, the Court argued that because the fundamental concept of liberty includes free exercise, which state governments cannot inhibit without due process, the same should be true of the prohibition against establishment.[67] Thus, the First Amendment requires neutrality in its relations between religious believers and non-believers.[68] The Court ruled that the government could not deny generally applicable public benefits to recipients solely on the basis of that beneficiaries' religious status.[69] Additionally, they ruled that the aid was sufficiently separate from the school's parochial life.[70] In upholding this program, the Court affirmed that just as the Free Exercise Clause applies to the states, so too does the Establishment Clause:[71]

> The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.[72]

Ironically, the Religion Clauses were incorporated in a case where the Court upheld financial aid, albeit indirectly, for a religious institution providing a public service, highlighting the imprecise line between church and state.[73]

After recognizing the incorporation of the Establishment Clause, the Court wrestled with how to create a framework to help the lower courts decide the constitutionality of cases involving the establishment or free exercise of religion. More specifically, the Court had yet to define what constitutes neutral relations between church and state. In *School District of*

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[65] *See Id.* at 12-14.
[66] *See* Everson v. Bd. of Educ. & the Twp. of Ewing, 330 U.S. 1, 11-12 (1947).
[67] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *See also* Everson v. Bd. of Educ. & the Twp. of Ewing, 330 U.S. 1, 15 (1947).
[68] *See Everson*, 330 U.S. at 18.
[69] *Id.* at 17.
[70] *Id.* at 18.
[71] *Id.* at 14-15.
[72] *Id.* at 15.
[73] *Id.*

Abington Township, Pennsylvania v. Schempp (1963), the Court attempted to craft an Establishment Clause test.[74] The constitutional test was two-pronged, stating that a government action must serve a secular legislative purpose and primary effect of the action cannot be to advance or hinder religion.[75] Almost a decade later, in *Lemon v. Kurtzman (1971)*, the Schempp Test was used to determine whether programs from two states subsidizing teachers' salaries, school textbooks, and secular instructional materials at religious elementary schools violated the Establishment Clause. Using the newly dubbed Lemon Test, the Court struck down these programs because religious elements could easily be woven into students' secular curriculum.[76] In deciding *Lemon*, the Court built on the test laid out in *Schempp*. The Court held that "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion."[77] The Court further reasoned that "a given law might not establish a state religion but nevertheless be one respecting that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[78] The Lemon Test, in outlining these broad elements, gave judges considerable discretion in outlining Establishment Clause violations. Judicial review of state and federal statutes would come to especially center around what qualifies as a primary effect of advancing or inhibiting religion, as well as defining a judiciable standard of excessive entanglement.[79]

In *Grand Rapids School District v. Ball (1985)*, the Court considered a program that used public money to provide classes for all non-public school students. The school district tried to distinguish its program from those in *Lemon*; classes were taught by part-time public school teachers, and the government formally leased the classrooms within the private schools.[80] Still, the Court ruled that this program violated the Lemon Test's second prong as it promoted religion.[81] Importantly, most of the non-public schools participating in the

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[74] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963).
[75] *See Id.*
[76] Lemon v. Kurtzman, 403 U.S. 602, 618 (1971).
[77] *Id.* at 612-613.
[78] *Id.* at 612.
[79] *Lemon*, 403 U.S. at 612; *See* Aguilar v. Felton, 473 U.S. 402, 420-421 (1985) (O'Connor, J., dissenting).
[80] Grand Rapids Sch. Dist v. Ball, 473 U.S. 373, 375 (1985).
[81] *Id.* at 385.

program were religious schools.[82] The Court feared that using non-public forums and teachers would enable the teachers to incorporate religious content into their instruction.[83] Additionally, the Court argued that students might believe that the state supported their religious education.[84] And finally, the Court reasoned that these programs effectively subsidized religious education by allowing secterian schools to presumably reallocate resources back to religious instruction.[85]

Aguilar v. Felton (1985) struck down a program similar to *Grand Rapids School District v. Ball (1985)*.[86] Yet the program notably included mandatory monitoring of teachers to ensure that they conducted religious and secular instruction separately.[87] The Court also entertained the idea that this difference could overcome Lemon's second prong,[88] but ultimately ruled that this program did violate the Lemon Test as the government oversight promoted excessive entanglement, violating Lemon's third prong.[89] Justice O'Connor vehemently disagreed with the majority in *Aguilar*. In her dissent, Justice O'Connor explained that Lemon's second prong is that a government action's primary effect cannot advance or inhibit religion.[90] However, the effects-based evaluation of prong two requires oversight that necessitates what the Court would then evaluate as excessive entanglement, violating Lemon's third prong.[91] Justice O'Connor questioned what then would pass all three prongs. Separately, Chief Justice Rehnquist argued that the objections raised by Justice O'Connor revealed that the Lemon Test was a constitutional catch-22.[92] The question of what role the government can play in oversight of programs that would benefit religious institutions would come to drive Establishment Clause controversies in the coming decades.

C. The Development of True Private Choice

[82] *Id.* at 375.
[83] *Id.* at 386-387.
[84] *Id.* at 388-389.
[85] *Id.* at 393.
[86] Aguilar v. Felton, 473 U.S. 402, 409 (1985).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 421 (O'Connor, J., dissenting).
[91] *Id.* at 420-421 (O'Connor, J., dissenting).
[92] *Id.*

For the next five decades, the Lemon Test was the standard for determining Establishment Clause violations.[93] Yet in the early 1980s, the Court's decision in *Mueller v. Allen (1983)* advanced the *child-benefit theory* that posits the government may give aid to religious entities if the primary purpose and effect is to benefit the child.[94] While past programs had tried to subsidize secular subjects in private schools through the schools themselves, this program directly distributed the benefits through the students. The monetary benefits were tax deductions to parents with children in private or public elementary and secondary schools for items such as tuition, textbooks, and transportation.[95] The Court affirmed this program, establishing that the *child-benefit theory* only applied when state benefits were distributed through families.[96] *Witters v. Washington Department of Services for the Blind (1986)* expanded upon the child-benefit theory in the case of a student who wanted to use a tuition assistance program to pursue an education as a Christian minister.[97] Washington State claimed that using public funds for religious education in the Christian ministry would violate the Establishment Clause.[98] The Justices unanimously rejected this argument, instead holding that the State could not prevent a student from using their general, public benefits to pursue a religious education.[99]

In *Zobrest v. Catalina Foothills School District (1993),* the Court again emphasized the centrality of individual choice in determining the constitutionality of giving public funds to religious institutions.[100] Here, the Court addressed whether the State wrongly denied an interpreter to a deaf student who attended a religious school.[101] The Court affirmed public funding for the disabled student's interpreter, stating that the state had no business incentivizing a parent to alter their choice to send their child to sectarian school.[102] Additionally, the Court ruled that the program created no financial incentives for parents to choose sectarian schools over public schools.[103] *Zobrest* overruled *Aguilar's* ruling by holding

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[93] *See* Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 22 (U.S. June 27, 2022).
[94] Mueller v. Allen, 463 U.S. 388, 395 (1983).
[95] *Id.*
[96] *Id.* at 399.
[97] Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481, 488 (1986).
[98] *Id.* at 482.
[99] *Id.* at 487-488.
[100] *See* Zobrest v. Catalina Foothills Sch. Dist, 509 U.S. 1, 9 (1993).
[101] *See Id.* at 3.
[102] *See Id.* at 9-10.
[103] See *Id.* at 10.

that government oversight of funds could sometimes allow religious entities to participate in government programs, further blurring the rigid boundaries set forth in *Lemon* between free exercise and establishment.[104] These rulings seemed to undercut the test set forth in Lemon.[105] *Zobrest* and *Witters* acknowledged that in some cases, entanglement is incidental to an individual exercising their constitutional rights.[106]

Less than a decade later in *Zelman v. Simmons-Harris (2002)*, the Court evaluated the constitutionality of a school voucher program that primarily benefited private Catholic schools.[107] The Court upheld this program, ruling that the fact that public aid went to religious schools (and further, to schools of one denomination) did not result from government incentives but from the organic choice and composition of the community.[108] The Court cited *Mueller*, *Witters*, and *Zobrest* and distilled these decisions into the doctrine of *true private choice*.[109] The Court held that government programs could indirectly fund religious entities if the funding goes through individuals who participate in these religious goods by *true private choice*.[110] The Court proceeded to define *true private choice* as the availability of a broad range of secular alternatives.[111]

The Court also found another exception to the Lemon Test for religious institutions receiving funding directly from the government.[112] *Bowen v. Kendrick (1988)* held that the federal government could fund some faith-based groups that provided sex education.[113] The Court held that nonsectarian programs that provide public goods devoid of religious references are constitutional.[114] The Court clarified this in *Agostini et al. v. Felton et al. (1997)*,

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[104] See *Id.* at 12. ("Disabled children, not sectarian schools, are the primary beneficiaries of the IDEA;").
[105] See *Id.* at 10. ("In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision making.").
[106] *See Id.* at 13-14. (The Court focuses on who benefits from the government program, not the issue of entanglement, and finds the handicapped child is the beneficiary, not the sectarian school).
[107] Zelman v. Simmons-Harris, 536 U.S. 639, 639-640 (2002).
[108] *Id.* at 656-657.
[109] Mueller v. Allen, 463 U.S. 388, 400 (1983); Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481, 487-488 (1986); *Zelman*, 536 U.S. at 653; *Zobrest*, 509 U.S. at 9-10.
[110] *Zelman*, 536 U.S. at 652-653.
[111] Zelman v. Simmons-Harris, 536 U.S. 639, 652-653 (2002) (*Zelman* has been used to uphold publicly funded religious alternatives to substance abuse programs).
[112] Bowen v. Kendrick, 487 U.S. 589, 611-612 (1988) (Dealt with a program that provided federal funding to organizations focused on reducing teenage pregnancy. Several of the organizations that received funding were tied to religious denominations).
[113] *Id.*
[114] *Id.* at 612-613.

ruling that the government may provide aid to religious schools so long as the aid is in the form of secular resources for secular purposes.[115] *Agostini* affirmed *Zobrest*, ruling that the oversight of religious institutions receiving government aid was not excessive entanglement.[116] *True private choice* presents yet another framework for evaluating the extent to which government action is directly or indirectly coercive. To be sure, opponents are fair to point out how one person's private choice (to attend religious schools) is what another person might characterize as coerced payment to support religion. However, some state and local governments engage in a variety of public-private partnerships. While these partnerships are not entirely analogous, one would not accuse the government of supporting any specific organization outside the writ of a specific task, event, or public service. In fact, permissible programs and benefits dealing with religious entities require the even higher standard of general applicability and a primary purpose that is not religious.[117] Furthermore, the Court has ruled that while taxpayers generally lack standing to sue the federal government over how it spends its budget, taxpayers do have standing to sue when that program may violate the Establishment Clause.[118] *True private choice* tempers Establishment Clause analysis by forcing the courts to consider whether government action that appears to advance religion is truly the result of government endorsement, or the result of individual decisions. The goal of the Religion Clauses is to confine the promotion of religion to the level of the individual, not to alienate religion from the public square.

D. Untangling Secular and Religious Holiday Symbols

Another interesting area where the Establishment Clause controversy has manifested is over holiday displays on government property. Controversies of this kind help illustrate the limitations of using the element of excessive entanglement and defining it on the basis of a reasonable observer's perception.[119] The Reindeer Rule, also known as the Three Plastic Animal Rule, is an Establishment Clause principle derived from the Court's application of the Lemon Test in *Lynch v. Donnelly (1984).*[120] This case dealt with the

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115 Agostini v. Felton, 521 U.S. 203, 211 (1997).
116 *Id.* at 203, 232-234.
117 *See* Mueller v. Allen, 463 U.S. 388, 395 (1983); *See also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
118 Flast v. Cohen, 392 U.S. 83, 88 (1968) (Ruled that Establishment Clause may grant litigants standing when the taxpayer sues over the constitutionality of a federal program).
119 *Cf.* Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 22 (U.S. June 27, 2022).
120 Lynch v. Donnelly, 465 U.S. 668, 686 (1984).

constitutionality of an annual holiday display in Pawtucket, Rhode Island.[121] The city funded the display annually, but the park was owned by a local nonprofit.[122] The display was designed to encompass the holiday season and represent a variety of religious practices.

> The display is essentially like those to be found in hundreds of towns or cities across the Nation…many of the figures and decorations traditionally associated with Christmas, including among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche [nativity scene] at issue here. All components of this display are owned by the city.[123]

Members of the Rhode Island American Civil Liberties Union brought legal action to challenge the city's inclusion of the nativity scene, arguing that the display "confers more than a remote and incidental benefit on Christianity."[124] The Court ruled that finding a religious benefit from including the nativity scene would require an overly critical framing, inconsistent with past decisions.[125] The Court begins by noting that the First Congress that approved the Religion Clauses enacted legislation a week later "providing for paid Chaplains for the House and Senate."[126] The Justices reinforce this point by citing *Marsh v. Chambers (1983)*, noting that where the very drafters of the amendment, not just the Founding generation, saw no conflict, neither would the Court.[127] The Court cites the unbroken practice of legislative prayer over the past two centuries as an example of accommodation beyond mere toleration.[128] The Court additionally looks to the practice of President Washington declaring the national holiday of Thanksgiving, later ratified by Congress, celebrated with the religious undertones of thanking God for the country's gifts and bounties.[129] The Justices also looked to the Acts of Congress and Executive Orders that proclaimed Christmas and Thanksgiving national holidays, where Federal Employees are

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[121] *Id.* at 671.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 672.
[125] *Id.* at 681.
[126] *Id.* at 674.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 675.

given paid days off.[130] The Court also looked to the examples of the national motto, "In God We Trust,"[131] and the art galleries that house religious artwork from the 15th and 16th centuries that are supported by public revenue.[132] The list continues by noting the stone carving of Moses holding the Ten Commandments that rests atop the chamber where the Supreme Court hears cases, as well as the accommodations in the Capitol building for religious worship and meditation.[133] The Court ruled that in this case, the nativity scene was merely a passive reminder of the origins of Christmas among other religious symbols and secular accompaniments.[134] The Court ultimately concluded that the Constitution expressly mandates some accommodation and not mere tolerance or "callous indifference."[135]

The Court considered a similar question in *Allegheny County v. ACLU (1989)*. Here, the Court considered the constitutionality of two annual holiday displays; a creche donated by the Holy Name Society, displayed in the courthouse's main room, and an 18-ft Menorah and 45-ft Christmas tree displayed outside the County Building.[136] The Court additionally noted the absence of Santa Claus and secular symbols, distinguishing it from the creche in *Lynch v. Donnelly (1984).*[137] An Orthodox Jewish Group, Chabad, owned the Menorah, but the city erected and stored it annually.[138] The second display contained both the Menorah and a Christmas tree, with a plaque underneath that read "Salute to Liberty."[139] The Court notes that the word "endorsement" is not self-defining and has a historical context, and "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same."[140] In *Allegheny County v. ACLU (1989)*, the Court relies on Justice O'Connor's concurrence in *Lynch* and bases the Endorsement Test on the Reindeer Rule.[141]

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130 *Id.* at 676.
131 *Lynch*, 465 U.S. at 676; *See also* 36 U.S.C. § 186.
132 *Lynch*, 465 U.S. at 676.
133 *Id.* at 677.
134 *Id.* at 685.
135 Zorach v. Clauson, 343 U.S. 306, 314 (1952); *Lynch*, 465 U.S. at 673.
136 Allegheny Cnty. v. Greater Pittsburgh ACLU, 492 U.S. 573, 578 (1989).
137 *Id.* at 579.
138 *Id.* at 587.
139 *Id.* at 582.
140 *Id.* at 573.
141 *Allegheny*, 492 U.S. at 595 (Justice O'Connor first advocated for the Endorsement Test in *Lynch*). *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

This rule attempts to discern what viewers may understand as the display's purpose.[142] Justice Blackmun outlines the Endorsement Test as: (1) does this action have the effect of endorsement of religious belief, and (2) is the use of religious symbols appropriate in the broader context of its display?[143] Based on the setting of the courthouse creche, the Court ruled that the effect of this creche was to communicate a religious message through the government.[144] In contrast, the Court ruled that Jewish and Christian symbols are neither necessary nor sufficient to constitute religious establishment.[145] The Court reasoned that because the Christmas Tree and Menorah have sufficient secular meanings—the context provided by the mayor's sign celebrating freedom of belief or no belief at all—no endorsement occurred.[146] However, there are problems accompanying the Endorsement Test. Just as "one man's vulgarity is another's lyric,"[147] one man's celebration is another's endorsement.

The Court refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."[148] The Court noted that the Lemon Test risks confining the Court to one analysis that proved is insufficient for all controversies.[149] To be sure, the Lemon Test captures some essential principles of separation between church and state.[150] However, the fundamental flaw of the Lemon Test is not its conceptual logic but its practical application. Discerning a government action's primary purpose and effect is hard enough, but evaluating an appearance of excessive entanglement is often in the eye of the beholder. What exactly does an establishment of religion look like?

II. Interring Lemon: Religiosity or Religious Establishment?

A. The Historical Practice and Understanding Analysis

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142 *Allegheny*, 492 U.S. at 595.
143 *Id.* at 597.
144 *Id.* at 599-600.
145 *Id.* at 614.
146 *Id.* at 617-619.
147 Cohen v. California, 403 U.S. 15, 25 (1971).
148 Walz v. Tax Comm'n, 397 U. S. 664, 671 (1970); *See also* Lynch v. Donnelly, 465 U.S. 668, 678 (1984).
149 *Lynch*, 465 U.S. at 679.
150 *See* Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

Even as the Court carved out a plethora of exceptions to the Lemon Test, the test remained the controlling Establishment Clause test. The child-benefit theory, the doctrine of *true private choice*, and the Court's decisions regarding public religious symbols signaled a shift. *Town of Greece v. Galloway (2014)* opened the door for the Court to outline an alternative to *Lemon*.[151] Beginning in 1999, the Town of Greece in New York opened its meetings with a prayer from a local faith leader.[152] The local legislature called local faith leaders until a list was formed of clergy willing to come to give the prayer.[153] The town never excluded, nor denied, anyone who asked to give the opening prayer, maintaining that anyone, including atheists, could give the opening prayer.[154] However, from 1999 to 2007 nearly all the local congregations were Christian; the issue at hand was whether this opening prayer had the effect of promoting Christianity by government means.[155] Writing for the majority, Justice Kennedy discussed the history of prayer in opening Congress and state legislatures.[156] The Court had previously held that the funding of federal and state chaplains is permissible due to the unique history of the United States, the same principle of history of practice supported opening legislative meetings with prayer.[157] The Court then determined that sectarian prayer also fits within the historical practice of state and federal governments, so long as ministers of many creeds have the equal opportunity to participate.[158] If instead, the Court empowered the government to review prayers and remove sectarian references, then the government produced the final religious product; this type of behavior facially violates the Establishment Clause.[159]

American Legion et al. v. American Humanist Association et al. (2018) signaled a definitive turning point.[160] The Court declined to use the Lemon Test and explicitly dismissed the Lemon Test's relevance.[161]

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[151] *See* Town of Greece v. Galloway, No. 12-696, slip op. at 6 (U.S. May 5, 2015) (Ruled that opening legislative meetings with prayer is in accordance with the history and tradition of the United States).
[152] *Id.* at 2.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* at 1-2.
[157] *Galloway*, slip op. at 6; Marsh v. Chambers, 463 U.S. 783, 786 (1983).
[158] *Galloway*, slip op. at 11.
[159] *See Galloway*, slip op. at 13.
[160] American Legion v. American Humanist Ass'n., No. 17-1717, slip op. at 16 (U.S. June 20, 2019).
[161] *Id.* at 12.

> When time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral... A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.[162]

Citing a multitude of opinions, including *Zobrest v. Catalina Foothills School District (1993), Zelman v. Simmons-Harris (2002),* and *Town of Greece v. Galloway (2014),* Justice Alito explained that the fact that the Court often declines to use the Lemon Test is a testament to its shortcomings.[163] He goes on further, quoting Justice Breyer in *Van Orden v. Perry (2005)* that the Lemon Test fails to explain "the prayers that open legislative meetings... the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving."[164] In her dissent, Justice Kagan warned that while the Lemon Test rightly focuses on purpose and effect, courts should not rigidly apply it.[165] Justice Alito instead advocated for a presumption of constitutionality for long-standing monuments, symbols, and practices.[166]

Debates about the Lemon Test culminated when the Court issued its successive rulings in *Shurtleff v. Boston (2022)*, *Carson v. Makin (2022)*, and *Kennedy v. Bremerton (2022)*. In *Shurtleff v. Boston (2022)*, the Court examined a program in the city of Boston that allowed individuals to petition to raise a flag on a government flagpole.[167] Boston declined to raise a flag with a Christian Cross, believing this violated the Establishment Clause.[168] The Court unanimously held that barring the petitioner from this general program discriminated against their free speech based on its religious content.[169] They held that the speech was not the government speech, but the petitioner's speech.[170] This landmark decision rejected earlier interpretations of the Lemon Test that would have characterized this display as the appearance of a religious establishment.[171]

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[162] *Id.* at 2.
[163] *Id.*
[164] Van Orden v. Perry, 545 U.S. 677, 699 (2005).
[165] *American Legion*, slip op. at 1 (Kagan, J., concurring in part).
[166] *American Legion*, slip op. at 16.
[167] Shurtleff v. City of Boston. Dist., No. 20-1800, slip op. at 1 (U.S. May 2, 2022).
[168] *Id.* at 2.
[169] *Id.*
[170] *Id.*
[171] Allegheny Cnty. v. Greater Pittsburgh ACLU, 492 U.S. 573, 578 (1989) (Ruled the indoor courthouse creche was religious endorsement by government whereas the outdoor holiday scene was not).

Justice Gorsuch's concurrence in *Shurtleff* foreshadowed the argument that would be used to discard the Lemon Test as a form of Establishment Clause analysis:

> Ultimately, *Lemon* devolved into a kind of children's game. Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for this reaction. How does he *feel* about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he *feels* it "endorses" religion. If so, game over. Faced with such a malleable test, risk-averse local officials found themselves in an ironic bind. To avoid Establishment Clause liability, they sometimes felt they had to discriminate against religious speech and suppress religious exercises. But those actions, in turn, only invited liability under other provisions of the First Amendment.[172]

Additionally, Justice Gorsuch wrote that "until Lemon, this Court had never held the display of a religious symbol to constitute an establishment of religion."[173] He even went so far as to contend that in order to discriminate against religion, Boston had tried to revive the Lemon Test, stating that "Lemon ignored the original meaning of the Establishment Clause…, disregarded mountains of precedent, and… substituted a serious constitutional inquiry with a guessing game." Thus, Gorsuch argued that "it is past time for local officials and lower courts to let the Lemon Test lie."[174] This decision marked a decisive change.

Not long after, the Court took on *Carson v. Makin (2022)* which questioned whether the Maine Department of Education could deny funding from a general education program to parents seeking to use it to send their children to sectarian schools.[175] The petitioners claimed that the Department's decision to exclude nonsectarian schools violated the First Amendment's Establishment Clause and Free Exercise Clause, as well as the Fourteenth Amendment's Equal Protection Clause.[176] The program in question offered tuition assistance for parents in school districts without a secondary school or contract with a particular school in their district.[177] The Court held that under this general program, denying public funding to families seeking to give their kids a religious education constituted an

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[172] *Shurtleff*, slip op. at 4 (Gorsuch, J., concurring).
[173] *Shurtleff*, slip op. at 12-13.
[174] *Id.* at 13.
[175] Carson v. Makin, No. 20-1088, slip op. at 1 (U.S. June 21, 2022).
[176] *Id.* at 5.
[177] *Id.* at 1.

indirect penalty for the free exercise of religion.[178] The majority wrote that "A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[179] This is not to say that the state must provide public funds for religious schools at an equal rate but that a general program cannot discriminate against religious schools solely on their religious status when that funding follows the independent choices of private recipients.[180] Nowhere in the opinions—the majority or the dissents—is there any mention of the Lemon Test. An opinion based on the Lemon Test would likely have found fault in the program's religious effect.[181] In *Carson*, the Court set a strong precedent in balancing both provisions of the First Amendment.

In its place, Justice Gorsuch proceeded to outline concrete examples of founding era religious establishment.[182]

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. Most of these hallmarks reflect forms of "coerc[ion]" regarding religion or its exercise.[183]

Justice Gorsuch's concurrence offered six concrete elements. These elements would ultimately become the basis for the Court's *historical practice and understanding approach* to Religion Clause controversies.[184]

The Court's recent decision in *Kennedy v. Bremerton* revisited the elements outlined in *Shurtleff*.[185] This case involved private prayer in a public forum by a publicly employed

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[178] *Id.* at 7.
[179] *Id.* at 11.
[180] *Id.* at 3.
[181] *See* Aguilar v. Felton, 473 U.S. 402, 421 (1985) (O'Connor, J., dissenting).
[182] *See* Shurtleff v. City of Boston. Dist., No. 20-1800, slip op. at 11 (U.S. May 2, 2022) (Gorsuch, J., concurring) (These examples draw on Judge Michael McConnell's scholarly work); *See also* McConnell, *supra* note 27, at 2110-2131.
[183] *Shurtleff*, slip op. at 11.
[184] *Id.*
[185] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 22 (U.S. June 27, 2022).

football coach.[186] Now writing for the majority, Justice Gorsuch declared that the Court had long abandoned the Lemon Test due to its ambitious, abstract, and ahistorical nature.[187] He cited that the Lemon Test invited inconsistent rulings in lower courts in factually identical cases and placing legislators in a precarious position when dealing with religious entities.[188] He also emphasized that this Court abandoned the idea that the Establishment Clause includes a heckler's veto, by which he meant permissible religious activity is not judged based on perceptions or discomforts.[189] In place of Lemon, Justice Gorsuch reiterated the examples of religious establishment from *Shurtleff* and emphasized how all reflected different elements of coercion.[190] "No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the Framers sought to prohibit when they adopted the First Amendment. Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion considering the original meaning of the Establishment Clause."[191] The common consensus of the Court is that some level of coercion, while not necessary, is sufficient in defining establishment.[192] Justice Gorsuch offers an excellent starting point, with examples of coercion around the time of the Founding. He summarizes them as: (1) exerting government control over church doctrine or personnel, (2) mandating religious attendance or penalizing non-participation, (3) punishing the religious exercise of minority churches, (4) restricting religious minorities' political participation, (5) providing financial support for an established church or granting preferential support to particular denominations, and (6) using churches to carry out civil functions by direct or indirect government monopoly.[193] Although these elements cannot settle all controversies, any future attempts to develop an effective analysis for the Religion Clauses must consider and take them into account.

The Lemon Test's abandonment, its exceptions, and its inability to reconcile historically permissible examples of government religiosity all highlight the crucial question

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[186] *Id.* at 1.
[187] *Id.* at 22.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* at 25.
[192] *See* Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).
[193] *See* McConnell, *supra* note 27, at 2110-2131.

surrounding the Religion Clauses: how can religious individuals participate in and associate with government institutions? Additionally, what is the proper way to evaluate the purpose and effect of government action? What is the proper safeguard in ensuring that government and religion do not become so codependent, blurring the government's role as a neutral arbiter of justice? The Lemon Test incorrectly equated the effect of government action with establishment and oversimplified the relationship between free exercise and establishment by placing too much emphasis on the perception of hypothetical observers.[194] Because the Lemon Test could not distinguish between government action that violates the Establishment Clause and religious individuals benefiting from general services, it risked chilling what government officials and citizens believe is a public, legal, and religious exercise. It is clear from the Court's turbulent history of interpreting the Religion Clauses that a new approach is needed.

III. A New Way Forward

A. The Expanding Logic of Lemon

Over the past half-century, the Justices have struggled to place the Lemon Test into a unified theory of Establishment Clause history.[195] Behind the Lemon Test was one uncompromising principle that eventually became its demise. Justice Black best articulated this in *Everson:* "The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We could not approve the slightest breach."[196] Taken to its logical conclusion, of course, even the slightest appearance of entanglement would run afoul of the Establishment Clause. However, the Court has consistently resisted this overly simplistic analysis. But what does litigation over religious issues look like in a post-Lemon world? The most straightforward answer is that the Court will look to the historical practices and understanding that are in "accord with history and faithfully reflect the understanding of the Founding Fathers."[197] Even Justice Brennan, who resisted attempts to overturn the Lemon Test, suggested that "the line we must draw between the permissible

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[194] *See* Shurtleff v. City of Boston. Dist., No. 20-1800, slip op. at 4 (U.S. May 2, 2022) (Gorsuch, J., concurring); *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002); *See also* Agostini v. Felton, 521 U.S. 203, 232-234 (1997).
[195] *Kennedy*, slip op. at 29.
[196] Everson v. Bd. of Educ. & the Twp. of Ewing, 330 U.S. 1, 18 (1947).
[197] *Kennedy*, slip op. at 23.

and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[198] The Court in *Kennedy* declared that interpretations of the Establishment Clause have strayed too far from the traditional definitions that served to limit its application.[199] However, in a pluralistic society, extrapolation is necessary for applying precedent to contemporary problems.

While there is no single throughline in Religion Clause jurisprudence, the overturning of the Lemon Test is anything but an aberration. There has long been spirited disagreement about the purpose of the Establishment Clause and the role that free exercise plays in its application. Ultimately, a new test is needed to move forward. Establishment Clause analysis must ask, with clear examples: (1) does the government action resemble historical examples of a religious establishment of a particular religion or denomination as the official state religion? Then ask, (2) does the government action privilege the services of a particular religion over others in a way that limits or differs from its secular alternatives? And finally, ask (3) whether the government is treating religious and secular private institutions in a substantively neutral way. The following section will expand upon the elements of this new test and make a case for why this mode of Establishment Clause analysis is faithful to the historical practices and understanding of the Religion Clauses.

B. Step One: Establishment?

The first step in evaluating whether a government action establishes religion should be: (1) does the government action resemble historical examples of religious establishment of a particular religion or denomination as the official state religion? Better known as the *historical practices and understanding approach*, this inquiry has the explicit backing of the Court.[200] The Court often uses this approach, albeit under a variety of names, and the argument is substantively the same: there are certain government actions that we know historically constitute a religious establishment. While the Roberts Court has shown a renewed interest in defining what historically constitutes religious establishment, this approach is not new. In fact, the Court outlined a version of the *historical practices and understanding approach* in *Everson*

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198 Abington Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).
199 *Kennedy*, slip op. at 23.
200 *See Kennedy*, slip op. at 23; Shurtleff v. City of Boston. Dist., No. 20-1800, slip op. at 11 (U.S. May 2, 2022) (Gorsuch, J., concurring); *See also* American Legion v. American Humanist Ass'n., No. 17-1717, slip op. at 2 (U.S. June 20, 2019).

v. Board of Education (1947).[201] In upholding the program in *Everson* to subsidize students' travel to school, the Court outlined the meaning of the First Amendment:[202]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[203]

Everson supports the idea that the government's place is to neither discourage the free exercise of religious individuals nor to incentivize the irreligious into religiosity. In the same way that the government cannot promote or endorse religion, it cannot treat it with "callous indifference."[204]

Any analysis of the Establishment Clause must begin with examples of religious establishment at the founding, as well as historical examples of what has not been considered establishment. Courts should ask: (1) Does the government action resemble historical examples of religious establishment of a particular religion or denomination as the official state religion? Specifically, Courts should look to history[205] and ask whether the government:

1. Exerted control over the doctrine and personnel of a House of Worship.
2. Mandated attendance or imposed punishment for non-participation.
3. Punished or impeded the free exercise of religious practitioners or their institutions.
4. Restricted the political participation of religious or secular dissenters.
5. Offered financial support or provided preferential treatment to a particular religion.
6. Used a religion or its institutions to carry out certain civil functions, often but not exclusively, by granting a monopoly over a specific function?

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[201] *Everson*, 330 U.S. at 14-15; *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L.R. 51, 54-55 (2007) (Argues that *Everson* advocates a version of the *historical practices and understanding approach*).

[202] *Id.* at 3.

[203] *Id.* at 14-15.

[204] Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

[205] *See* McConnell, *supra* note 27, at 2110-2131 (Discussing examples of colonial establishment).

Additionally, courts should ask how this specific government action, or government actions of this kind, have been historically viewed by the courts. As the Court expressed in *Lynch v. Donelly, (1984)*, "Entanglement is a question of kind and degree"[206] and courts should view litigation brought against historically permissible government actions as more suspect than those with no applicable precedent. Actions of this kind include but are not limited to "the prayers that open legislative meetings...the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving."[207] While not exhaustive, these lists of historically permissible and impermissible government actions provide courts with objective measures to evaluate Establishment Clause violations. We can undoubtedly expect that the Court will ask judges to reason by analogy and apply the underlying principles of these six elements.

C. Step Two: Has the Government Restricted Free Exercise?

The second step is to ask whether *the government action infringes upon basic privileges and immunities by mandating or restricting certain behaviors.* Establishment Clause analysis should include recognition of incorporation in discussions of the *historical practices and understanding approach* to the Religion Clauses. There are certain government practices that "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply."[208] Time's passage in itself does not determine the permissibility of government action, and courts must be wary of the practices of local government that have slipped through the cracks of incorporation. However, "even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment."[209] When asking whether a government action infringes upon basic privileges and immunities, looking at the purpose and effect of the government action becomes instructive but not determinant. For example, the Court has declined to directly address the extent to which the Establishment Clause permits state holidays. Instead, the Court has used history to suggest that this practice is constitutional and cited the practice to justify upholding legislative prayer and state

[206] Lynch v. Donnelly, 465 U.S. 668, 683 (1984).
[207] Van Orden v. Perry, 545 U.S. 677, 699 (2005).
[208] American Legion v. American Humanist Ass'n., No. 17-1717, slip op. at 17 (U.S. June 20, 2019).
[209] *American Legion*, slip op. at 18.

Chaplains.[210] While the state and federal legislatures differ in the subjects they can legislate on, they must both be held to the same standard when it comes to religious establishment.

The act of looking at factors beyond a government action's purpose and effect does not diminish the importance of these elements in some Establishment Clause cases. For example, legislation that seeks to increase awareness of the Christian Gospel by mandating prayer in school is unconstitutional.[211] The Court has ruled that "an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[212] Similarly, legislation that seeks to improve cultural understanding and awareness of the Jewish people by mandating daily Torah study would also violate the Establishment Clause. While the purpose is secular, the remedy implicates required religious study. In contrast, the Court in *Everson* demonstrated how a government action might produce what is, in effect, an outcome that supports a religion without the assistance itself being religious.[213] Any program that benefits the public welfare by broadly subsidizing individuals' free choices may fund a religious preference.[214] Excluding religion from a general welfare program may cause individuals to not engage in religious behavior if, for example, police officers cannot protect religious institutions.[215] It is certainly true that government action with a religious purpose produces a religious effect, but legislation with a religious effect may not be the product of a religious purpose. Additionally, other factors, such as time, may obscure how we understand the extent of the action's religious meaning.[216] Historical examples of religious establishment provide a solid footing for identifying Establishment Clause violations rather than examining mere appearances or debating purposes and effects. Courts should always consider the right to free exercise when the government asserts its interest in disestablishment to exclude religious groups from public fora or from public benefits.

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[210] *See* Marsh v. Chambers, 463 U.S. 783, 786 (1983).
[211] *See* Engel v. Vitale, 370 U.S. 421, 422 (1962).
[212] *Engel*, 370 U.S. at 425.
[213] Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).
[214] *See Id.*
[215] *See Id.*
[216] *See American Legion*, slip op. at 18. (The Court upheld public funding to a Cross that was erected as a memorial to fallen soldiers in World War I, stating that time had obscrued the exact meaning and the State has an interest in preserving our history and tradition some of which uses religious symbols).

D. Step Three: Does this Government Action Preference or Privilege Religion(s)?

The next step in Establishment Clause analysis is to ask whether *the government action privileges the services of a particular religion over others in a way that limits or differs from its secular alternatives.* Looking to see whether a government action privileges the services of a particular religion over the secular alternatives is not necessarily about monopoly but rather bias. Thus, courts should hold government action to the standard of *true private choice.* Government programs that fund religious entities are permissible if the funding goes through individuals who participate in these goods, even with a broad range of secular alternatives.[217] By this definition, a religious good or service becomes defined not by what religion is but by everything a secular service is not. If a private, secular group would not offer a service that is provided by religious groups, the government cannot fund it. While judges may use hypothetical examples to help justify their rulings, they should not rely solely upon them. This standard prevents the government from using its interest in disestablishment to exclude religious entities from government programs solely upon the status of the entity's religious label.[218] Additionally, this standard eliminates any question that the purpose of the government action will be secular. If a secular institution would perform the service in question, then the service is almost certainly one with a secular purpose. That is not to say that there is no ambiguity regarding the details of the service. While courts should not judge a program solely on its outcomes, this standard allows courts flexibility to decide whether the service provided by the religious entity meets the government's interest.

However, another standard of permissibility is necessary to avoid constraining services that benefit underserved and distressed communities. Courts should also employ a broad outcomes-based approach to judging whether a service offered by a religious entity accomplishes the same goals as its secular counterparts. Take, for example, the issue of reintegrating the incarcerated into society. Reentry of formerly incarcerated individuals is by no means cheap, and incarcerated individuals come from a variety of backgrounds and circumstances. One can see why states or municipalities would allocate funding to private

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[217] *See* Mueller v. Allen, 463 U.S. 388, 400 (1983); *See also* Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481, 487-488 (1986); *See also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-10 (1993); *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).
[218] *See* Carson v. Makin, No. 20-1088, slip op. at 3 (U.S. June 21, 2022).

groups rather than undertake statewide programs. While the government can choose only to fund public programs, there is little justification for why the government could support secular private groups to provide a service but exclude religious groups. Additionally, there is no reason to believe that a program administered by a House of Worship would prove less effective in reducing recidivism rates and achieving reentry than a secular program. While the government should subject these programs to scrutiny and monitoring, courts should not judge programs by their provenance. Just as any government funding would require petitioners to meet specific criteria and results, so should funding toward religious entities promoting the general welfare. This view finds support from former Justice O'Connor and Chief Justice Rehnquist. In their separate dissenting opinions in *Aguilar v. Felton (1985)*, they argued that *Lemon's* excessive entanglement requirement made the surveillance of religious programs impossible and effectively barred religious institutions from funding to benefit their communities.[219]

As Justice Gorsuch has aptly pointed out, there is little "difference between saying I endorse something and I proselytize."[220] Therefore, looking for a proselytizing effect would amount to an imprecise measure. Religious belief often manifests itself in charitable action and what most would characterize as promoting public welfare. This does not mean that all those who profess faith are well-intentioned, it is to say that the law should not understand their intentions or endeavors to be any more or less suspect than those of the irreligious and agnostic. While the government has a choice to exclude both private and religious services from general public programs, it cannot exclude those religious alternatives that adequately resemble their secular alternatives simply for their religiosity. Courts should judge programs suspected of forwarding religious establishment on whether those programs adequately resemble their secular alternatives, forward a government interest, or are engaged in by the *true private choice* of individuals.

E. Step Four: Substantive Neutrality

The final layer of Establishment Clause analysis is to ask whether *the government is treating religious and secular private institutions in a substantively neutral way*. Proposed by Professor

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[219] Aguilar v. Felton, 473 U.S. 402, 425 (1985).
[220] Transcript of Oral Argument at 8-10, American Legion v. American Humanist Ass'n., slip op. (U.S. June 20, 2019) (No. 17-1717).

Douglas Laycock of the University of Virginia School of Law, substantive neutrality requires that a law "[neither] encourages [n]or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[221] What he means by this is that disestablishment does not involve prohibiting church and state interaction, but rather ensuring the government is not incentivizing citizens toward religiosity or away from it. The government often prohibits these interactions under formal neutrality (separationism) because "religious and secular examples of the same phenomenon are treated exactly the same."[222] Professor Laycock goes as far as to argue that formal neutrality is ahistorical, defies common sense, and often results in limiting free exercise.[223] Laycock gives an example of this in a hypothetical free exercise case. He argues that a law forbidding children from consuming alcohol under any circumstances would be formally neutral. However, we would not expect the government to arrest children or parents if a child were to drink wine during communion or a Passover Seder.[224] A substantively neutral law would likely prohibit retailers from selling alcohol to minors, restrictions on the time, place, and manner where minors could consume it, and limited exceptions for religious practice or parental supervision.

When dealing with issues of religious establishment, Laycock's substantive neutrality also addresses the shortcomings of *Lemon*. Substantive neutrality, he argues, is not only faithful to a historical understanding of the Religion Clauses, but also to *Lemon* itself.[225] Laycock posits that "[Lemon's] secular purpose thereafter took on a life of its own, but it was only very occasionally the basis for a judgment."[226] He also adds, that "where Lemon had found a departure from neutrality in any aid that might benefit a school's religious mission, the Court's new majority found neutrality in the fact that aid flowed on similar terms to religious and secular schools alike."[227] Laycock suggests that judging government programs solely on whether they advanced the religious mission of the school asks the wrong question of whether government and religion are separate.[228] Instead, Courts should ask the

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221 Laycock, *supra* note 194, at 54-55.
222 *Id.* at 55.
223 *Id.* at 54.
224 *Id.* at 55.
225 *See Id.* at 59.
226 *Id.*
227 *Id.* at 66.
228 *Id.*

more important question of whether the government has violated neutrality by altering citizens' incentives to be religious.[229] In fact, he goes as far as to argue that substantive neutrality also accords with many of the Court's prior decisions. For example, he argues that both tax exemptions and equal funding for religious and secular private schools are substantively neutral.[230] Laycock writes that "funding secular private education but not religious private education creates a religious category (thus not formally neutral) and it creates incentives to secularize religious education (thus not substantively neutral)."[231] He also points out that the Court has never argued that maintaining a separation between church and state is in opposition to neutrality.[232]

But why is it important for courts to emphasize neutrality and ask whether *the government is treating religious and secular private institutions in a substantively neutral way?* "At the conceptual level, substantive neutrality insists on minimizing government influence on religion. Minimizing government influence leaves religion maximally subject to private choice, thus maximizing religious liberty."[233] Applying substantive neutrality to Establishment Clause controversies refocuses courts' analyses, charging them to ask whether the government has advanced or inhibited religion.[234] *True private choice* can only be present when the government has acted in a substantively neutral way. By minimizing the role government plays in incentivizing citizens from engaging or disengaging in religious activity, we can ensure that the government has done nothing to advance nor inhibit the free exercise of religion.

F. The Chilling Effect: Will New Rules Impede Diversity?

Those who advocate for a broader, abstract definition of religious establishment argue that government aid to religion, even indirect, creates a chilling effect.[235] In the law, a chilling effect is when government regulation is unclear, uncertain, or overbroad in application or articulation, causing people to refrain from engaging in permissible actions

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[229] *See Id.*
[230] *Id.* at 63.
[231] *Id.*
[232] *Id.* at 66.
[233] *Id.* at 65.
[234] U.S. CONST. amend. I.
[235] *See* Note, *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338 (2020).

because they are unsure of their action's legality.[236] A note in the Harvard Law Review, *The Establishment Clause and the Chilling Effect*, argues that "government establishment of religion can chill the free exercise of religion, and that Establishment Clause jurisprudence should incorporate the concept of chilling."[237] The author argues that practices such as legislative prayer in a small town may lead a member of a religious minority to believe their religious expression is not welcome.[238] The author also argues that chilling is already used in Free Exercise Clause claims, generally to determine whether the government has burdened religion, but that the Court should also apply chilling analysis as a method of what the author calls disestablishment.[239]

The author argues that if a law "required someone to attend a certain church on Sunday mornings, they would not be able to attend their own church at that time—but the doctrine does not fully recognize the issue of what goes missing when the government establishes a religion."[240] The author seems to suggest that when a government program directly or indirectly benefits a particular religion, it may have engaged in religious establishment, therefore privileging one religion to the detriment of the free exercise of others.[241] Of course the author's example of direct benefit through government coercion is religious establishment. However, behind this argument is the idea that if religious entities access government benefits, but in an inequitable way, the government has engaged in religious establishment.[242] The problem with this argument is that it assumes religious expression results from government benefits, or an incentive, rather than internal conviction, and that one's motivations for religious expression are primarily utilitarian.[243] The fact that equitable religious expression did not result from a generally applicable program does not mean that the government engaged in religious establishment.

While government action can certainly play a role in chilling religion or directly endorsing it, individuals have both a right to exercise their religion and to participate in

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[236] *See Id.*
[237] *Id.*
[238] *Id.* (Notes are published anonymously in the Harvard Law Review).
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *But cf. Id.* (Argues for an outcome based approach when evaluating indirect Religious Establishment).

general government programs. In fact, this objection does not go far enough. The author limits their objection to religious groups, but to exclude religious entities from general public programs would actively discourage religious practice as a whole.[244] The government would need to suspend all government entitlements to prevent the possibility of affecting anyone's religious practice in any way. Current precedent indicates that a law need only be facially neutral and generally applicable to restrict free exercise.[245] Yet the Court has also ruled that even if the practice of legislative prayer was used only by one religion, this does not necessarily mean that the program was not generally available.[246] The author's argument incorrectly equates government chilling and social pressure, mistaking *true private choice*[247] with the government manufacturing that behavior. The Court rejected the idea that the Religion Clauses require equity of expression in *Shurtleff* and *Town of Greece.*[248] Establishment Clause violations are not about the missing element of free exercise but rather an impermissible, institutional relationship between church and state. Judging Establishment Clause violations on a chilling effect risks an overbroad rule that further confuses current jurisprudence.

Conclusion

While there is no single throughline in Religion Clause jurisprudence, the overturning of the Lemon Test is anything but an aberration. There has long been spirited disagreement about the purpose of the Establishment Clause and the role that free exercise plays in its application. One thing is certain: the Lemon Test is gone, and uncertainty is left in its wake. The *historical practices and understanding approach* now governs Establishment Clause analysis.[249] The Court is now tasked with clarifying what they meant in *Kennedy*, that "the line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers."[250]

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[244] Mueller v. Allen, 463 U.S. 388, 400 (1983); Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481, 487-488 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-10 (1993); Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).
[245] *See* Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).
[246] *See* Town of Greece v. Galloway, No. 12-696, slip op. at 6 (U.S. May 5, 2015).
[247] *See Mueller*, 463 U.S. at 400; *See also Witters*, 474 U.S. at 487-488; *See also Zobrest*, 509 U.S. at 9-10; *See also Zelman*, 536 U.S. at 653.
[248] Shurtleff v. City of Boston. Dist., No. 20-1800, slip op. at 1 (U.S. May 2, 2022); *Galloway*, slip op. at 11.
[249] *See* Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 23 (U.S. June 27, 2022).
[250] *Id.*

While the Court declined to offer a meaningful explanation of its history-and-tradition test, one thing is certain: the Establishment Clause's original purpose was not to legislate callous indifference or erect an abstract wall between church and state.[251] The original purpose of the Religion Clauses was to act as co-guarantors of freedom by ensuring that citizens have the liberty to exercise their right to religious liberty. While it is far too simple to characterize all of the founders as sharing the same view of how religion and government can coexist, it is clear that their view was not the one advanced in *Lemon*. This was the Congress that enacted legislation "providing for paid Chaplains for the House and Senate."[252]

In conclusion, it is essential to recognize that religious liberty is not something that government simply accommodates; it is the cornerstone of a just and free society. Establishment Clause analysis must ask, with clear examples: (1) does the government action resemble historical examples of a religious establishment of a particular religion or denomination as the official state religion? Then ask, (2) does the government action privilege the services of a particular religion over others in a way that limits or differs from its secular alternatives? And finally, questions (3) whether the government is treating religious and secular private institutions in a substantively neutral way. While this does not cover every case and controversy, it does provide a rubric that properly appreciates the original understanding of religious liberty. Freedom from religious pressure from the government is just as essential as freedom from irreligious pressures. The Founding Fathers established a system whereby liberty would be preserved, and the government to serve as its neutral guard. We must remain ever vigilant that government actions do not echo historical examples of religious establishment, and equally vigilant that we do not deprive religious individuals of their liberty. The balance between neutrality and separatism is delicate, but it is essential that we seek to uphold it. Every citizen has the natural right to freely choose whether or not to exercise their beliefs without fear of, or influence from, the government. In the words of Washington: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural

[251] *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952); *See also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
[252] *Lynch*, 465 U.S. at 674.

rights…every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid."[253]

[253] Letter from George Washington to Hebrew Congregation, *supra* note 43.

DALL-E: Who is the True Artist?

Jackson Lanzer

Introduction

In 2016, an artist named DABUS (Device for the Autonomous Bootstrapping of Unified Sentience) created a painting titled, "A Recent Entrance to Paradise," which depicted "a simulated near-death experience."[1] What was unique about this piece of art was the fact that DABUS was not human. Rather, DABUS is an artificial intelligence (AI) system trained to create art, as well as other inventions, through a machine learning algorithm.[2] These algorithms rely on two sets of data. The first set, known as the "training set," is the data inputted by computer programmers into the machine learning algorithm, which is "the software code that explores the relationship between the input information and the answers."[3] The second set of data, known as the "test set," is then inputted into the algorithm and includes the answers to the given task.[4] Finally, the programmer establishes "weighting mechanisms," which "...define the relationships between the input information and the answers…"[5] AI systems like DABUS utilize this process to create art.[6] Rather than inputting textual data as the training set for DABUS, the programmer inputs artwork and images.[7] As a result, when given a prompt by a user of the algorithm, DABUS produces artwork based

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[1] Jane Recker, *U.S. Copyright Office Rules A.I. Art Can't Be Copyrighted*, SMITHSONIAN MAG. (Mar. 24, 2022), https://www.smithsonianmag.com/smart-news/us-copyright-office-rules-ai-art-cant-be-copyrighted-180979808/#:~:text=A%20Recent%20Entrance%20to%20Paradise%20is%20part%20of%20a%20series,by%20a%20synthetic%20dying%20brain; Stephen Thaler, *Artificial Intelligence – Visions (Art) of a Dying Synthetic Brain*, URBASM (May 18, 2016), https://www.urbasm.com/2016/05/artificial-intelligence-visions-art-of-a-dying-brain/.

[2] U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 1 (2022); Comm'r for Patents, U.S. Pat. and Trademark Off., *Application No. 16/524,350*, 2 (2020); Warren E. Agin, *A Simple Guide to Machine Learning*, BUS. L. TODAY, 1, 2 (Feb. 2017).

[3] Warren E. Agin, *A Simple Guide to Machine Learning*, BUS. L. TODAY, 1, 2-3 (Feb. 2017).

[4] *Id.* at 2.

[5] *Id.* at 3.

[6] Will Knight, *When AI Makes Art, Humans Supply the Creative Spark*, WIRED (Jul. 13, 2022), https://www.wired.com/story/when-ai-makes-art/

[7] *Id.*

upon the user's prompt and the relationships the algorithm learned between the training set data and test set answers.[8] The creator of DABUS, Stephen Thaler, applied for a copyright for the AI-created art on behalf of the system, claiming it as the author of the art and worthy of the art's copyright.[9] However, the United States Copyright Review Board denied this request, raising an important question: Who owns art created by AI?[10]

The prevalence of this question proliferated as AI creative systems gained widespread popularity.[11] One such AI creative system is DALL-E. DALL-E was created by OpenAI, a research company, and offers users of the system the ability to produce art by simply providing DALL-E with a "text description."[12] DALL-E then produces art inspired by the description.[13] But as the use of DALL-E grows, already reaching over three million users, so does the necessity of answering the question of ownership.[14] While not explicitly stated by OpenAI, OpenAI's company policies imply a belief that the company controls the copyright. For instance, OpenAI gave users the right to sell their art.[15] The act of providing these rights suggests that OpenAI believed they controlled the ownership of the rights. Furthermore, the company has a content policy that prohibits art deemed inappropriate and mandates that users acknowledge that their art was created using an AI system.[16] This demonstrates that the user of DALL-E does not have complete autonomy over their art.

This note evaluates the core problem regarding AI and current copyright law in the United States: Who owns the copyrights to the artwork produced by AI systems such as DALL-E and DABUS? As a result, this note explores other questions of authorship of AI-produced art: Does OpenAI, the creator of DALL-E, own the rights to the art made by the AI system it developed? Should the user who inputs the description that inspires DALL-E's art be considered as the creative force behind the art? Or does DALL-E have rights to the art it makes? Part I of this note provides an overview of court cases and federal laws that are

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[8] *Id.*; Agin, *supra* note 3, at 2.
[9] U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 2 (2022).
[10] *Id.* at 7.
[11] Bobby Allyn, *Surreal or too real? Breathtaking AI tool DALL-E takes its images to a bigger stage*, NAT'L PUB. RADIO (Jul. 20, 2022), https://www.npr.org/2022/07/20/1112331013/dall-e-ai-art-beta-test.
[12] OPENAI, *DALL-E 2*, https://openai.com/dall-e-2/ (last visited Jan. 6, 2023).
[13] *Id.*
[14] Allyn, *supra* note 11; *DALL-E API Now Available in Public Beta*, OPENAI (Nov., 2022), https://openai.com/blog/dall-e-api-now-available-in-public-beta/.
[15] *DALL-E Now Available in Beta*, OPENAI (Jul. 20, 2022), https://openai.com/blog/dall-e-now-available-in-beta/
[16] OPENAI, *Content Policy*, https://labs.openai.com/policies/content-policy (last visited Jan. 6, 2023).

relevant to the question of ownership of AI art. Part II of the note considers whether OpenAI or the users of DALL-E own artwork created by DALL-E. Part II also evaluates whether Fair Use Doctrine applies to DALL-E and DABUS. Finally, Part III of the note argues co-ownership of the copyrights to AI-created art is the best solution and suggests Congress amend the human authorship requirement in order to allow for the possibility of sentient artificial intelligence in the future. To conclude, this note argues that a system of co-authorship of AI artwork should be established, that the human authorship requirement should be amended to sentient authorship, and that the machine learning process should be considered fair use.

I. An Overview of US Copyright Law and Relevant Court Cases

A. The Copyright Act of 1976

Copyright was first incorporated into United States law by Article I, Section 8, Clause 8 of the United States Constitution.[17] Clause 8 states: "[The Congress shall have Power . . .] to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[18] Since the establishment of copyright law within the Constitution, copyright law has evolved. *The Copyright Act of 1976* contains several provisions that are particularly relevant in evaluating who owns the copyright to art created by AI systems.[19]

First, Section 102 of the Act lists seven categories of works that qualify for copyright protection: "literary works," "musical works," "dramatic works," "pantomimes and choreographic works," "pictorial, graphic, and sculptural works," "motion pictures and other audiovisual works," and "sound recordings."[20] However, Section 102 states that the categories mentioned in the Act "are not meant to be limitative."[21] This means that other categories of "original works of authorship" that are not explicitly mentioned in the Act can still qualify for copyright protection.[22] One such category is computer programs, which encompasses AI programs. The Copyright Office's guide to the Act states that computer programs may qualify for copyright protection, as "the definition of 'literary works' refers

[17] U.S. CONST. art. I, §8, cl. 8.
[18] *Id.*
[19] Copyright Act of 1976, 17 U.S.C. §§101-201 (2022).
[20] U.S. Copyright Off., *General Guide to The Copyright Act of 1976*, 32 (1977).
[21] *Id.* at 32.
[22] *Id.* at 33.

to works expressed in 'words, numbers, or other verbal or numerical symbols or indicia.'"[23] That being said, Section 102 mentions a limit to copyright protection that may hinder the ability of computer programs and thus AI systems to acquire copyright protection: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[24] Thus, programming falls into a gray area of copyright law. The question becomes what portion of the program is considered "literary expression" and what portion of the program is simply a "process" or "method of operation?"[25]

Second, Section 107 of the Act outlines the principle of fair use. The Act states that using copyrighted works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[26] Furthermore, the Act outlines factors that impact whether the use of copyrighted works is considered fair use: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," "the nature of the copyrighted work," "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," "and the effect of the use upon the potential market for or value of the copyrighted work."[27]

Third, Section 101 describes types of works that entail co-authorship of copyrights and Section 201 of the Act describes how co-authorship impacts the ownership of copyrights.[28] One type of work is joint work, which refers to work in which separate contributions by different authors are "merged into inseparable or interdependent parts of a unitary whole."[29] This type of work is jointly owned by the authors.[30] Another type of co-authorship is collective work in which authors make contributions to the work and only own the copyright to the contributions they made to the work, not the work as a whole.[31]

B. Google LLC v. Oracle America, INC.

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[23] *Id.* at 33-34.
[24] *Id.*
[25] *Id.*
[26] 17 U.S.C. §107 (2022).
[27] *Id.*
[28] 17 U.S.C. §§ 101, 201 (2022).
[29] *Id.*
[30] *Id.*
[31] *Id.*

In 2021, the Supreme Court considered how fair use should apply in the digital age in *Google LLC v. Oracle America, INC.*[32] After purchasing Android, Google attempted to create new software that was compatible with Java SE, "a computer platform that uses the popular Java computer programming language."[33] Google programmers used 11,500 lines of Java SE to create their own program.[34] However, the copyright to Java SE is owned by Oracle America, Inc.[35] As a result, Oracle America claimed Google infringed on Oracle's copyright through its use of 11,500 lines of Java SE.[36] The Court ruled in favor of Google, stating that Google's use of the code was fair use.[37] The Court's decision addressed the four factors of Fair Use Doctrine, stating Google's use of the code was "transformative," "new creative expression," and represented only "only 0.4 percent" of the API.[38] Thus, this case expanded fair use to apply to the "technological world."[39]

C. Burrow-Giles Lithographic Co. v. Sarony

Among the Supreme Court's foundational technology-related copyright precedents is *Burrow-Giles Lithographic Co. v. Sarony*.[40] In 1882, Napoleon Sarony, a photographer, took a photograph of Oscar Wilde, titled "Oscar Wilde, No. 18, " and he wrote "'Copyright, 1882, by N. Sarony'" on the photograph, which served as "a notice of the copyright."[41] However, Sarony's photograph was reproduced and sold without his permission by the Burrow-Giles Lithographic Company, which argued Sarony's photograph did not qualify for copyright protection because "a photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought."[42] The Court ruled in favor of Sarony, stating that "posing" Oscar Wilde, "arranging" aspects of the photograph, and "evoking the desired expression" meant Sarony's photograph is "an original work of art" and "the product of the plaintiff's intellectual invention."[43] Thus, the decision recognized Sarony as the author of the

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[32] *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1187 (2021).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1191.
[37] *Id.* at 1209.
[38] *Id.* at 1204, 1202, 1205.
[39] *Id.* at 1208.
[40] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884).
[41] *Id.* at 55.
[42] *Id.*
[43] *Id.* at 60.

photograph and granted him the copyright to the photograph.[44] Furthermore, this case extended copyright protection to photography and demonstrated that copyright law applied to emerging technologies not originally mentioned by United States copyright law.[45] When analyzed in terms of AI, this case offers insights into how copyright protection is extended to new technologies and how "intellectual invention" is a requirement for being considered an author.[46] The following sections of this note use the concept of "intellectual invention" to examine the contributions to the production of artwork made by the programmers of AI systems, the users of AI systems, and the systems themselves.[47]

D. DABUS: Copyright Review Board Decision

The case of DABUS is important to examine further. Stephen Thaler, the creator of DABUS, applied for a copyright for the art created by DABUS, titled "A Recent Entrance to Paradise," on behalf of DABUS.[48] Thaler claimed DABUS as the author of the art and worthy of the art's copyright.[49] The Copyright Review Board denied this request.[50] The main reason the Copyright Review Board denied the request was that DABUS is not human, and "courts interpreting the Copyright Act, including the Supreme Court, have uniformly limited copyright protection to creations of human authors."[51] Additionally, Thaler argued that DABUS' art was "work made for hire," but the Copyright Review Board denied this as well, because "a 'Creativity Machine' cannot enter into binding legal contracts and thus cannot meet this requirement.'"[52] Thus, to claim exclusive rights to art, one must be human. This has major implications for the question of AI ownership because it removes one possible claimant: the AI itself. But this still leaves two possible human claimants for the copyright: the programmer and the users of the AI system.

II. The Problem: Who Owns the Copyright to DALL-E's Art

At the time of publication, federal courts have not determined who owns the copyright to art created by DALL-E. However, on March 16th, 2023, the United States

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[44] *Id.*
[45] *Id.* at 58.
[46] *Id.* at 60.
[47] *See Id.* at 60.
[48] U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 2 (2022).
[49] *Id.* at 7.
[50] *Id.*
[51] *Id.* at 4.
[52] *Id.* at 6-7.

Copyright Office released a guide on its policy pertaining to AI created art.[53] Their policy stated that AI cannot copyright its own art, because copyright protection only applies to human authors.[54] The Copyright Office said artwork in which the AI controlled "expressive elements of its output" cannot be claimed by the human author and when prompts do not determine the "expressive elements," they do not constitute authorship.[55] Yet, the Copyright Office stated that each artwork is "a case-by-case inquiry," meaning the extent of human control over the "expressive elements" will be evaluated for each artwork and determine whether copyright applies.[56] In the case study of DALL-E, determining the extent of human control over the "expressive elements" is necessary.[57] Thus, as AI art systems are increasingly accessible to the public, determining definitively who owns the copyright of these works is crucial.[58] This section explores possible claimants to AI created art, evaluating whether there is legal precedent to award them ownership over the copyright. Furthermore, this section further explains why AI systems cannot register for copyrights, and whether AI systems violate the copyrights of other artists during the machine learning process.

A. Is DALL-E itself a breach of copyright?

One of the largest controversies surrounding AI artwork is the use of other artwork by programmers to train their machine learning algorithms.[59] In order to create art, engineers of AI systems feed many pieces of artwork into the AI system.[60] Through this process, the AI learns how to create art based on the inputted artwork, and the AI then creates its own artwork.[61] Thus, the AI system utilizes others' artwork as the foundation upon which it creates new art.[62] Recently, some artists have challenged art created by AI, claiming that AI artists breach copyright by using the artwork of human artists as inputs during the machine learning process.[63] This raises the question: Does fair use apply to DALL-E? If not, AI-created art infringes upon the copyrights of the other artists, and no

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53 *88 FR 16190*.
54 *Id.* at 16191.
55 *Id.* at 16192.
56 *Id.* at 16192.
57 *Id.* at 16192.
58 U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 2 (2022); Allyn, *supra* note 11.
59 Mirko Degli Esposti et al., *The Use of Copyrighted Works by AI Systems: Art Works in the Data Mill*, 11 EUROPEAN J. OF RISK REGUL., 51, 52 (Mar. 2020).
60 Agin, *supra* note 3, at 2.
61 Esposti et al., *supra* note 59, at 52.
62 *Id.*
63 *Id.*

one would own the copyright to the art produced by DALL-E and DABUS.

The Fair Use Doctrine states that there are several qualities of fair use: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;" "the nature of the copyrighted work;" "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;" "and the effect of the use upon the potential market for or value of the copyrighted work."[64] In the case of DALL-E, it appears that fair use applies. First, regarding "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the inputs used by DALL-E include a large number of artworks.[65] Thus, the portion of any one individual artwork in relation to the DALL-E-produced artwork as a whole is minuscule.[66] Second, regarding "the nature of the copyrighted work," the artwork created by DALL-E is produced according to text written by users of DALL-E.[67] Therefore, the nature of the artwork is based upon the DALL-E users' ideas, not the inputs originally used during the machine learning process.[68] Third, regarding "the purpose and character of the use," OpenAI, which is the developer of DALL-E, is both a research corporation and a non-profit organization.[69] As a result, DALL-E appears to fall under the umbrella of both nonprofit and educational purposes.[70] The only area where fair use may be questioned is whether DALL-E has a negative impact on "the potential market for or value of the copyrighted work."[71] While DALL-E may represent competition to non-AI artists, the *Google LLC v. Oracle America, INC.* decision suggests that this factor alone will not limit DALL-E from being considered fair use.[72]

Google LLC v. Oracle America, Inc. establishes a precedent that fair use applies to computer programs that utilize code created by other programmers as long as the code is used in a "transformative" manner.[73] Interpreted within the context of AI creative systems, transforming borrowed code is similar to using other artworks to create new art during the machine learning process because both transform the work of others in order to form new

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64 17 U.S.C. § 107 (2022).
65 *Id.*
66 *Id.*
67 17 U.S.C. § 107 (2022); OPENAI, *DALL-E 2*, https://openai.com/dall-e-2/ (last visited Jan. 6, 2023).
68 OPENAI, *DALL-E 2*, https://openai.com/dall-e-2/ (last visited Jan. 6, 2023).
69 17 U.S.C. § 107 (2022); OPENAI, *DALL-E 2*, https://openai.com/dall-e-2/ (last visited Jan. 6, 2023).
70 17 U.S.C. § 107 (2022)
71 *Id.*
72 *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).
73 *Id.* at 1203.

creations.[74] As a result, the fair use doctrine applies to DALL-E, meaning that DALL-E does not violate the copyrights of artists whose work is used during the machine learning process.[75]

B. Who is the author of AI-created art?

The *Burrow-Giles Lithographic Co. v. Sarony* case established the precedent that individuals who demonstrate "intellectual invention" or "intellectual creation" are endowed with copyrights to the works they produce.[76] Thus, determining which individuals contribute intellectual invention or intellectual creation to AI creative systems like DALL-E and DABUS is crucial to determining who has the right to the artwork created by the AI. In the case of DALL-E, there are two potential copyright claimants to its output: Open-AI and DALL-E users. First, OpenAI, the company that created DALL-E, can claim "intellectual invention," because the companies' programmers created the code for DALL-E, demonstrating a creative contribution to the AI system that serves as the foundation for the art created by DALL-E.[77] Without the programmers creating DALL-E, none of the art produced by DALL-E would be possible, which reveals the programmers' contributions to be crucial. Additionally, the OpenAI programmers curated which pieces of artwork to use as inputs for DALL-E's machine-learning process.[78] Because these inputs inspire and limit the artwork created by DALL-E, the choice of inputs has a direct effect on the artwork created and is similar to the creative decisions made by *Sarony* which the Supreme Court decided warranted "intellectual invention."[79] Just as Sarony's claim to copyright was based on "selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade" as well as posing Oscar Wilde, the programmers' claim would thus be based on curating the inputs that trained the DALL-E system and formulating the code that produced the artwork.[80]

Second, the users of DALL-E may claim to have contributed "intellectual

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[74] *Id.* at 1203.
[75] *Id.* at 1196.
[76] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).
[77] OPENAI, *Research*, https://openai.com/research/overview (last visited Apr. 14th, 2023).
[78] Agin, *supra* note 3, at 2.
[79] *Sarony*, 111 U.S., at 60.
[80] *Id.*

invention" to the artwork created by DALL-E. This claim is based upon the fact that DALL-E's artwork is created after users provide DALL-E a prompt or sentences describing what they want the artwork to look like or what themes or ideas they want the artwork to incorporate.[81] Thus, the choice of prompts could arguably qualify as "intellectual invention," because it is an idea that directly influences the artwork produced. This means that DALL-E users may also have a valid claim to the copyrights of AI-created artwork and the title of "author."

Third, using this line of logic, DALL-E could be entitled to the copyright of its own work, because it arguably demonstrates "intellectual creation." This occurs when DALL-E uses the prompt and inputted artwork during the machine learning process to create a new, unique piece of artwork. However, as highlighted in previous paragraphs, DALL-E is not human. Thus, despite demonstrating some level of creation, DALL-E cannot register copyrights for its work, because under the Copyright Act only humans can be authors and non-humans cannot be given copyrights.[82] In sum, both the programmers of DALL-E and the users of DALL-E possess valid claims to the copyrights of AI-produced artwork. The solution to who should be given the copyrights is offered in Part III of this note.

Interestingly, it appears that OpenAI views itself as the sole holder of DALL-E's copyright. OpenAI's policy on publishing its AI-generated artwork is conditional upon "[t]he role of AI in formulating the content [being] clearly disclosed in a way that no reader could possibly miss, and that a typical reader would find sufficiently easy to understand."[83] This suggests that OpenAI—or at least DALL-E—deserves at least partial credit for the artwork created by users. Furthermore, OpenAI influences artistic expression through a content policy that prohibits types of art deemed inappropriate, including art depicting violence, "hateful symbols," harrasment, "sexual acts," public health, "self-harm," and "content that may be used to influence the political process or to campaign."[84] Thus, the user of DALL-E does not have complete control over their art, and OpenAI exerts influence over what types of "intellectual production" can be

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[81] OPENAI, *DALL-E 2*, https://openai.com/dall-e-2/ (last visited Jan. 6, 2023).
[82] *See* U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 7 (2022).
[83] OPENAI, *Sharing & Publication Policy*, https://openai.com/api/policies/sharing-publication/ (last visited Jan. 6, 2023).
[84] OPENAI, *Content Policy*, https://labs.openai.com/policies/content-policy (last visited Jan. 6, 2023).

pursued using the DALL-E system.

Finally, the United States Copyright Office's policy statement about AI released in March 2023, confirms the precedent that copyright protection does not apply to non-human authors of creative works.[85] As a result, DALL-E and DABUS do not qualify for copyrights, because neither are human. Furthermore, this policy statement reaffirms the DABUS decision from the Copyright Office because the DABUS decision denies DABUS copyright protection on the grounds that DABUS is not human.[86]

III. The Solution: Amend Human Authorship or Embrace Co-Authorship

A. Co-Authorship

Because the Copyright Review Board stated copyright requires human authorship, the users or programmers of AI systems should be considered the authors of the art.[87] An article in *Issues in Science and Technology* suggests that both should be rewarded copyright protection, which this note will show is supported by legal precedent.[88] *Burrow-Giles Lithographic Co. v. Sarony* determined that "intellectual invention" was key to obtaining copyright protection.[89] Thus, because both programmers and users demonstrate "intellectual invention," the copyright system should grant co-authorship. Furthermore, some scholars, such as Deepak Somaya, a professor of business administration at University of Illinois at Urbana-Champaign, and Lav R. Varshney, an associate professor of engineering at University of Illinois at Urbana-Champaign, in an *Issues in Science and Technology* article, argue awarding both users and programmers rights to the artwork created by their machines will incentivize innovation in AI technology.[90] This focus on incentivizing innovation aligns with United States copyright law as it is envisioned in the United States Constitution. Article I, Section 8, Clause 8 of the Constitution states: "[the Congress shall have Power . . .] [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

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[85] *88 FR 16190*.
[86] U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 3 (2022).
[87] *Id.*
[88] Deepak Somaya & Lav Varshney, *Ownership Dilemmas in an Age of Creative Machines*, 36 Issues in Sci. and Tech., Winter 2020, at 79, 84.
[89] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).
[90] Somaya & Varshney, *supra* note 88, at 84.

exclusive Right to their respective Writings and Discoveries."[91] Thus, the system of co-ownership of copyright aligns with the Constitution's directive to promote the "Progress of Science and useful Arts."[92]

Co-authorship of copyrights is outlined by the *Copyright Act of 1976*.[93] Section 101 defines several terms relevant to co-authorship.[94] A collective work is defined as "a work…in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[95] Whereas a joint work is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[96] *Section 201, Part A, of Title 17 of the United States Code*, states: "[t]he authors of a joint work are co-owners of copyright in the work."[97] Thus, if the artwork produced by DALL-E is viewed as joint work between OpenAI programmers and the users of DALL-E, both the programmers and the users would be considered authors of the work and co-owners of the copyright.

However, there is another form of co-authorship outlined by Title 17 that could also be implemented for DALL-E. Rather than being viewed as a "joint work," the artwork created by DALL-E could be viewed as "collective works."[98] Part C of Section 201 of Title 17 states: "[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution."[99] If applied to the DALL-E situation, the copyrights would be given separately to the contribution of the programmers and the contributions of the user. This means that the programmers would be given the copyright to the algorithm they created, and the user would be given the copyright to the "text description" they wrote. However, because both the programmer and user possess "only the privilege of reproducing and distributing the contribution," as highlighted by Part C of Section 201, neither would possess the rights to the entire collective work.[100] This means neither would possess the

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[91] U.S. CONST. art. I, §8, cl. 8.
[92] *Id.*
[93] Copyright Act of 1976, 17 U.S.C. §§101-201 (2022).
[94] 17 U.S.C. §101 (2022).
[95] *Id.*
[96] *Id.*
[97] 17 U.S.C. §201 (2022).
[98] *Id.*
[99] *Id.*
[100] *Id.*

right to distribute the artwork created by DALL-E.[101] Because considering the artwork to be collective work would hinder the ability of both the programmer and the user to distribute the artwork created by DALL-E, viewing the artwork as "joint work" rather than "collective work" appears as the most practical method of establishing a system of co-authorship for artificially intelligent created artwork.

B. Sentient Authorship

A second possible solution is amending the requirement of "human authorship" for attaining copyrights to sentient authorship instead. This would allow AI systems to copyright their own works, meaning DABUS and DALL-E could qualify as authors if their sentience is proven. However, this requires amending the *Copyright Act of 1976*, which requires human authorship for obtaining copyright protection. Amending the *Copyright Act* would necessitate Congress enacting legislation that would state authorship applies to both human and non-human authors. This would hypothetically include animals and artificial intelligence systems that demonstrate sentience. Federal copyright laws have been amended several times to modernize copyright law, such as the *Digital Millennium Copyright Act of 1998*.[102] Therefore, it is feasible for Congress to adapt copyright law to an age of AI by acknowledging that there are more than just human authors of artwork.

Several legislatures around the world have enacted legislation recognizing the sentience of non-humans. In 2022, the United Kingdom passed the *Animal Welfare (Sentience) Act of 2022*, which stated that animals are sentient beings, adopting the European Union Commission's definition of sentience as "capable of feeling pleasure and pain" and offering more protections for the welfare of animals that are deemed sentient [103] It also established an "Animal Sentience Committee," tasked with analyzing the effect United Kingdom (UK) policies have on animals.[104] Similarly, the New Zealand Legislature passed the Animal Welfare Amendment Act in 2015, declaring animals as sentient and establishing stricter rules about animal testing, hunting, and the treatment of animals.[105] Both pieces of legislation provide an example of legislation that recognizes

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[101] *See* Copyright Act of 1976, 17 U.S.C. §§101-201 (2022).
[102] Digital Millennium Copyright Act, 17 U.S.C. (1998).
[103] Animal Welfare (Sentience) Act, 2022 (Act No. 22/2022) (U.K.); Animal Welfare (Sentience) Act Explanatory Note, 2022 (Act No. 22/2022) (U.K.)
[104] Animal Welfare (Sentience) Act, 2022 (Act No. 22/2022) (U.K.).
[105] Animal Welfare Amend. Act, 2015, (Act No.2/2015) (N.Z.).

sentience as bestowing additional rights upon non-humans. While these acts did not provide animals with any rights to intellectual property, it demonstrated that sentience is deserving of expanded rights that match the sentient being's capability to feel emotions. Thus, hypothetically, if AI develops to become sentient beings, the logic of these acts would mean AI would be deserving of expanded rights to match their level of sentience, which in the case of an AI artist, would include rights to its art.

Furthermore, while the UK legal system differs from the US legal system, the UK Animal Welfare (Sentience) Act of 2022 can provide inspiration for the creation of legislation in the United States that grants additional rights to sentient beings.[106] More specifically, legislation could incorporate an AI Sentience Committee that evaluates how United States government policy affects non-human beings and assesses whether AI systems have attained sentience.[107] If so, the committee would require rights to be bestowed upon sentient beings.[108] If the committee determines that AI systems have attained sentience, then systems like DABUS and DALL-E could qualify as authors of the artwork they create and be granted copyrights to their work.

That being said, this solution is merely theoretical at the moment. Even if human authorship was amended, it would not immediately change DALL-E and DABUS' ability to obtain copyright protection. Past legislation in UK and New Zealand has only recognized animals as sentient, not AI, and both DALL-E and DABUS have yet to prove their sentience. This means that they do not qualify for the rights that a hypothetical amendment would provide to sentient beings.

Conclusion

In the *DABUS* decision, the United States Copyright Review Board stated that copyright protection requires human authorship.[109] Thus, because DALL-E is neither human nor sentient, it does not qualify for intellectual property rights and is merely a tool for creativity. Unless the human authorship requirement is amended to sentient authorship, the copyrights should instead be owned by the humans involved in the

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[106] Animal Welfare (Sentience) Act, 2022 (Act No. 22/2022) (U.K.).
[107] *Id.*
[108] *Id.*
[109] U.S. Copyright Off. Rev. Bd., U.S. Copyright Off., *Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise*, 7 (2022).

creation of the artwork: the programmer and the user. Both the programmer of the system, through their involvement in curating the inputs during the machine learning process, and the user of the system, through their contribution of the prompt, play a role in the creation of the artwork and demonstrate "intellectual invention" as defined by *Burrow-Giles Lithographic Co. v. Sarony*. Thus, both the artist and the corporation, who the programmers work for, should qualify for ownership of copyrights to the art. As a result, the legal system should allow for co-ownership of copyrights for AI-created art.

Africa's Last Colony: How Morocco's Occupation of Western Sahara Exposes the Limits of International Law

Taylor Wong

Introduction

Decolonization symbolically began on December 14, 1960: the United Nations General Assembly (UNGA) released Resolution 1514, which proclaimed the "speedy and unconditional end [to] colonialism in all its forms and manifestations."[1] For many countries, Resolution 1514 marked the end of colonization and the beginning of a new era of independence.[2] Yet as colonial empires crumbled, colonialism itself did not. Instead, it re-manifested itself in the form of settler colonialism: a different form of colonialism premised on the same desires for domination and power. Settler colonialism has been called "UNGA Resolution 1514's modern enemy,"[3] as it aims to displace a certain indigenous population and replace it with settlers.[4] While traditional colonialism dominates a group or nation through force and political control, settler colonialism constitutes the "destruction and replacement of indigenous people and their cultures by the settlers. . . in order to establish themselves as the rightful inhabitants."[5]

Western Sahara, a sparsely populated territory on Africa's Atlantic coast, is a relevant, yet oft-forgotten, example of settler colonialism.[6] Western Sahara is the last African

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[1] G.A. Res. 1514 XV, § 1, (Dec. 14, 1960).
[2] *Timeline: African Independence*, RADIO FRANCE INTERNATIONALE (Feb. 19, 2010, 7:46 PM). https://www.rfi.fr/en/africa/20100216-timeline-african-independence.
[3] Shabia Rather, *Falling Through the Cracks: Kashmir's Resistance Against Settler Colonialism and the Limits of International Law*, 63 HARV. INT'L. L. J., 2 (2022).
[4] Cornell L. Sch., Legal Information Institute, Settler Colonialism, https://www.law.cornell.edu/wex/settler_colonialism.
[5] *Id.*
[6] Jacob Mundy & Stephen Zunes, *Moroccan Settlers in Western Sahara: Colonists or Fifth Column?,* in SETTLERS IN CONTESTED LANDS: TERRITORIAL DISPUTES AND ETHNIC CONFLICTS, 40 (2015).

territory on the United Nations (UN) list of Non-Self-Governing Territories;[7] its status has been disputed for almost fifty years. For the Sahrawis, the ethnic group native to Western Sahara, this has meant decades of fighting, forced exile, and what they see as an illegal occupation by government-sponsored settlers of Morocco, which borders the territory to the north.[8]

This note uses the case of Western Sahara to understand and analyze the relationship between indigenous rights, settler colonialism, and international law. The Sahrawis' fundamental right to self-determination, both as a territorial entity and indigenous community, has been affirmed on numerous occasions by treaties, UN resolutions, and opinions by the International Court of Justice (ICJ).[9] Yet these laws lack the key aspect of enforceability because Morocco views Western Sahara as an integral part of Moroccan territory and thus defies international law by incorporating the territory as its "Southern Provinces."[10] From this revelation, one might think that international law should be dismissed. However, despite its flaws, this note argues that indigenous communities can use their legal rights to craft a new form of international law that better suits their needs. Therefore, it proposes a departure from the influence of states in favor of a multi-faceted "bottom-up" approach to lawmaking that relies upon informal techniques as a means of gaining leverage and concentrated support. Such an approach works to create new instruments of formal international law, enabling the Sahrawis and other colonized peoples to work towards unlocking their legally determined rights and freeing themselves from their colonial chains.

I. Historical Background

On December 26th, 1884, European nations came together to partition Africa in what is known as the Berlin Conference.[11] It was here that Spain laid claim to present-day Western Sahara.[12] Spain administered the territory for nearly a century under the official

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[7] Under Chapter XI of the Charter of the United Nations, the Non-Self-Governing Territories are defined as "territories whose people have not yet attained a full measure of self-government." For the current list, see *id.*
[8] Mundy & Zunes, *supra* note 6, at 40.
[9] *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct 16).
[10] CONSTITUTION OF MOROCCO, arts. 135–146.
[11] The Eds. of Encyclopedia Britannica, Berlin West Africa Conference, Britannica (Jan. 13, 2023), https://www.britannica.com/event/Berlin-West-Africa-Conference.
[12] Martin Dawidowicz, *Trading Fish for Human Rights in Western Sahara,* in STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY 250 (Duncan French ed., 2013); Pal Range, *Western Sahara, the European Commission and the Politics of International Legal Argument,* in ECONOMIC ACTIVITIES IN

name of "Spanish Sahara."[13] In 1963, the territory was added to the list of UN Non-Self Governing Territories.[14] As African countries gained independence throughout the 1960s and early 1970s, pressure for independence began to build in the territory,[15] and as Spanish influence waned, a UN mission revealed that an overwhelming majority of Sahrawis favored independence.[16] Nevertheless, Morocco and Mauritania sought control over the territory, and in 1974 the UN General Assembly requested that the ICJ issue an opinion on Western Sahara's status.[17] The court came to two conclusions. First, despite acknowledging the existence of some pre-colonial relations between Morocco, Mauritania, and nomadic peoples in the territory, they could not establish "any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity."[18] Second, no factor could affect "the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."[19]

On November 6th, three weeks after the release of the ICJ's opinion, Morocco initiated the Green March, in which hundreds of thousands of Moroccan settlers walked into Western Sahara.[20] In response, the UN drafted Resolution 380, which called upon Morocco to "immediately . . . withdraw from the Territory of Western Sahara all the participants in the march."[21] Two weeks after the withdrawal of the marchers, Spain, Morocco, and Mauritania signed the Madrid Accords, in which Spain agreed to leave Western Sahara while simultaneously "confirm[ing] its resolve . . . to decolonize the territory."[22] However, the agreement did not bring colonialism to an end for the Sahrawis. In negotiating the accords, the three aforementioned countries agreed to a secret pact that partitioned Western Sahara between Morocco and Mauritania in exchange for Spanish access to the territory's fishing

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OCCUPIED TERRITORIES: INTERNATIONAL, EU LAW AND BUSINESS AND HUMAN RIGHTS PERSPECTIVES 163 (A. Duval & E. Kassoti ed., 2020). These sources both contain accurate and recently updated histories of Western Sahara.

[13] Dawidowicz, *supra* note 12, at 254.

[14] Range, *supra* note 12, at 166.

[15] Dawidowicz, *supra* note 12, at 257.

[16] *Id.*

[17] G.A. Res. 3458 XXX, § 15, (Dec. 10, 1976).

[18] *Western Sahara, supra* note 9, at 60.

[19] *Id.*

[20] Dawidowicz, *supra* note 12, at 257.

[21] S.C. Res. 380, § 2, (Nov. 6, 1975) (calling upon Morocco to withdraw its troops from Western Sahara).

[22] Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania, Nov. 14. 1975, 988 U.N.T.S. 171 *generally* [hereinafter Madrid Accords].

and phosphate reserves.[23] Shortly thereafter, Morocco and Mauritania annexed Western Sahara in a military invasion of the territory, thereby beginning a protracted conflict with the Polisario Front, or the liberation movement of the Sahrawis.[24] Mauritania withdrew its claims to Western Sahara in 1979 and threw its support behind the Polisario, which resulted in further Moroccan invasion of the former Mauritanian-occupied territory.[25]

As the conflict between the Polisario and Moroccan forces continued, UN Security Council Resolution 690 was adopted on April 29th, 1991; the resolution established the UN Mission for the Referendum in Western Sahara (MINURSO), a permanent peacekeeping mission in the territory.[26] The two sides soon agreed to a ceasefire, which led to the creation of a "settlement plan" aimed to initiate a MINURSO-supervised "referendum for self-determination for the people of Western Sahara."[27] However, the plan was opposed by Morocco and therefore was not implemented.[28] In 2003, James Baker, Personal Envoy of the UN Secretary-General for Western Sahara, proposed a solution known as the Baker Plan II, a revised version of his less notable Baker Plan I, which was ill-conceived and rejected by all involved parties.[29] The revised plan would have seen the entire population of Western Sahara, including settlers, vote for either independence, integration, or autonomy within Morocco.[30] The proposal was endorsed, albeit reluctantly, by the Polisario and secured the recommendation of the entire UN Security Council,[31] but was rejected by Morocco because it contained a provision for independence.[32] Morocco countered in 2007 with its "final political solution" which was a proposal for Western Saharan autonomy within "the framework of the Kingdom's sovereignty and national unity."[33] The Polisario rejected the proposal and restated its commitment to the Baker Plan II, while the Security Council neither endorsed nor rejected the proposal.[34]

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[23] Dawidowicz, *supra* note 12, at 257.
[24] Maria Makhmutova, *Specific Features of the Polisario Front as a Non-State Actor,* 1 Novaia I Noveishaia Istoriia, 150 (2021).
[25] Dawidowicz, *supra* note 12, at 259.
[26] S.C. Res 690, § 4, (April 29, 1991) (establishing the United Nations Mission for the Referendum in Western Sahara (MINURSO).
[27] *Id.*
[28] *See Dawidowicz, supra* note 12, at 260.
[29] *Id.*
[30] U.N. Secretary-General, *Rep. Concerning the Situation in Western Sahara*, § 4.49 (May 23, 2003).
[31] S.C. Res. 1495, § 1, (July 31, 2003) (supporting the Peace plan for self-determination of the people of Western Sahara presented by the Personal Envoy of the Secretary-General).
[32] Anna Theofilopolou, *The United Nations and Western Sahara: A Never Ending Affair* in USIP SPECIAL REPORT 166, 13 (2006).
[33] Dawidowicz, *supra* note 12, at 261.
[34] *Id.*

Throughout the conflict, the UN's official stance on the matter has never changed: their ultimate goal is a "just, lasting, and mutually acceptable political solution . . . which will provide for the self-determination of the people of Western Sahara . . . consistent with the principles and purposes of the Charter of the United Nations."[35] Yet Morocco's position on Western Sahara also remains the same: its historical ties to Western Sahara make it an essential part of its territory;[36] therefore, any proposal with Sahrawi independence as an option is a non-starter. Between 1975 and 1991 hundreds of thousands of Sahrawis were displaced by settlers; many took refuge in the Tindouf Refugee Camps in Algeria, where they and their descendants remain today.[37] Moroccan settlers are believed to make up approximately two-thirds of Western Sahara's total population,[38] a number that shows the extent to which the Sahrawis have been pushed out. For the Sahrawis, the failure of Morocco to follow the UN's guidelines and the failure of the UN to enforce them has meant sustained colonialism, war, and deprivation of the right to self-determination.

II. Self-Determination and Indigenous Rights

For colonized peoples, the concepts of self-determination and indigenous rights offer established protection from settler colonialism. Self-determination –in essence, the right for a people to determine their own political status– is key for indigenous communities in their fight against settler colonialism. Both the UN International Covenant on Civil and Political Rights (ICCPR) and the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) contain provisions regarding self-determination: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[39] The covenants also state that "the States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall

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[35] S.C. Res 2602, § 1, (Oct. 29, 2021) (Recalling and reaffirming all previous resolutions on Western Sahara).
[36] Dawidowicz, *supra* note 12, at 254.
[37] Renata Briano, Sahrawi Refugee Camps in Tindouf, EUROPEAN PARLIAMENT PARLIAMENTARY QUESTION (June 12, 2018), https://www.europarl.europa.eu/doceo/document/E-8-2018-002896_EN.html (citing a UN High Commission for Refugees report estimating 173 600 Sahrawi refugees residing in camps in Tindouf).
[38] For a live estimate of Western Sahara population, see Western Sahara Population 2023 (Live), WORLD POPULATION REVIEW, https://worldpopulationreview.com/countries/western-sahara-population.
[39] International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] arts 1 (1).

promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[40] Morocco signed both the ICCPR and ICESCR in 1977 and the agreements were ratified in 1979; therefore, as stipulated by UN Charter Article 73, the provision for self-determination in both the ICCPR and ICESCR should be applied to Western Sahara.[41]

Nevertheless, self-determination in international law is intentionally vague, an "unsettled norm" with no precise definition.[42] While it is widely expected that a more determinate understanding of the scope and content of the right would have emerged since the ratification of the ICCPR and ICESCR, a nuanced and official definition has yet to be introduced.[43] According to international law professor John Dugard, "much of the support for the principle of self-determination as a legal right and as a peremptory norm is couched in generalizations and little attempt is made to define the content of the right with any precision."[44] As a result, the scope and application of self-determination under international law have been debated for decades and necessitated rulings by the ICJ to address indigenous and separatist movements.

One of the first ICJ cases regarding self-determination, titled *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, dealt with South Africa's occupation of Namibia, then known as "South-West Africa." In 1969, the UN Security Council instructed South Africa to withdraw from the territory; South Africa refused, and the Security Council called on the ICJ for a ruling.[45] South Africa argued that "tribal and cultural divisions" in Namibia meant limitations on self-determination,[46] but the court rejected that view, affirming the right to self-determination in the territory and rendering South Africa's continued presence illegal.[47]

In the 2000s, the ICJ issued rulings regarding self-determination in two partially recognized states: Palestine and Kosovo. In 2004, an opinion was requested after Israel

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[40] ICCPR, supra note 39, at art. 1; ICESCR, *supra* note 39, at art. 3.
[41] *See* U.N. Charter art. 73.
[42] Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HARV. HUM. RTS. L. REV., 610 (2011).
[43] *Id.* at 612.
[44] John Dugard, *Recognition and the United Nations*, 1 LEIDEN INT'L. L.J., 160 (1987).
[45] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 1 (June 21) [hereinafter *Namibia*].
[46] *Id.* at 63.
[47] *See generally Id.*

constructed a barrier in *de jure* Palestinian territory.[48] The court ultimately concluded that "the wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force."[49] The ruling also reaffirmed the importance of a commitment to self-determination for Palestinians.[50] In 2009, following Kosovo's unilateral declaration of independence, an opinion on whether the declaration violated international law was requested.[51] The court ruled that the declaration did not violate international law because Kosovar Albanians had a right to self-determination.[52] It both reaffirmed the right of self-determination and stated that the ICCPR and ICESCR's provisions on self-determination meant that "a people may secede from the territory of a sovereign state without the latter's consent."[53]

In 2019, the court issued an opinion on the decolonization process of Mauritius, a sovereign state in the Indian Ocean, by releasing *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[54] The court found that the decolonization process in Mauritius was incomplete because the United Kingdom, which colonized Mauritius before it achieved independence, continued to occupy the Chagos Archipelago illegally.[55] It recalled that the scope of those rightfully owed self-determination is defined by reference to the entirety of a non-self-governing territory. Moreover, the court stated that "any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination."[56] Each of these cases set significant precedents regarding self-determination across the world, and multiple key impacts can be taken from these cases with regards to the status of Western Sahara.

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[48] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 2 (July 9) [hereinafter *Palestine*].
[49] *Id.* at 63.
[50] *See generally Id.*
[51] *Accordance with International Law of the Unilateral Declaration of Independence by the Provision Institutions of Self-Government of Kosovo*, Advisory Opinion, 2009 I.C.J 403, 1 (Dec 21) [hereinafter *Kosovo*].
[52] *See generally Id.*
[53] *Id.* at 4.
[54] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, 2019 I.C.J 95, 1 (Feb 25) [hereinafter *Mauritius*].
[55] *See generally Id.*
[56] *Id.* at 8.

In the *Namibia* case, the court found that the ICCPR "clearly embrace[s] territories under a colonial regime,"[57] meaning self-determination can be applied to non-self-governing territories like Western Sahara in *any* instance. In the case regarding Israel and Palestine, the court noted "the construction of the Barrier [was] an attempt to annex the territory contrary to international law";[58] in Western Sahara, Morocco has constructed the Berm, a militarized sand wall in Western Saharan territory meant to deter Sahrawi fighters from entering the Moroccan-occupied portion of the territory.[59] If the Berm is treated in the same manner as the Israel-Palestine barrier, its construction and maintained military presence constitute a breach of international law. The *Kosovo* case saw the court assert that "the right to self-determination of peoples includes the exercise of this right through secession; and, furthermore, that these instruments neither limit the exercise of this right through secession to the colonial context nor to the consent of the state from which a people seeks to secede."[60] This ruling means that despite UN efforts to engage both the Sahrawis and Moroccans in negotiations, self-determination need not necessarily come with the Moroccan government's consent. Finally, the *Mauritius* case simply reaffirms the illegality of Morocco's annexation of Western Sahara in the wake of the Madrid Accords.

In addition to the principle of self-determination, another key concept in the fight against settler colonialism is indigenous rights. In 2007, the UN passed the Declaration on the Rights of Indigenous Peoples (UNDRIP), a non-binding declaration[61] signed by most of the world's countries.[62] Notably, Morocco was absent from the vote and never ratified the declaration.[63] The declaration reinforces the rights of indigenous communities by prohibiting forced assimilation and displacement.[64] Most notable, however, is its commentary on the recognition of indigenous sovereignty. On one hand, it recognizes that indigenous peoples have a right to self-determination, and "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[65] On the

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[57] *Namibia, supra* note 45, at 31.
[58] *Palestine, supra* note 48, at 49.
[59] Range, *supra* note 12, at 166.
[60] *Kosovo, supra* note 51, at 4.
[61] *See* Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System,* Fact Sheet No. 9, 8 (2013).
[62] *See Generally* G.A. Res. 61/297, LXI (2007) [hereinafter UNDRIP].
[63] United Nations Declaration on the Rights of Indigenous Peoples Voting Record, U.N. DIGITAL LIBRARY (Sep. 13, 2007) https://digitallibrary.un.org/record/609197?ln=en.
[64] UNDRIP arts. 5-8.
[65] *Id.* art. 3.

other hand, UNDRIP sees self-determination as "the right to autonomy or self-government in matters relating to their internal and local affairs,"[66] meaning that even if self-determination is achieved, aspects of indigenous communities can still be controlled by a settler state. Furthermore, Article 46 of the declaration states that indigenous communities may not engage in actions that go against existing "territorial integrity and political unity" of existing states.[67] Morocco, therefore, could claim that Sahrawi self-determination constitutes a breach of its territorial integrity in Western Sahara, or disrupts the political unity created by its administration as the "Southern Provinces."[68] Since the agreement is a declaration, it has no binding power under international law: it only carries "moral force."[69] During the ratification process, states that ratified the declaration greatly watered-down the rights of indigenous in order to ensure they retained control.[70] Nevertheless, despite its flaws, UNDRIP is the most comprehensive resolution regarding indigenous rights that is in effect today.

III. Proposal

The situation in Western Sahara constitutes a complete failure of international law. Under international law, the Sahrawis clearly satisfy the guidelines for self-determination, as the ICJ stated that no factor could impede self-determination in the territory.[71] Moreover, Morocco's occupation represents a clear violation of its obligations under the ICCPR and ICESCR. Yet despite numerous UN declarations and ICJ precedent, Morocco has never been reprimanded for its actions in Western Sahara, nor has its annexation of the territory been rightfully characterized as illegal.[72]

Top-down international lawmaking consists of "state actors making international law and imposing it on others who may have been quite removed, geographically and politically, from the entire lawmaking process."[73] Indeed, in the case of UNDRIP, the top-

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[66] *Id.* art. 4.
[67] *Id.* art. 46.
[68] CONSTITUTION OF MOROCCO, *supra* note 10, arts. 135-146.
[69] ICCPR, supra note 39, at art. 1; ICESCR, *supra* note 39, at art. 1.
[70] Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. L. REV., 1158 (2008).
[71] *Western Sahara, supra* note 9, at 60.
[72] *Annexation is a Flagrant Violation of International Law, Says UN Human Rights Expert*, United Nations Human Rights Office of the High Commissioner (June 20, 2019), https://www.ohchr.org/en/press-releases/2019/06/annexation-flagrant-violation-international-law-says-un-human-rights-expert.
[73] Janet K. Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L. L., 126 (2005).

down approach allowed signatories to use potential abstention as leverage to get their way. An instance of this can be seen in the presence of Article 46, which was only included after an African bloc of 53 countries threatened to withhold their votes due to concern for the possibility of secession.[74]

Third World Approaches to International Law (TWAIL) is a school that criticizes international law for its historical roots in colonialism.[75] To them, top-down lawmaking serves as a way to appease oppressed communities while legally ensuring settler states maintain power. TWAIL scholars, for example, would argue that although indigenous communities were involved in the drafting stage of UNDRIP, [76] the forced concessions to appease UN members severely curtails indigenous rights and cements settler control over indigenous communities. Additionally, the ambiguity of UNDRIP in the context of indigenous self-determination fails to actually result in self-determination because states are "bound only by that to which they have consented."[77] Nevertheless, despite these criticisms, TWAIL has never proposed a concrete alternative to remedy the problems they critique,[78] which begs the question: is completely abandoning international law possible? Despite its colonial origins, this note sees working within international law as not only possible but necessary for Sahrawi liberation, as the problem occurs not in international law itself but in the top-down manner in which international law is framed.

Countries like Morocco (and the United States, to an extent) disregard UNDRIP without penalty due to its non-binding status, making the treaty nothing more than virtue signaling.[79] To this end, international law, and more specifically self-determination and indigenous rights law, should be reimagined with a bottom-up approach. Legal scholar Janet K. Levin excellently contrasts the top-down and bottom-up approaches:

> "In the traditional top-down approach, state elites enact rules (typically formal, treaty-based rules) that govern the practices and behavior of those who are subject to the rules. In contrast, in the bottom-up approach, the practices and behaviors of various actors inform and constitute the rules, which, in turn, govern the practices and behaviors of those very same actors."[80]

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[74] Wiessner, *supra* note 70, at 1159, 1166.
[75] B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L. CMTY. L. REV., 3 (2006).
[76] *See UN Declaration on the Rights of Indigenous Peoples*, AUSTRALIAN HUMAN RIGHTS COMMISSION, (No Date) https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1.
[77] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 33 (2005)
[78] Chimni, *supra* note 75, at 3.
[79] This disregarding can be seen in general Moroccan refusal to honor Sahrawi self-determination as stipulated by the ICJ.
[80] Levit, *supra* note 73, at 126.

Levit writes in the context of international trade law; this note seeks to expand upon her scholarship by applying it to indigenous rights law. Bottom-up lawmaking is, according to Levit, "rooted in the informal,"[81] and therefore "largely undiscovered as an alternative path to law."[82] However, this does not diminish its potential for change in the realm of international law. In Western Sahara, bottom-up lawmaking as a means of resisting settler colonialism is a particularly appealing alternative to top-down lawmaking for two reasons. First, the Sahrawis are uniquely equipped to utilize bottom-up lawmaking given its role is to "challenge prevailing international lawmaking theory and paradigms,"[83] such as those that have allowed Moroccan occupation to persist. Second, indigenous communities across the world have "enact[ed] legislation and other rules and regulations that better serve their communities than those imposed by the state,"[84] providing key precedents for the Sahrawis in resisting oppressive state rule.

Writ large, bottom-up lawmaking in Western Sahara must entail the active participation of Sahrawi people in the lawmaking process and ensure that legal framework is informed by the experiences and needs of the Sahrawi people, rather than being imposed upon them by external state actors. While bottom-up lawmaking can take many forms, in the following section, this note will isolate two types that the Sahrawis can utilize in their fight for self-determination.

For indigenous communities, one key aspect of bottom-up lawmaking is participatory governance, a form of governance that emphasizes democratic engagement through collective decision-making.[85] Numerous indigenous communities have successfully utilized participatory governance as a means of resisting colonialism and settler colonialism. In Ecuador, the Quechua established community-led initiatives and monitoring programs to protect their territory from oil drilling and resource extraction by corporations working in conjunction with the Ecuadorian government.[86] In Norway, the Sami established the Sami Parliament, a democratically-elected body, which "deals with all matters concerning the Sami

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Leah Sarson, *Shifting Authority: Indigenous Lawmaking and State Governance,* 50 MILLENNIUM J. INT'L. S., 210 (2022).
[85] Frank Fischer, *Participatory Governance: From Theory to Practice*, in THE OXFORD HANDBOOK OF GOVERNANCE 457 (David Levi-Faur ed., 2012).
[86] *Community of Sarayaku,* CENTRO POR LA JUSTICIA Y EL DERECHO INTERNACIONAL (No Date) https://cejil.org/en/case/community-of-sarayaku/.

people" in 1989.[87] And in New Zealand, the Maori established *runaka*, or tribal governance groups,[88] which have negotiated settlements with the New Zealand government over violations of the 1840 Treaty of Waitangi.[89] In each of these examples, indigenous communities successfully used bottom-up lawmaking to engage with state governments over cultural, land, and resource issues. To this end, the Sahrawis can utilize participatory governance in their fight for self-determination, whether it be in the form of a democratically elected tribal government that addresses issues in the territory or community-led initiatives that seek to raise awareness of occupation. While the question remains of whether the Moroccan government would consider such measures legitimate, participatory governance is an essential tool to establish legitimacy and resist settler colonial threats to the community.

Moreover, the Sahrawis can engage in what scholar Duncan Kennedy describes as "legal work," or the usage of the law to achieve a desired outcome.[90] Legal work as a concept can be utilized by the state, which can be seen in the Bush Administration's placement of the Guantanamo Bay Detention Center in Cuba in order to subvert United States law and hold detainees indefinitely without charging them of a crime,[91] Israel's regulation of the Palestinian Territories,[92] and even Morocco's occupation of Western Sahara, but is also a key tool for non-state actors in the context of bottom-up lawmaking. According to Kennedy, legal workers can "transform an initial apprehension of what the system of norms requires . . . so that a new apprehension of the system . . . will correspond to the extra-juristic preferences of the interpretive worker."[93] In other words, legal work involves a process of transforming an initial understanding of legal requirements to fit with the worker's personal beliefs and values, which can result in a new interpretation of the legal system that is influenced by the worker's own perspective. Legal work can take many forms, and can involve working with NGOs and nonprofits to document and report Moroccan human rights violations, such as torture[94]and arbitrary detention,[95] which are enshrined in *binding* laws like ICESCR and

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[87] *Sami Parliaments,* NORDIC POLICY CENTER (Jan. 22, 2021) https://www.nordicpolicycentre.org.au/sami_parliaments.
[88] Peter Walker & Patrick Shannon, *Participatory Governance: Towards A Strategic Model*, in 46 CMTY. DEV. J., 63 (2011).
[89] *See Generally Deed of Settlement Between the Crown and Ngati Tara Tokanui, 2022 N.Z. GOV*.
[90] Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation,* in LEGAL REASONING, COLLECTED ESSAYS 158 (2008).
[91] Noura Erakat, JUSTICE FOR SOME 7 (2019).
[92] *Id.*
[93] Kennedy, *supra* note 90, at 158.
[94] ICCPR, supra note 39, at art. 7.
[95] ICCPR, supra note 39, at art. 9.

ICCPR, as well as awareness campaigns ranging from advocacy for Sahrawi access to fishing and natural gas resources[96] to larger resistance movements that resemble the Boycott, Divestment, and Sanctions movement by Palestinians, the goal of which is " to end international support for Israel's oppression of Palestinians and pressure Israel to comply with international law."[97]

Legal work is often a long, drawn-out process, and therefore will not immediately lead to Sahrawi independence. Nevertheless, by engaging in legal work, the Sahrawi independence movement can legitimize itself as more than a guerilla group; in turn, resulting in increased support on the international level. Indeed, Palestinian legal work has led to recognition by over 70% of UN member states[98] and "non-member observer state" status at the UN,[99] showcasing its potential as a means of achieving concentrated legal support for Sahrawi independence and statehood.

Conclusion

To quote B.S. Chimi, author of *Third World Approaches to International Law: A Manifesto*, "the threat of recolonisation is haunting the third world."[100] Indeed, well-documented examples of settler colonialism have occurred in the United States, Palestine,[101] Jammu and Kashmir,[102] and Oceania. However, academic research into settler colonialism in Western Sahara is less prevalent, which can be attributed to the fact that settler colonial studies tend to focus on situations where the colonizer is a white, western power. In the case of Western Sahara, both Moroccans and Sahrawis are non-white, which pushes the limits of settler colonial theory and receives considerably less international attention. While such a dichotomy should be acknowledged, it should neither delegitimize the case of settler colonialism occurring in Western Sahara nor deter the Sahrawis' bid for self-determination.

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[96] *See* Sarson, *supra* note 84, at 214.
[97] *What is BDS?* BDS (No Date) https://bdsmovement.net/what-is-bds.
[98] Palestine is recognized as an independent state by 138 UN member states. *See* PERMANENT OBSERVER MISSION OF THE STATE OF PALESTINE TO THE UNITED NATIONS NEW YORK, https://palestineun.org/about-palestine/diplomatic-relations/ (Jan. 15, 2021).
[99] *Id.*
[100] Chimni defines recolonisation as "the reconstitution of the relationship between State and international law so as to undermine the autonomy of third world States and to the disadvantage of its peoples." Chimi, *supra* note 75, at n. 3.
[101] Omar J. Salamanca et. al., *Past is Present: Settler Colonialism in Palestine* in SETTLER COLONIAL STUDIES 1 (2013).
[102] *See generally* Rather, *supra* note 3.

International laws were created as a means of supporting world order and "humanity's fundamental goals of advancing peace, prosperity, [and] human rights[.]"[103] Yet, as Chimni notes, the world order is increasingly interconnected with the global north-south divide, resulting in international law "playing a crucial role in helping legitimize and sustain . . . unequal structures and processes."[104] ICCPR, ICESCR, and UNDRIP are examples of top-down international lawmaking created by the global north to *govern* the global south. These non-binding "laws" serve as smokescreens to appease oppressed communities while simultaneously cementing the power of settler states. Yet despite these flaws, international law cannot be abandoned altogether. After all, self-determination and indigenous rights prove that a framework outlining rights for the colonized *exists*.

Therefore, the Sahrawis must use these rights to reimagine and recreate international law. Engaging in bottom-up lawmaking ensures that laws are created by "practitioners . . . [who] roll up their sleeves and grapple with the day-to-day technicalities of their trade,"[105] and is a viable solution to combating settler colonialism as well as the aforementioned north-south divide. Indigenous communities across the world have already utilized participatory governance and legal work in their fight against oppressive powers, and even other forms of activism exist as possibilities for the Sahrawis.

As Morocco works to consolidate international support for its settler colonial project through recognition of sovereignty over Sahrawi territory,[106] the urgency for reform cannot be understated. Absent change, Morocco's illegal occupation will persist, and Western Sahara will continue to carry the distinction of being Africa's last colony.

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[103] Mary Ellen O'Connell, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 1 (2008).
[104] Chimni, *supra* note 75, at 4.
[105] Levit, *supra* note 73, at 126.
[106] *See Proclamation on Recognizing the Sovereignty Of The Kingdom Of Morocco Over The Western Sahara,* US EMBASSY & CONSULATES IN MOROCCO *(Dec. 10, 2020)* https://ma.usembassy.gov/proclamation-on-recognizing-the-sovereignty-of-the-kingdom-of-morocco-over-the-western-sahara.

Guilty by Reason of Neurological Immaturity: "Permanent Incorrigibility" and Juvenile Life without Parole Sentencing

Madeline Goldstein

Introduction: The Beginning of Juvenile Life without Parole and "Permanent Incorrigibility"

In 1962, the Oakland County Circuit Court sentenced Sheldry Topp to mandatory life in prison without the possibility of parole for a first-degree murder conviction.[1] At the age of seventeen, he was apprehended by the Federal Bureau of Investigations just two weeks after the crime was committed.[2] Mr. Topp confessed to breaking into the home of Charles Davis in order to steal money from a bedroom dresser. When Mr. Davis tried to stop the theft, the two struggled, and Topp fatally stabbed Mr. Davis.[3]

In 2012, The Sentencing Project surveyed nearly 1,600 people serving life without parole sentences for an offense committed as a juvenile to gain insight on their backgrounds, early childhoods, and the circumstances of their respective crimes.[4] When surveyed, Mr. Topp asserted that he had no intention to kill anyone at the time of the break-in.[5] Rather, on the day of the crime in 1962, he was searching for money because he had just escaped from

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[1] Lauren del Valle, *He Was Sentenced to Life for Murder at Age 17. At Age 74 He's a Free Man,* CNN (Mar. 1, 2019, 8:58 AM), https://www.cnn.com/2019/02/28/us/michigan-longest-juvenile-lifer-released-from-prison-trnd/index.html.
[2] Jessica Pishko, *55 Years Behind Bars,* SLATE MAG.: TRIALS & ERROR (July 17, 2017, 9:00 AM), https://slate.com/news-and-politics/2017/07/sheldry-topp-went-to-prison-when-he-was-17-in-1962-its-time-to-let-him-go-free.html.
[3] del Valle, *supra* note 1.
[4] *See* Carrie Johnson, *Without Parole, Juveniles Face Bleak Life In Prison,* NPR (Mar. 20, 2012, 3:11 PM), https://www.npr.org/2012/03/20/148919350/without-parole-juveniles-face-bleak-life-in-prison#:~:text=Without%20Parole%2C%20Juveniles%20Face%20Bleak%20Life%20In%20Prison%20For%20the,jail%20are%20out%20of%20reach.
[5] *See Id.*

a mental institution to which he was involuntarily committed at age thirteen.[6] Medical records reflect Mr. Topp's ongoing challenges with mental health throughout his adolescence, in part due to the beatings with electrical cords and baseball bats he suffered at the hands of his father.[7] Mr. Topp "constantly trembled" in the presence of his father, who made him fear for his life.[8] While institutionalized from the ages of thirteen to seventeen, he suffered electroshock treatments, or electrically induced seizures, and hydrotherapy, which involved wrapping very cold or hot wet sheets around his entire body for hours at a time.[9] Mr. Topp professed that he "only wanted to escape from the [state] hospital" the day of the crime—to do that, he needed cash.[10] Debroah Labelle, the attorney who handled Topp's most recent parole review, told reporters that Topp was only looking for money to run away from the hospital and his abusive father—he did not want or plan for anyone to be harmed.[11]

Topp's attorneys claimed during his trial that these were mitigating circumstances which prevent the imposition of a life without parole sentence.[12] Medical experts also testified at trial that Mr. Topp was a child under extreme distress and was not beyond rehabilitation.[13] Still, the judge did not find the testimony on Mr. Topp's circumstances or mental state to be sufficient and ultimately determined that Topp—while nearly a decade from being fully neurologically developed—would never be capable of a life outside of prison.[14]

In 1987 and 2007, the Michigan Parole Board recommended that Topp receive a new shortened sentence; however, each time the governor refused to reassess Topp's sentence.[15] Finally in 2019, Judge James Alexander of the Oakland County Sixth Circuit Court found that at age seventy-four, Topp was finally "rehabilitated."[16] Topp was re-

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[6] *See* Pishko, *supra* note 2.
[7] *See Id.*
[8] Johnson, *supra* note 4.
[9] *See also* del Valle, *supra* note 1; Rebecca Bouterie Harmon, *Hydrotherapy in State Mental Hospitals in the Mid-Twentieth Century*, 30 ISSUES IN MENTAL HEALTH NURSING 491, 491-94 (2009).
[10] Johnson, *supra* note 4.
[11] Meghan Keneally, *A Man Who Spent 56 Years Behind Bars for a Juvenile Conviction Was Just Freed, Highlighting Old Laws,* ABC NEWS (Feb. 28, 2019, 5:48 PM), https://abcnews.go.com/US/man-spent-56-years-bars-freed/story?id=61383255.
[12] del Valle, *supra* note 1.
[13] *Id.*
[14] Pishko, *supra* note 2.
[15] Ed White, *Judge Asked to Stop Juvenile Lifer Sentencing Process in Michigan,* S. BEND TRIB. (July 8, 2016, 6:00 AM), https://www.southbendtribune.com/story/news/crime/2016/07/08/judge-asked-to-stop-juvenile-lifer-sentencing-process-in-michiga/117133584/.
[16] *Id.*

sentenced to a minimum of forty years.[17] Because he had already served fifty-six years and earned ten additional years of good-behavior credit, Sheldry Topp—with the aid of a walker—walked out of a Michigan state prison on March 1, 2019.[18]

Topp's release not only comes in a wave of recent state decisions to review juvenile life sentencing practices across the country; it was also a direct product of two landmark Supreme Court decisions that accept recent neuroscience research on the diminished criminal culpability of juveniles.[19] Decided in 2012 and 2016 respectively, *Miller v. Alabama* and *Montgomery v. Louisiana* take steps toward limiting the use of juvenile life without parole sentences based on developing scientific evidence which establish juveniles as neurologically different than adults and more amenable to rehabilitation.[20] The Supreme Court decided in *Miller v. Alabama* that mandatory life sentences without the possibility of parole are unconstitutional under the Eighth Amendment's Cruel and Unusual Clause; the decision, however, did not ban discretionary life without parole sentencing and did not address its application to those who were sentenced as juveniles prior to *Miller*.[21] The subsequent *Montgomery v. Louisiana* decision in 2016 applied *Miller* retroactively, giving individuals like Mr. Topp a chance at freedom.[22] Without *Miller* and *Montgomery*, people like Sheldry Topp would still be incarcerated for crimes committed during adolescence.

These landmark decisions were grounded in the precedent set by *Roper v. Simmons* and *Graham v. Florida*, which differentiate juvenile offenders from adults.[23] *Roper* and *Graham* combined with *Miller* make up what legal scholars refer to as the *Miller* trilogy—a sequence of Eighth Amendment cases which narrow the range of punishments that may be levied on

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[17] del Valle, *supra* note 1.
[18] *Id.*
[19] *See also* Caroline Grueskin, *Juvenile Life Sentences Reviewed,* THE BISMARCK TRIB. (Jan. 19, 2017), https://advance-lexis-com.proxygw.wrlc.org/api/document?collection=news&id=urn:contentItem:5MNN-JY71-JCM7-R2XN-00000-00&context=1516831; Kimberlee Kruesi, *Tennessee Court: Juvenile Life Sentencing Unconstitutional,* THE ASSOCIATED PRESS (Nov. 18, 2022, 11:18 PM), https://apnews.com/article/homicide-tennessee-nashville-sentencing-government-and-politics-4ef200be90ffb7c8fb6406d13c83243b; Dana DiFilippo, *Justices Give Hope to Juvenile Offenders, Allow Sentencing Review After 20 Years,* N.J. MONITOR (Jan. 10, 2022, 12:13 PM), https://newjerseymonitor.com/2022/01/10/justices-give-hope-to-juvenile-offenders-allow-sentence-review-after-20-years/#:~:text=The%20New%20Jersey%20Supreme%20Court,be%20locked%20away%20for%20life; Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 577 U.S. 190, (2016).
[20] *See also Miller*, 567 U.S. at 460; *Montgomery*, 577 U.S. at 206–10.
[21] *See Miller*, 567 U.S. at 476–77.
[22] *See Montgomery*, 577 U.S. at 206.
[23] *See also Miller,* 567 U.S. at 462; *Montgomery,* 577 U.S. at 192–93.

youthful offenders.[24] For its part, *Roper* eliminates the use of capital punishment against youth offenders, while *Graham* holds that life without the possibility of parole for *solely non-homicidal* juvenile offenders is unconstitutional.[25] Both *Roper* and *Graham* hold that under the Cruel and Unusual Clause of the Eighth Amendment, these extreme punishments against juveniles contradict child neuroscience research reflecting that "juveniles are more capable of change than are adults" and less criminally culpable.[26]

Despite these steps toward limiting excessive punishment of juveniles, the *Miller* trilogy and *Montgomery* together simultaneously establish a dangerous standard in the sentencing of youth. *Montgomery* endorses the practice of reserving life without parole sentences for the "rarest" youth whose crimes "reflect permanent incorrigibility," a standard which defies basic developmental neuroscience.[27] *Roper* was the first to establish such an idea and create a group of "rare juvenile offender[s] whose crime reflects irreparable corruption."[28] From there, *Graham*, *Miller*, and *Montgomery* created a precedent which asserts that some youth display such "irretrievable depravity that rehabilitation is impossible and life without parole is justified."[29]

How "permanent incorrigibility" is found, however, is unclear and ultimately subject to significant discretion; it opens the floodgates for arbitrary life without parole sentencing for juvenile offenders who are unjustifiably labeled as "beyond repair."[30] But finding that a juvenile offender is "beyond repair" requires that judges act as experts in neuroscience and psychology, predicting whether a child could ever be amenable to rehabilitation—even in the face of actual experts who proclaim the inaccuracy of making such a prediction and who assert that youth are universally more responsive to rehabilitative interventions.[31] The standard of "permanent incorrigibility" for juveniles is one which in and of itself defies the

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[24] *See* Cara H. Drinan, *The Miller Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659, 1659–83 (2021).
[25] *See also* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010).
[26] *See also Roper,* 543 U.S. at 565–66; *Graham*, 560 U.S. at 68.
[27] *See also Montgomery*, 577 U.S. at 209; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 THE AM. PSYCH. 1009, 1009–18 (2003).
[28] *Roper*, 543 U.S. at 573.
[29] *Montgomery*, 577 U.S. at 208.
[30] *See also Graham*, 560 U.S. at 69; Rachel Ness-Maddox, Comment, *Irreparably Corrupt and Permanently Incorrigible: Georgia's Procedures for Sentencing Children to Die in Prison*, 72 MERCER L. REV. 471, 476 (2020).
[31] *See also* Ana Ionescu, Note, *Incorrigibility is Inconsistent with Youth": The Supreme Court's Missed Opportunity to Cure the Contradiction Implicit in Discretionary JLWOP Sentencing*, 76 U. MIA. L. REV. 612 (2022); FRANCES E. JENSEN & AMY ELLIS NUTT, THE TEENAGE BRAIN: A NEUROSCIENTIST'S SURVIVAL GUIDE TO RAISING ADOLESCENTS AND YOUNG ADULTS 221 (2015).

scientific facts of developmental neuroscience, as it stunts the timeline of brain growth and prematurely concludes that a brain which has not fully developed may be incapable of any further change.[32]

The standard of "permanent incorrigibility" is far from sound or just—nonetheless, *Montgomery* continued to advance the realization of evolving adolescent brain science to limit juvenile life without parole sentencing. But in 2021, *Jones v. Mississippi* completely diverts from this path and holds that "permanent incorrigibility" is not a necessary finding to sentence juveniles to life without the possibility of parole because a "discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."[33] This ruling—as Justice Sotomayor explained in her dissent—completely "guts" the former decade of progress made through *Miller* and *Montgomery* on the use of developmental neuroscience research to limit juvenile life without parole sentencing.[34] *Jones* removes the requirement to assess "permanent incorrigibility" of the child, allowing any minor convicted of homicide to be sentenced to die in prison without consideration of mitigating circumstances.[35]

Whether judges use the "permanent incorrigibility" standard or full discretion in the sentencing of youth, a problem persists. It is both scientifically and legally unsound for the United States judicial system to require that judges make the impossible determinations about a youth's potential future disposition which are necessary to lock away a child and throw away the key. Thus, this note looks to the evolution of "contemporary human knowledge" on adolescent brain science to argue the unconstitutionality of juvenile life without parole sentences under the Cruel and Unusual Clause.[36] The "evolving standards of decency" test has widely expanded the way in which the Cruel and Unusual Clause can be applied—it is no longer a narrow tool which only prevents barbaric public executions and torture.[37] Its "expansive and vital character" demands judicial attention toward recent evolution in our society's knowledge of adolescent neurological growth, which indicates that the brain is in an "active state of maturation" throughout adolescence.[38] Thus, this note

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[32] *See* Hannah Duncan, *Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole,* 131 YALE L.J. 1936, 1995–98 (2022).
[33] Jones v. Mississippi*,* 141 S. Ct. 1307, 1313 (2021).
[34] *See Jones*, 141 S. Ct. at 1328 (Sotomayor, J., dissenting).
[35] *See Id.* at 1313.
[36] Robinson v. California*,* 370 U.S. 660, 666 (1962).
[37] Trop v. Dulles*,* 356 U.S. 86, 101 (1958).
[38] *See also* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 458 (2013); Weems v. United States, 217 U.S. 349, 377 (1910).

argues that no child may be deemed "irreparably corrupt," and neither "permanent incorrigibility" nor juvenile life without parole have a place in our legal system.[39] Given the Supreme Court's history of reliance on various scientific and medical evidence to uphold decisions, it is constitutionally necessary for the Supreme Court to declare juvenile life without parole sentences unconstitutional based on newly established principles of developmental neuroscience.

Part I provides a brief overview of the emergence of juvenile life without parole sentencing and the development of the Cruel and Unusual Clause. In addition, it details Supreme Court precedent which demonstrates the relationship of the Court with scientific and medical evidence, both generally and specifically with respect to juvenile sentencing. Part II then presents a thorough examination of adolescent neuroscience research which demonstrates the many fallacies in the logic of juvenile life without parole sentencing. Lastly, Part III explains the practical failures of juvenile life without parole sentences for the purposes of punishment and presents alternative options to this scientifically inaccurate and inhumane punishment of youth.

I. Background on Juvenile Life Without Parole Sentencing and the Supreme Court's Relationship with Scientific Evidence

A. The History of Juvenile Life Without Parole Sentencing - The Law and Order Era

For the first several decades of its existence, the juvenile justice system was distinctive from the overall criminal legal system: it aimed to assist troubled youth using various interventions rather than simply meting out punishments. In 1899, the first juvenile court was established in Chicago, prompted by a group of Progressive Era women who believed in creating a separate system for juvenile offenders that would handle youth differently from adults.[40] The goal of the juvenile justice system at the time of its creation was to treat children and adolescents as "misdirected and misguided and needing aid, encouragement, help and assistance" rather than as criminals, and this goal was maintained for the first two-thirds of the 20th century.[41] This system of compassion and "rehabilitative

[39] Mariam Arain et al., *supra* note 38, at 456–61.
[40] *See* CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY 16-17 (2017).
[41] *People ex rel. Houghland v. Leonard*, 415 Ill. 135, 139–40 (1953).

ideals," however, was soon replaced with a more adversarial approach more closely resembling adult courts.[42]

The Due Process Era took hold in 1967, with the landmark Supreme Court case *In re Gault* marking "the transformation of the juvenile court from a welfare agency into a legal institution."[43] The Supreme Court held in *Gault* that juvenile offenders are constitutionally entitled to the same due process rights as adults throughout adjudication, including assistance of counsel, notice of charges, confronting and cross-examining witnesses, and the privilege against self-incrimination.[44] This decision, while a monumental move by the Warren Court to protect the rights and liberties of children and adolescents in the juvenile system, also signified a "procedural and substantive convergence" with the adversarial adult court.[45]

Just a few years later, the Get Tough Era gave rise to an even more punitive juvenile system which would eventually become a near replica of the adult criminal court.[46] Justice Clarence Thomas' dissenting opinion in *Miller* ascribes the rise of this era to "outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors [...]."[47] This "outcry" and "disaffection" primarily refers to the white hysteria which began to escalate in the 1970s, surrounding what was claimed to be a wave of Black youth crime, triggered by the migration of Blacks from the South to the North and racialized poverty in the wake of industrial changes.[48]

Legal scholars, including Barry C. Feld and Cara H. Drinan, specifically cite the "superpredator" term—a direct product of youth crime wave hysteria—as a major catalyst for this era.[49] Professor John Dilulio at Princeton University coined the term "superpredator" in 1996 and predicted that juvenile incarceration would increase three times in the coming years.[50] Criminologists jumped on the bandwagon, triggering a false panic that led almost every state to pass more tough-on-crime legislation for juvenile offenders.[51] Youth

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[42] CARL SUDDLER, PRESUMED CRIMINAL: BLACK YOUTH AND THE JUSTICE SYSTEM IN POSTWAR NEW YORK 7 (2019).
[43] BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 43 (2017).
[44] *See In re* Gault, 387 U.S. 1 (1967).
[45] FELD, *supra* note 43, at 44.
[46] *See Id.* at 132.
[47] *Miller*, 567 U.S. at 495 (Thomas, J., dissenting).
[48] *See* FELD, *supra* note 43, at 71–72.
[49] *See also Id.* at 105; DRINAN, *supra* note 40, at 47.
[50] *See The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/.
[51] See *Id.*

crime wave sensationalism also gained the attention of the federal government during this period. In 1994, Congress and President Bill Clinton passed the Violent Crime Control and Law Enforcement Act (VCCLEA), which resulted in more youth arrests, harsher penalties, and longer youth sentences.[52]

Crime data at the time tell a different story. The rate of juvenile murder offenses was largely stagnant throughout all three eras with only a small uptick in the 1990s, primarily due to harmful social policies and increased police surveillance in communities of color.[53] Despite this, the juvenile arrest rate for violent crimes jumped from 11 percent of all juvenile arrests in 1980 to 68 percent in 1994.[54] Even more jarring, in eleven of the seventeen years between 1985 and 2001, juveniles convicted of murder were more likely to enter prison with a life without parole sentence than adult murder offenders.[55] It is important to observe that since as early as the 1930s, Black youth have historically been overpoliced and disproportionately incarcerated compared to whites: today, Black individuals make up approximately 60 percent of all youth offenders serving life without parole nationwide with whites making up just 29 percent.[56] This data demonstrates an increasing association especially between Black youth and criminality, disproportionate and unwarranted policing and arrests of youth, and at times more punitive treatment of juveniles compared to adults.

Furthermore, within the last decade, criminologists, law experts, and judicial officials have shown that the notion of a "superpredator" is a myth. In 2022, the Connecticut Supreme Court held in *State v. Belcher* that a sentence handed down by a judge who relied on the term "superpredator" in its decision was illegal because the term itself is "materially false."[57] Two decades after criminologists John Dilulio and James Fox coined the idea of the "superpredator," they authored an extensive amicus curiae brief in support of Evan Miller.[58] In this document, they discredit the "superpredator" term and claim that empirical research

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[52] *See* Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, CTR. FOR AM. PROGRESS (May 10, 2019), https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/.
[53] *See* Mills et. al, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 535–605 (2016).
[54] *See* FELD, *supra* note 43, at 82.
[55] *See The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL 30-32 (2005), https://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.
[56] *See also* SUDDLER, *supra* note 42, at 18–28; HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, *supra* note 55, at 39.
[57] State v. Belcher, 268 A.3d 616 (2022).
[58] *See* Brief of Amicus Curiae, Jeffrey Fagan et. al., *Miller v. Alabama* (2012).

on the uptick and subsequent decline in violent crime throughout the 1990s "demonstrates that the juvenile superpredator was a myth and the predictions of future youth violence were baseless."[59]

From 1962 until 1981, an average of just two youth offenders in the United States entered prison each year with life without parole sentences.[60] Recent official corrections data from all states and the Federal Bureau of Prisons, however, show that there are approximately 8,600 individuals serving life without parole or de facto life sentences for crimes committed as juveniles, reflecting a drastic increase in the number of life without parole sentences since 1981.[61] In the last forty years, the number of juveniles sentenced to life in prison without parole has skyrocketed as part of a trend of viewing minors as increasingly dangerous to society and ultimately unfixable. In all three cases of the *Miller* trilogy as well as *Montgomery* and *Jones*, the justices ultimately fail to fully recognize that the management of juvenile offenders is different than adults and requires expertise of other areas in which they are not experts. A child's criminal culpability and amenability to rehabilitation boils down to adolescent brain structure and development, which requires the Court to look to outside evidence from developmental psychology and neuroscience experts in order to apply the Eighth Amendment correctly and justly.

B. The Evolution of Cruel and Unusual: Eighth Amendment Background

To understand juvenile life sentences and questions surrounding their constitutionality under the Eighth Amendment, it is imperative to examine the evolution of the Cruel and Unusual Clause and Eighth Amendment jurisprudence in the last 150 years. In 1878, the Supreme Court in *Wilkerson v. Utah* interpreted the Cruel and Unusual Clause as only protecting against punishments that would have been considered crimes at the time of the Bill of Rights authorship, such as old English torture, but not against punishments such as execution by firing squad, being "emboweled alive, beheaded, and quartered" or burned alive.[62] Twelve years later, the Court in *In re Kemmler* defined torture as cruel and unusual and further laid out protections against "lingering death" under the Eighth

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[59] *Id.* at 8.
[60] *See* HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, *supra* note 55, at 31.
[61] *See* Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Sentences,* THE SENTENCING PROJECT (Feb. 17, 2021), https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/ (De facto life sentences are sentences which, while technically sentences with a possibility of parole, are so long that they amount to life without the possibility of parole in practice.)
[62] Wilkerson v. Utah, 99 U.S. 130, 145 (1878).

Amendment.[63] *Kemmler* also held that capital punishment itself is not cruel, allowed the first use of the electric chair, and claimed that the Cruel and Unusual Clause "implies … something inhuman and barbarous, something more than the mere extinguishment of life."[64] Interestingly, *Kemmler* claimed that "lingering death" is more barbaric than the immediate taking of a person's life, and thus a sentence of essentially awaiting death in prison may not be a "supposedly 'lesser' evil" of capital punishment.[65]

Weems v. U.S. (1910), a landmark case for Eighth Amendment jurisprudence, established the Eighth Amendment as having an "expansive and vital character," rather than being "dead" as some justices like Scalia and Thomas may prefer.[66] The Eighth Amendment goes beyond the protection of just "exact repetition of history:" "[t]he Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice [...]."[67] The Cruel and Unusual Clause, therefore, is not just intended to protect against Old English forms of torture but for punishment that does not fit the crime—disproportionate punishment and government abuses of power from both the judiciary and legislature.[68] This case is a precursor and predictor of *Trop v. Dulles* and other later Court decisions, which interpret the Cruel and Unusual Clause as evolving in light of new human understandings and societal developments.[69]

In 1958, the Supreme Court accepted the legal philosophy posed by Justice Field in his *O'Neil v. Vermont* dissenting opinion, who wrote that a sentence that is excessively severe given the convicted offenses "may justly be termed both 'unusual and cruel.'"[70] In *Trop v. Dulles*, the Court expanded on the "expansive and vital character" of the Eighth Amendment as established in *Trop* and determined that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[71] The Court subsequently ruled that taking away a person's citizenship is cruel and unusual.[72] The justices

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[63] *In re* Kemmler, 136 U.S. 436, 447 (1890).
[64] *Id.* at 447.
[65] *See* Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J. L. & SOC. POL'Y 173, 175 (2020).
[66] *See also Weems*, 217 U.S. at 377; Eric J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, 91 WASH. U. L. REV. 1663, 1663 (2014).
[67] *Weems*, 217 U.S. at 350.
[68] *See Id.* at 377.
[69] *See Trop,* 356 U.S. at 101–03.
[70] O'Neil v. Vermont*,* 144 U.S. 339 (1958) (Field, J., dissenting)
[71] *Trop,* 356 U.S. at 101.
[72] *See Id.* at 101–02.

criticized the severity of the penalty compared to the offense, which demonstrates a departure from only considering the Eighth Amendment as a protection against barbaric or torturous punishment. Notably, the Court asserted that psychological abuse may constitute inhumane treatment.[73]

Subsequently, in *Robinson v. California* (1962), the Supreme Court reviewed a case under the Eighth Amendment involving a relatively short prison sentence and a statute that criminalized a mental disorder. A 6-2 majority of the Court agreed that a three-months prison sentence for violating a California statute that made drug addiction, or substance use disorder (SUD), a criminal offense was cruel and unusual.[74] This case did not deal with an Old English method of torture, capital punishment, or even a long prison sentence. Rather, the majority determined that the statute, which criminalized a brain disease, was unconstitutional because drug addiction is "an illness which may be contracted innocently or involuntarily," and "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[75] This case made a strong statement that the Cruel and Unusual Clause is relevant to any criminal punishment which is disproportionate "in light of contemporary human knowledge," even for a sentence of ninety days.[76] In this case and in the case of juvenile life without parole sentencing, it is "contemporary human knowledge" of the inner workings of the human brain that is essential for correct application of the Eighth Amendment.[77]

In 1972, the Court published a 232-page analysis of Eighth Amendment history, interpretation, precedent, and application in *Furman v. Georgia.* The actual per curiam opinion, however, is only one page in length and under 200 words. In this short opinion, the Court held that a sentence of death in one case of murder and two cases of rape was cruel and unusual punishment under the Eighth Amendment.[78] While each Justice published his or her own concurrence which continue to contribute to Eighth Amendment jurisprudence, Justice Brennan specifically established a four-prong test to determine whether a punishment may be considered cruel and unusual: the severity of the punishment as it relates to the

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[73] *See Id.* at 111.
[74] *See Robinson,* 370 U.S. at 666–68.
[75] *Id.* at 667.
[76] *Id.* at 666.
[77] *See Id.* at 671–72.
[78] *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

degradation of human dignity; the arbitrariness of the punishment inflicted; the acceptance of the punishment in society; and the disproportionality or excessiveness of the punishment as compared to the offense(s).[79] These four elements have remained primary points of debate with respect to Eighth Amendment analysis.

In light of *Miller*, *Montgomery*, and *Jones*, the third prong of Brennan's test has been widely debated among Supreme Court justices and constitutional law scholars. Several justices, most notably Justice Kennedy in *Roper v. Simmons*, asserted that the international community represents the most comprehensive poll of societal acceptance and that international jurisdictions' use of certain sentencing practices should influence American practices.[80] Others have claimed that the opinions of state legislatures should inform society's standards. In the majority statement for *Penry v. Lynaugh*, Justice O'Connor wrote that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," which Justice Thomas echoed in his dissenting opinion in *Miller*.[81] Justice Thomas also expressed disapproval of the majority's use of public opinion polls in *Miller*, questioning their credibility, accuracy, and reliability.[82]

C. The Court and Science: Believing The Scientific Community

While this note specifically calls for the Court to recognize evolving child neuroscience research and, based on that research, to ban juvenile life without parole sentencing, it is important to first establish the Court's relationship with the scientific community more generally. The Court has repeatedly asserted the uneasy partnership between science and legal philosophy. In his concurring opinion in *Association for Molecular Pathology v. Myriad Genetics,* Antonin Scalia said, "I join the judgment of the Court, and all of its opinions except Part I–A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief."[83] Similarly, Chief Justice Roberts claimed in his dissent of *Moore v. Texas* that the definition of cruel and unusual should be determined by "a judicial judgment about societal standards of decency, not a medical assessment of clinical practice."[84]

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[79] *See Id.* at 271–80.
[80] *See Roper,* 543 U.S. at 575–78.
[81] Penry v. Lynaugh*,* 492 U.S. 331 (1989).
[82] *See Miller*, 567 U.S. at 510–12.
[83] Ass'n for Molecular Pathology v. Myriad Genetics*,* 133 S. Ct. 2107, 2120 (2013).
[84] Moore v. Texas, 137 S. Ct. 1039, 1058 (2017) (Roberts, C.J., dissenting).

The Chief Justice's statement is a paradox—societal standards of decency are informed by evolving human knowledge of physical and psychological harm, cruelty, and inhumanness, as the Court has said.[85] Thus, without an assessment of ongoing scientific developments which use clinical methods to understand the harm caused by certain punishments, or the mental and neurological causes of crime and capacities of certain populations, the Court cannot make a judicial judgment on what is cruel and unusual. Without evolving scientific understanding of drug and alcohol addiction, which society now understands as a brain disorder due to scientific research, *Robinson* would not have been decided.[86] The Court cannot make the mistake of believing that it is a completely independent body that makes legal decisions absent evidence brought forth by experts of other relevant areas. In his statement, Chief Justice Roberts essentially states that the Court should make a legal decision completely divorced from science—an abrogation of judicial duty.[87]

Gonzales v. Carhart especially demonstrates the failure of the Court to use evolving scientific evidence to support legal decisions regarding abortion law. President George W. Bush and the 108th Congress signed the Partial-Birth Abortion Ban Act into law in 2003, which outlawed "partial-birth abortions," or an abortion that is performed when an individual "vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the mother's body."[88] Partial-birth abortions make up the majority of second-trimester abortions; they are more commonly referred to as a procedure called an intact dilation and evacuation (IDE) or rarely an intact dilation and extraction (IDX).[89] IDE surgical abortions often do not require an overnight stay in the hospital and are considered one of the safest medical procedures.[90] While this note questions recent "rhetoric of medical necessity" surrounding women's reproductive healthcare perpetuated by the Supreme Court,

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[85] *See Furman*, 408 U.S. at 271–80.
[86] *See Robinson,* 370 U.S. at 666–68.
[87] *See also Moore*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting); Austin Holler, *Moore v. Texas and the Ongoing National Consensus Struggle Between the Eighth Amendment, the Death Penalty, and the Definition of Intellectual Disability*, 50 LOY. U. CHI. L. J. 415, 438 n.175; Stephen Breyer, *Science in the Courtroom*, 16 ISSUES IN SCI. AND TECH. 52, 52-53 (2000); Sheila Jasannof, *Science, Common Sense & Judicial Power in U.S. Courts*, 147 DAEDALUS 15, 15–27 (2018).
[88] Partial Birth Abortion Ban Act, 18 U.S.C. § 1531 (2003).
[89] *See also* Gonzales v. Carhart*,* 550 U.S. 124*,* 134–35 (2007); Stephen T. Chasen et al., *Dilation and Evacuation at ≥20 Weeks: Comparison of Operative Techniques*, 190 AM. J. OF OBSTETRICS & GYNECOLOGY 1180, 1180–83 (2004).
[90] *See* Univ. of Cal. San Francisco, *Surgical Abortion (Second Trimester),* UCSF HEALTH, https://www.ucsfhealth.org/treatments/surgical-abortion-second-trimester#.

reasons for a second-trimester abortion may include, "delays in suspecting and testing for pregnancy, delay in obtaining insurance or other funding, and delay in obtaining referral, as well as difficulties in locating and traveling to a provider."[91] A second-trimester abortion may also be a result in an identification of "major anatomic or genetic anomalies" in the fetus or due to significant medical complications for the individual carrying the fetus, such as preeclampsia and preterm premature rupture of membranes.[92]

Despite all this, the Court ruled in *Gonzales* that the 2003 statute did not impose an undue burden on abortion access and therefore did not violate the Fifth Amendment.[93] The majority, authored by Justice Kennedy, started by detailing testimony of a nurse from a Senate Judiciary Committee hearing. This testimony graphically and subjectively narrated a doctor's performance of a partial-birth abortion using non-clinical terms; she described the fetus's "little feet" that were "kicking" and its arm which "jerked out, like a startle reaction," as the doctor "sucked the baby's brains out" and then "threw the baby in a pan."[94] The majority opinion in *Gonzales* does not include medical explanations for an IDE abortion, and the Act does not include exceptions to safeguard a woman's health, as Ginsburg's dissent points out.[95] Kennedy asserted the need to discuss abortion procedures "in some detail," but this brief part of the opinion fails to include information provided by medical experts.[96] The majority of Kennedy's opinion discusses the government's "legitimate interest" in protecting the life of the fetus that may become a child rather than the health and safety of the mother or future viability of the fetus.[97] The *New England Journal of Medicine* Editor in Chief Jeffrey Drazen wrote that the Court was effectively "practicing medicine without a license."[98] In *Gonzales*, the Court blatantly ignored its obligation to refer to scientific evidence to interpret and apply the Constitution, treating it as the "dead" document Scalia would like it to be.

However, two noteworthy cases—*Atkins v. Virginia* and *Moore v. Texas*—demonstrate the Supreme Court's reliance on and acceptance of scientific evidence in handing down decisions. More specifically, these two cases display the Court's use of modern

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[91] *See also* James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, 6 HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY (2019); *Practice Bulletin No. 135*, 121 OBSTETRICS & GYNECOLOGY 1394, 1394–1406 (2013).
[92] *Practice Bulletin No. 135*, 121 OBSTETRICS & GYNECOLOGY 1394, 1394 (2013).
[93] *See Gonzales,* 550 U.S. at 125.
[94] *Id.* at 124.
[95] *See Id.* at 169–72 (Ginsburg, J., dissenting).
[96] *Id. at* 126.
[97] *Id.* at 145–58.
[98] M. Jeffrey Drazen, *Government in Medicine*, 356 THE NEW ENG. J. OF MED. 2195, 2195 (2007).

psychological and neuroscientific evidence to apply the Eighth Amendment and highlight that the Court could not interpret legal principles without accepting this research as fact.

In 1996, Daryl Atkins and another individual abducted Eric Nesbitt, robbed him, forced him to withdraw additional cash from a teller machine, later shooting and killing him.[99] During sentencing, a forensic psychologist testified that Atkins suffered from mental disabilities and had an IQ of fifty-nine.[100] Despite having an intellectual disability, Atkins was sentenced to be executed. Two main elements are necessary to evaluate an intellectual disability: determining the individual's intellectual functioning and evaluating the "impact that the impaired intellectual functioning has in the individual's everyday life."[101] According to the National Institute of Health's Clinical Characteristics of Intellectual Disabilities, there are also several different types of tests to determine intellectual disability which psychologists and psychiatrists commonly use.[102] In the case of *Atkins v. Virginia* (2002), the Court referred to two clinical definitions of intellectual disability—one set forth by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the other by the American Psychiatric Association (APA) in its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).[103] Both definitions establish a three-prong standard for intellectual disability, characterized by "subaverage intellectual functioning" and "significant limitations in adaptive skills," which "became manifest before age 18."[104] The Court ultimately determined that a person's "deficiencies" due to an intellectual disability "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."[105]

Moore v. Texas, among other cases, built upon the precedent established in *Atkins* to find that sentencing a person to capital punishment while ignoring "prevailing clinical standards" on intellectual disabilities violates the Cruel and Unusual Clause.[106] Bobby James Moore was given the death penalty after shooting a store clerk in Houston. Upon appeal, Moore argued that he should not be sentenced to death due to his intellectual disability based

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[99] *See* Atkins v. Virginia, 536 U.S. 304 (2002).
[100] *See Id.* at 338.
[101] *See also* James W. Ellis et al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 HOFSTRA L. REV. 1305, 1329 (2018); *About Intellectual and Developmental Disabilities (IDDs)*, NAT'L INST. OF HEALTH (Nov. 19, 2021), https://www.nichd.nih.gov/health/topics/idds/conditioninfo.
[102] *See* THOMAS F. BOAT & J. T. WU, MENTAL DISORDERS AND DISABILITIES AMONG LOW INCOME CHILDREN 127 (Boat & J. T. Wu, Eds., 2015).
[103] *See Atkins,* 536 U.S. at 308–09.
[104] *Id.* at 318.
[105] *Id.*
[106] *See Moore*, 137 S. Ct. at 1050.

on *Atkins*. While the Court of Criminal Appeals of Texas (CCA) asserted that he did not meet the requirements of an intellectual disability, Moore pointed out that the court used a definition from 1992 to make this determination.[107] The Supreme Court asserted that the 1992 definition was inadequate and significantly outdated, and Moore's sentence was a violation of the Cruel and Unusual Clause under the Eighth Amendment.[108] It is important to note that the Court held that the Texas CCA's decision ultimately "diminish[ed] the force of the medical community's consensus."[109]

Atkins and *Moore* represent a straightforward example of the Supreme Court relying on evolving neurological and psychological research to apply the law and, more specifically, to determine an individual's culpability for their criminal activity. Both cases call attention to the important fact that lawyers are not doctors, psychologists, or scientists and could not have possibly come to the legal decision they did in *Atkins* or *Moore* without the scientific community providing all of the above information. If the Court had not been advised and presented with evidence from the scientific community on intellectual disabilities, the Court alone could not have made the legal decision they did, as they are not experts in child neuroscience or psychology. There was also no debate as to whether the justices *believed* the AAIDD or the APA and the expertise they provide in the areas of psychology and psychiatry. The justices accepted it as fact, emphasized the importance of the relevant experts' "consensus," and used it to interpret and apply the Eighth Amendment.[110]

D. The Intersection of Science, The Supreme Court, and the Eighth Amendment for Juveniles

In *Thompson v. Oklahoma* (1988), the Court ruled that executing a child under the age of 16 is unconstitutional under the Eighth Amendment due to the "evolving standard of decency" for inflicting punishment.[111] The Court describes child neurological and behavioral psychological evidence for the decreased culpability of juveniles compared to adults when stating that: "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct, while, at the same time, he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[112] As

[107] *See Id.* at 1039-1040.
[108] *See Id.* at 1040.
[109] *Id.* at 1040.
[110] *See Id.*
[111] Thompson v. Oklahoma, 487 U.S. 815 (1988).
[112] *Thompson,* 487 U.S. at 835.

this note will discuss later, emotional instability and peer pressure are key elements of a child's neurological immaturity.[113]

In each case of the *Miller* trilogy, the Supreme Court repeatedly bases its holdings firmly "in the light of contemporary human knowledge" on adolescent neurological development.[114] In *Roper v. Simmons* (2005), which determined that death penalties for minors are unconstitutional and violates the Cruel and Unusual clause in the Eighth Amendment, Justice Kennedy cited the neuroscience community—specifically referring to Drs. Laurence Steinberg and Elizabeth Scott, among others—to establish that juveniles are less mature, more susceptible to peer pressure, and "not as well formed" as adults.[115] Similarly, in *Graham v. Florida* (2010), which held that life without parole sentences for juvenile non-homicide offenses is unconstitutional, the Court explicitly called upon evolving scientific developments to support their holding: "[d]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[116] They referenced briefs from the American Medical Association and the APA to support this finding.[117] Lastly, in *Miller v. Alabama*, the case in which the Court held that sentencing a fourteen year old to life in prison without the possibility of parole under a mandatory statute violated the Cruel and Unusual Clause, the Court called back to scientific evidence presented in *Roper* and *Graham*.[118] The Court took a step further in citing an amicus curiae brief from the APA, asserting that the "'ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions.'"[119] This strongly implies the Court, at one point, intended to constantly re-examine juvenile sentencing practices in the wake of continuously evolving understandings of the adolescent brain.

Montgomery v. Louisiana, while having seemingly noble aims to apply *Miller* retroactively, established the "permanent incorrigibility" standard for determining a child's eligibility for a life without parole sentence.[120] *Montgomery* reiterates that juveniles are a

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[113] *See* Steinberg & Scott, *supra* note 27, at 1009–18.
[114] *See also Atkins*, 536 U.S. at 304; *Roper* 543 U.S. at 551; *Graham,* 560 U.S. at 48; *Miller*, 567 U.S. at 460.
[115] See *Roper*, 543 U.S. at 565–70.
[116] *Graham,* 560 U.S. at 64.
[117] *See Id.*
[118] *See Miller,* 567 U.S. at 461–62.
[119] *Id.* at 468.
[120] *See Montgomery,* 577 U.S. at 209.

distinct status category of offenders who are less blameworthy than adults and more capable of change, making them exempt from mandatory life without parole sentences. At the same time, however, the Court paradoxically creates a standard that defines some children as "irreparabl[y] corrupt[ed]," directly contracting its position on juveniles' heightened amenability to rehabilitation.[121] This standard is incredibly problematic and presents scientific and legal inconsistencies.

Just five years after *Montgomery*, the *Jones* decision erased this significant decade of progress for juveniles by eliminating the "permanent incorrigibility" standard and reverting back to a fully discretionary sentencing system, beyond the basic and incomplete requirement to consider an offender's youth.[122] The opinion is riddled with labeling rhetoric, repeatedly referring to youth who have been convicted of homicide offenses as "murderers," demonstrating the Court's view of juvenile offenders as evil criminals rather than children in need of assistance and support, as the juvenile court system was created to do.[123]

Jones demonstrates that the Court remains stuck in the Get Tough Era mentality, despite decades of new and evolving scientific developments on the decreased criminal culpability of youth and their increased amenability to rehabilitative interventions compared to adults.

II. Developmental Neuroscience and the Scientific Inaccuracy of "Permanent Incorrigibility"

A. Contemporary Human Knowledge: The Development of the Human Brain

Trop v. Dulles shows the necessity of looking toward society's "evolving standards of decency" to assess a punishment's appropriateness under the Eighth Amendment.[124] These progressing standards are partially informed by new information that leading scientists and medical experts make available as research and technology advances. One of these experts, Dr. Frances E. Jensen of The University of Pennsylvania School of Medicine, recently asserted in her book *The Teenage Brain* that teenage brains are even less developed than many would assume.[125]

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[121] *See Id. at* 192.
[122] *See Jones*, 141 S. Ct. at 1308.
[123] *See Id.* at 1310.
[124] *See Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590 (1958).
[125] *See* JENSEN & NUTT, *supra* note 31.

When children enter their teenage years, they have elevated levels of sex hormones that indicate the "physiological transformation of a child into a sexually mature being."[126] Teenage boys may grow bigger and taller, but they are far from being a true adult in terms of neurological development. According to Dr. Frances Jensen, author of *The Teenage Brain*, emotions always win over reason as white matter is continuously being laid down.[127] White matter is incredibly important as it forms the connections between the different parts of the brain. During adolescence—up to age eighteen at the least—white matter is still slowly building and is not nearly all there. Thus, for a judge to determine that a youth under age eighteen is incapable of change is scientifically inaccurate.

The primary culprit of poor decision-making during adolescence is the late development of the frontal lobes. This part of the brain is responsible for mood stability, impulse control, consideration of consequences, and rationalization, among other things. The frontal lobe is the last part of the brain to fully form during neurological development. While one may think that a homicidal seventeen year old is fully capable of making rational decisions and is incapable of rehabilitation—making a life without parole sentence appropriate—the reality is that that youth is far less in control of his behaviors and much more amenable to the proper interventions than an adult.[128]

Even after adolescence, there is another stage of development in which white matter is still being laid down. This stage is responsible for self-absorption, anxiety, and insecurity in the early to mid-twenties. Dr. Jensen declares that a human brain may not be fully developed until as late as age thirty. Because of this long process of brain development which spans beyond adolescence, diagnosing anyone under the age of eighteen with "permanent incorrigibility" is a scientific fallacy and would, therefore, be an abrogation of judicial duty to impose a sentence in contravention of this scientific reality.[129] Even for youth who have severe mental illnesses, such as antisocial personality disorder (ASPD), these types of "incurable" illnesses cannot be diagnosed until age eighteen. Before adulthood, the proper diagnosis for youth is a conduct disorder.[130] The scientific community refuses to diagnose a

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[126] *Id.* at 22–23.
[127] *See Id.* at 27.
[128] *See* Steinberg & Scott, *supra* note 27, at 1009–18.
[129] *See* D.W. Black, *The Natural History of Antisocial Personality Disorder*, 60 THE CANADIAN J. OF PSYCHIATRY, 309-14 (2015).
[130] *See Antisocial Personality Disorder*: *Causes, Symptoms, and Treatment*, CLEVELAND CLINIC (May 12, 2021), https://my.clevelandclinic.org/health/diseases/9657-antisocial-personality-disorder.

person with such personality disorders until age eighteen—ergo, any court cannot with full certainty declare a child beyond repair before age 18. If a doctor cannot determine a juvenile to be amenable to rehabilitation, any judge or jury cannot do so either unless the judge wishes to "practice medicine without a license."[131]

B. Characteristics of the Teenage Brain - The Difference Between Juveniles and Adults

Teenage brains are at a much less mature stage of development than adult brains, but courts and legislatures often overlook the state of the teenage brain and the specific shortcomings which lead a youth into the juvenile justice system. Drs. Steinberg and Scott—the neuroscientist and psychologist cited throughout the *Miller trilogy*—continue to research and grow the amount of information available on the characteristics of the teenage brain.[132] The two scientists clarify that "even when teenagers' cognitive capacities come close to those of adults, adolescent judgment and their actual decisions may differ from that of adults as a result of psychosocial immaturity."[133] There are four specific psychosocial factors that separate juvenile judgment and decision making: susceptibility to peer pressure, attitudes toward and perception of risk, future orientation, and the capacity for self-management.[134] Teenagers are not simply "different" in terms of age and legal status—they are psychologically and behaviorally at an entirely different stage of development, making them "unique[ly] immature" and less criminally responsible than adults.[135]

The underdeveloped frontal lobe of the teenage brain—in direct contrast to the developed frontal lobes of adults—provides clear support for the difference in criminal culpability that the Court has already established.[136] The frontal lobe is the last part of the brain to mature fully, causing adolescents to lack cognitive functioning and executive control over emotions and behaviors.[137] The prefrontal cortex, which plays a key role in cognitive control functions, is not developed fully until as late as twenty five years old.[138] Because of underdevelopment in this important region, teenagers are more likely to make impulsive decisions in response to emotionally arousing stimuli and take risks in the presence of

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131 Drazen, *supra* note 98, at 2195.
132 *See* Steinberg & Scott, *supra* note 27 at 1009–18.
133 *Id.* at 1012.
134 *See Id.*
135 *Id* at 1009.
136 *See also Graham*, 560 U.S. at 63; *Roper* 543 U.S. at 551; *Miller*, 567 U.S. at 471.
137 *See* Yu Du, *Brain Immaturity and Juvenile Delinquency: Empirical Evidence, Age-Related Legal Debate, and Ethical Concerns*, 19 J. L. & SOC. DEVIANCE 76, 78 (2020).
138 *See also* Arain et al., *supra* note 38, at 459; LAURENCE STEINBERG, AGE OF OPPORTUNITY*:* LESSONS FROM THE SCIENCE OF ADOLESCENCE 205-217 (2014).

friends.[139] In a study of twenty boys who were imprisoned for murder as teenagers, when asked thirty-five years later about the reasons for their criminal involvement, 70 percent of the men identified "friends/peer pressure" as a major influence and 20 percent replied that it was "somewhat of a factor."[140] This equals a total of 90 percent of the interviewed men citing peer pressure as a factor in their committing murder as teens. Experts in the neuroscience community assert that criminal behavior in adolescence, even in the most violent forms, represents "normative experimentation with risky behavior," not "deep-seated moral deficiency reflective of 'bad' character."[141] In other words, criminal conduct is "fleeting" for most youth as white matter is continuously laid down in the frontal lobe and reliance on the amygdala eases.[142]

The ability to control one's responses to fear and anxiety is greatly influenced by the amygdala, which develops earlier than the frontal lobes. Neurologists recently estimate that the amygdala peaks in volume around ages nine to eleven, with male amygdalas developing slightly later.[143] The amygdala is part of a network of brain structures which are responsible for regulating and processing emotions; it leads to "diverse physiological responses to emotional cues such as fear."[144] This part of the brain is crucial in regulating "defensive behavior in stages of fear and anxiety—" with an amygdala at full volume but an underdeveloped frontal cortex, a youth's response to fear is far less controlled and more impulsive.[145] In other words, juveniles rely on the amygdala to make decisions and control their actions as the prefrontal cortex, the center for logic and judgment, is still developing.

Adolescents are more likely to respond to threat cues in a hostile way when exposed to threatening or traumatic environments—environments that, as mentioned earlier, children cannot remove themselves from.[146] Recent studies have echoed prior research that shows an increased level of sensitization in the amygdala among children who are exposed

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[139] *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV., 78-106 (2008).
[140] Kathleen M. Heide, *Juvenile Homicide Offenders Look Back 35 Years Later: Reasons They Were Involved in Murder*, 17 INT'L J. OF ENV'T RSCH. & PUB. HEALTH 3932, (2020).
[141] Brief of Amicus Curiae, American Psychological Association et. al., *Graham v. Florida,* 20 (2009).
[142] *See Id.* at 20.
[143] *See* Chiaki Tanaka et al., *Developmental Trajectories of the Fronto-Temporal Lobes from Infancy to Early Adulthood in Healthy Individuals*, 34 DEVELOPMENTAL NEUROSCIENCE, 477–487 (2013).
[144] Matt DeLisi et al., *The Criminology of the Amygdala*, 36 CRIM. JUST. & BEHAVIOR 1241, 1242 (2009).
[145] *See Id.* at 1243.
[146] *See* Brief of Amicus Curiae, Aber et. al., *Graham v. Florida,* 26 (2009).

to violence at a young age.[147] Adverse childhood experiences (ACE) are positively correlated with amygdala sensitivity, or activity in the amygdala.[148] In other words, children who experience trauma or violence in their youth are more likely to impulsively respond to threat-cues or fearful situations, rather than think through a certain action rationally or logically. Without ACEs, youth are already predisposed to react impulsively in a fearful or threatening situation—with mitigating circumstances such as abuse in the home or gang activity, the ability of youth to think logically and react rationally is dampened even more.[149] Of course, this is not the case in regard to adult brains with fully developed amygdalas. Thus, it is scientifically inaccurate to determine that a child is "permanently incorrigible" and sentence them to life without parole based on an action performed during a period of neurological immaturity. The Court must consider that a child's behavioral responses in stressful situations are connected to neurological development, which is a continuous process until at least the age of twenty-five.[150]

The relationship between brain maturity and criminal culpability is repeatedly demonstrated and discussed throughout Supreme Court case law relating to the application of the Eighth Amendment. *Miller* asserts that children are "constitutionally different from adults for purposes of sentencing" and possess "diminished culpability and greater prospects for reform."[151] The Court clearly states that it draws these conclusions from scientific evidence which was presented in *Roper* and *Graham*—evidence presented by the scientific community which the Court did not have on its own and was necessary to make its legal decision.[152] *Miller* outlines this evidence, mainly that children are less mature, more vulnerable to peer pressure and lack the ability to remove themselves from negative environments, and "less-fixed" in themselves.[153] In a recent report from the Congressional Research Service on juvenile life without parole sentences, legislative attorneys support the fact that "children are uniquely vulnerable in that they are generally dependent upon others for their material, emotional, and social needs and are often unable to remove themselves

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147 *See* Jennifer S. Stevens et al., *Amygdala Responses to Treat in Violence-Exposed Children Depend on Trauma Context and Maternal Caregiving*, DEVELOPMENTAL & PSYCHOPATHOLOGY 1, 1–12 (2021).
148 *See Id.*
149 Martin H. Teicher & Jacqueline A. Samson, *Annual Research Review: Enduring Neurobiological Effects of Childhood Abuse and Neglect*, 57 J. OF CHILD PSYCH. AND PSYCHIATRY 241, 241-266 (2016).
150 *See* JENSEN & NUTT, *supra* note 31, at 188.
151 *Miller*, 567 U.S. at 471.
152 *See also Roper,* 543 U.S. at 565–66; *Graham*, 560 U.S. at 68.
153 *Id.* at 471.

from harmful or risky environments."[154] Juvenile life without parole, then, inevitably punishes a child for actions that were caused, in whole or part, by a harmful environment, negative pressures, or neurological immaturity—all which are outside that child's realm of control.

C. Abused Children in Prison – Neurological Responses to Trauma

Sheldry Topp, who was sentenced to life without parole at the age of seventeen, suffered traumatic abuse as a child at the hands of his father. Topp was emotionally and physically abused, including beatings with baseball bats and electrical cords.[155] The judge in Topp's case determined that his actions justified sentencing him to death in prison, despite these mitigating circumstances. While approximately 18 percent of children in the general population are physically abused and 9 percent are sexually abused, nearly 50 percent of all juveniles sentenced to life without parole report histories of physical abuse.[156] These numbers increase for girls: 80 percent of girls sentenced to juvenile life without parole reported experiencing physical abuse and 77 percent reported histories of sexual abuse.[157] Overall, 79 percent of juveniles serving life without parole witnessed violence in their homes regularly.[158] Among youth, there is a clear relationship between exposure to violence and criminal activity that results in a life sentence. Recent research demonstrates that childhood abuse and exposure to violence can stunt or change the typical development of the brain, raising further difficulties in cognitive functioning.[159]

When subjected to abuse and exposed to violence, the brain experiences electrophysiological changes—it impacts the normal development of a child's brain.[160] Exposure to sexual abuse in childhood can alter brain structure, change the brain's reaction to stimuli, impair cognitive functioning, and increase the likelihood of the development of

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[154] *See* Emily J. Hanson & Joanna R. Lampe, *Juvenile Life Without Parole: In Brief*, CONG. RSCH. SERV. (June 13, 2022).
[155] *See* Pishko, *supra* note 2.
[156] *See also* Children's Rights, *Child Abuse and Neglect*, CHILDREN'S RTS. NEWSROOM, https://www.childrensrights.org/newsroom/fact-sheets/child-abuse-and-neglect/; Joshua Rovner, *Juvenile Life Without Parole: An Overview,* THE SENTENCING PROJECT (May 24, 2021), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/.
[157] *See* Rovner, *supra* note 156.
[158] *See Id.*
[159] *See also* Lukasz M. Konopka, *The Impact of Child Abuse: Neuroscience Perspective*, 56 CROATIAN MED. J. 315, 315-316 (2015); Pascal Ibrahim et al., *Molecular Impacts of Childhood Abuse on the Human Brain*, 15 NEUROBIOLOGY OF STRESS, 100343 (2021); Damyan Edwards, *Childhood Sexual Abuse and Brain Development: A Discussion of Associated Structural Changes and Negative Psychological Outcomes*, 27 CHILD ABUSE REV. 198, 198–208 (2018).
[160] *See* Konopka, *supra* note 159, at 199.

psychiatric disorders.[161] During the most sensitive periods of brain development, violent and traumatic experiences could hinder certain functions from developing; for example, extreme stress can cause executive functioning difficulties including increased impulsivity.[162] Child abuse can also significantly impact brain connectivity as "the specific molecular mechanisms of the brain impacted by childhood trauma leaves a long lasting mark," including mood disorders, post traumatic stress disorder, and suicidal thoughts.[163] These data provide evidence that youth who experience abuse or exposure to violence are more likely to have underdeveloped brain functioning in adolescence and beyond. In the case of youth like Sheldry Topp, it is critical to consider these mitigating factors which decrease the youth's culpability.

D. Amenability to Rehabilitation and Reformative Intervention

The vast majority of youth are extremely open to and successful in rehabilitation when given the opportunity to engage in appropriate and effective interventions.[164] As a result of the undeveloped state of the brain during adolescence, juveniles are scientifically more amenable to rehabilitative services and more likely to demonstrate a change when awarded the chance.[165] This is in part due to the increased plasticity of the teenage brain compared to adult brains.[166] Plasticity, defined as "the capacity of the brain to exhibit persistent structural and functional change," leaves lasting marks on the developing brain in reaction to learning experiences in different environments.[167] In simpler terms, the brain can reorganize and rewire itself throughout neurological development in response to experiences. Since the enhanced plasticity of the adolescent brain leaves it more vulnerable to be influenced by experiences, positive and evidence-based rehabilitative interventions present a far higher chance of success for juveniles than adults.[168] The neurological fact that juveniles are more friendly to rehabilitation further disproves both the efficacy and appropriateness of life without parole sentencing for juveniles.

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161 *See Id.* at 316.
162 *See* Danya Glaser, *The Effects of Child Maltreatment on the Developing Brain*, 82 MEDICO-LEGAL J. 106 (2014).
163 Ibrahim et al., *supra* note 159, at 199.
164 *See* NAT'L ACADEMIES OF SCIENCES, ENG'G, AND MED., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 151 (2013)
165 *See also* Brief of Amicus Curiae, Aber et. al., *Graham v. Florida,* 26; *Roper v. Simmons* 543 U.S. 570, 588 (2005).
166 *See* JENSEN & NUTT, *supra* note 31, at 273.
167 Fandakova, Yana, & Catherine A Hartley, *Mechanisms of Learning and Plasticity in Childhood and Adolescence*, 42 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 100764, 100764 (2020).
168 *See The Adolescent Brain: A Second Window of Opportunity,* UNICEF 1, 29-33 (2017), https://www.unicef-irc.org/publications/pdf/adolescent_brain_a_second_window_of_opportunity_a_compendium.pdf.

While the growth of dopamine receptors, a neurotransmitter that is connected to reward-driven behavior, is partially responsible for risky decision-making among adolescents, it is also an element of the adolescent brain which supports amenability to rehabilitation.[169] Dopamine, in addition to risk and reward, is also associated with learning.[170] Rehabilitation programs that implement learning techniques which are mindful of these factors may be incredibly successful.[171]

The Supreme Court recognizes that "for most teens, [risky or anti-social] behaviors are fleeting; they cease with maturity as individual identity becomes settled."[172] Recent studies continuously demonstrate that only a small fraction of juveniles become repeat offenders in adulthood.[173] A more recent study by Laurence Steinberg, the quoted neurologist in *Roper*, finds that among 1,300 youth offenders including high repeat offenders, the majority of them had stopped their criminal activity by age twenty-five.[174] The same study finds that the severity of the crime is not a determinant in regards to a youth's likelihood of desistance—a juvenile offender convicted of homicide is not necessarily any less amenable to massive changes than a juvenile convicted of drug or property offenses.[175]

E. Purposes of Punishment and the Failure of Juvenile Life Without Parole

The Supreme Court lists four primary purposes of punishment within the criminal legal system: retribution, deterrence, incapacitation, and rehabilitation.[176] While the juvenile justice system was founded upon the mission to rehabilitate youth, juvenile life without parole sentences, similar to the death penalty, "[do] not even purport to serve a rehabilitative function."[177] To justify sentencing a person to die in prison, the crime must be "so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator [...]."[178] Ergo, any purpose of rehabilitation does not exist in a juvenile life without parole sentence.

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169 *See* Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 THE HASTINGS L.J. 1474, 1474 (2012).
170 *See Id.*
171 *See* Samantha Harvell et al., *Bridging Research and Practice in Juvenile Probation*, URBAN INST. (Oct. 23, 2018), https://www.urban.org/research/publication/bridging-research-and-practice-juvenile-probation.
172 *Roper,* 543 U.S. at 570.
173 *See* NAT'L ACADEMIES OF SCIENCES, ENG'G, AND MED., *supra* note 164, at 140.
174 *See* Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop: Issue Brief*, RES. CTR. PARTNERSHIP 1, 3 (2014).
175 *See Id.* at 4.
176 *See* Harmelin v. Michigan, 501 U.S. 957, 999 (1991).
177 *Id.* at 1028.
178 *Furman*, 408 U.S. at 307.

Even if it did, research consistently shows that harsher or longer prison sentences are not rehabilitative—for those who get to one day live outside the walls of prison, studies demonstrate that mental health is most likely worse upon release.[179] This is, in part, due to the severe lack of rehabilitative services and opportunities inside prison. As of 2017, only four out of fifty state prisons in the country provide effective medications to fight drug addiction even while more than 65 percent of the United States prison population has an active substance use disorder (SUD).[180] In a study that compares the health of individuals who expected to be released or paroled with those serving life sentences without the possibility of parole, those serving life without parole have lower health scores across the board.[181]

Given that a life without parole sentence constitutes a judicial declaration that there is no interest in rehabilitating the individual, the remaining purpose of juvenile life without parole sentencing is deterrence or incapacitation. The Court states that the purpose of retribution is less relevant to juveniles given the diminished culpability in comparison to adults.[182] In regard to deterrence, juvenile life without parole is utterly ineffective. Harsh juvenile sentences do not deter youth from committing homicide offenses.[183] Juvenile life without parole sentencing has not lowered the rate of youth crime, specifically youth homicide, in the United States over the past several decades; 1,180 juveniles were arrested for murder and nonnegligent manslaughter in 2000 and 930 were arrested in 2020.[184] Just over ten per 100,000 youth aged fourteen to seventeen committed homicide in 1980—with the exception of a peak in the 1990s which has been accredited to social and political factors, this number is the same as in 2008.[185] While data from recent years reflects a small decline

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[179] *See also* Linda A. Teplin et al., *Prevalence, Comorbidity, and Continuity of Psychiatric Disorders in a 15-Year Longitudinal Study of Youths Involved in the Juvenile Justice System*, 175 JAMA PEDIATRICS 1, 8 (2021); Jennifer M. Reingle Gonzalez & Nadine M Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. OF PUB. HEALTH 2328, 2328–33 (2014); Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POLICY INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/.

[180] *See also* Beth Schwartzapfel, *A Better Way to Treat Addiction in Jail*, THE MARSHALL PROJECT (Mar. 1, 2017), https://www.themarshallproject.org/2017/03/01/a-better-way-to-treat-addiction-in-jail; *Criminal Justice DrugFacts*, NAT'L INST. OF HEALTH (June 2020), https://nida.nih.gov/publications/drugfacts/criminal-justice.

[181] *See* Amanda Li et al, *Mental and Physical Health of Older Incarcerated Persons Who Have Aged in Place in Prison*, 41 J. OF APPLIED GERONTOLOGY 1101, 1101–10 (2022).

[182] *See Montgomery,* 577 U.S. at 205.

[183] *See* HUMAN RIGHTS WATCH, *supra* note 55, at 108.

[184] *See Estimated Number of Juvenile Arrests, 2020*, U.S. DEPT. OF JUST. (July 8, 2022), https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp.

[185] *See also* Alexia Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008*, U.S. DEP'T. OF JUST. (Nov. 2011), https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf; Drinan, *supra* note 40, at 28-34.

in juvenile homicide offenders, it does not demonstrate the level of efficacy which one who supports the deterring effect of life sentences would expect.

From a psychological standpoint, researchers assert that adolescents do not think of potentially negative long-term consequences when acting impulsively for short-term gain.[186] Consequently, adolescents do not respond to even the most severe threats of punishment because "the punishment is projected far into the future [...]."[187] The perceived probability of a severe punishment such as life without parole is incredibly low, and the adolescent focus on immediate consequences renders them unable to even consider what life in prison would be like.[188] Thus, juvenile life without parole is an ineffective deterrent and fails to prevent violent youth crime. Juvenile life without parole may simply incapacitate youth, but it does not rehabilitate or deter.

III. Banning Juvenile Life Without Parole Sentencing and Alternative Interventions

A. Alternatives to Juvenile Life Without Parole and Limitations

Thus far, this note has demonstrated the scientific and legal incorrectness of the "permanent incorrigibility" standard and, more broadly, sentencing a juvenile to life without parole. The "contemporary human knowledge" standard as established in *Robinson* opens the door to a new type of public opinion survey on cruel and unusual punishment—one in which scientific and medical experts are the ones to determine acceptability and appropriateness.[189] On certain issues, the Court should look beyond state legislatures, the international community, and even widespread public opinion. This note argues that the "unacceptable to society" standard should refer to those who can have an informed opinion on the punishment and its appropriateness in context. For any issue that requires scientific or medical expertise, the Court must not confuse themselves with scientists or abrogate their duty to rely upon science when formulating a judicial opinion calls for them to do so. Part II thoroughly presented the most recent research and evidence from child neuroscientists on the diminished culpability and increased amenability to rehabilitation of juveniles. Part III builds upon this evidence and further calls upon experts in child behavior and psychology

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[186] *See* Ezequiel Mercurio et al, *Adolescent Brain Development and Progressive Legal Responsibility in the Latin American Context*, 11 FRONTIERS IN PSYCH. 1, 7 (2020).

[187] NAT'L ACADEMIES OF SCIENCES, ENG'G, AND MED., *supra* note 164, at 122.

[188] *See Id.* at 122.

[189] *See Robinson,* 370 U.S. at 666.

to offer alternatives to juvenile life without parole sentencing. There are many possible options and interventions available to rehabilitate and treat youth who have committed even the most violent crimes.

B. Shorter Sentencing and Appropriate Placement of Youth Offenders

Firstly, for the most violent youth, the apparent alternative to life without the possibility of parole for juvenile offenders is a shorter sentence in a juvenile detention facility that releases them after a reasonable period of time. It must be recognized that in some cases, violent youth must be kept in a facility for some time to protect both the child and the public; however, it certainly should not be for life and not in adult facilities.[190] In these rare instances, it is most appropriate to place a child in a juvenile care facility.[191] As community-based interventions continue to develop across the country, it is critical that youth be placed in facilities which are capable of serving their unique needs and can create a therapeutic environment with appropriate programming.[192] In 2019, Oregon passed sweeping legislation to provide more protection for juveniles facing more severe charges.[193] Senate Bill 1008 eliminated requirements that youth ages fifteen, sixteen, and seventeen charged with certain crimes be automatically sent to adult court—for a child to be charged as an adult in Oregon, a motion for a waiver hearing must be filed.[194] This law also ensures that youthful offenders who are convicted in adult court and sentenced to two or more years get a "Second Look" hearing once half of the sentence is served, and it completely outlaws life without parole for juveniles.[195] As Oregon reduced the number of juvenile offenders transferred to adult facilities, including the older and more "dangerous" youth, there was no decrease in safety within their juvenile facilities.[196] Studies demonstrate that youth are more likely to be depressed, victims of severe physical assault and sexual abuse, and attempt suicide at higher rates in adult facilities than in juvenile facilities.[197]

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190 *See* L. Pilnik & M. Mistrett, *If Not the Adult System Then Where? Alternatives to Adult Incarceration for Youth Certified as Adults*, CAMPAIGN FOR YOUTH JUSTICE, 19 (2019).
191 *See Id.* at 19.
192 *See Id.* at 23.
193 *See* Daniel Nichanian, *Oregon Overhauls It's Youth Justice System*, THE APPEAL (Jul. 25, 2019), https://theappeal.org/politicalreport/oregon-overhauls-its-youth-justice-system/.
194 *See Oregon Juvenile Justice Laws Change This Year*, OR. YOUTH AUTH. COMMUNICATIONS (Jan. 28, 2020), https://insideoya.com/2020/01/28/oregon-juvenile-justice-laws-change/.
195 *See Id.*
196 *See Id.* at 19.
197 *See also* Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L. J. 1445 (2012); Irene Y. H. Ng et al., *Incarcerating Juveniles in Adult Prisons as a Factor in Depression*, CRIM. BEHAV. AND MENTAL HEALTH 21, 25–27 (2011).

C. Therapeutic Alternatives to JLWOP and Their Limitations

Recent studies have uncovered the efficacy of several different types of therapeutic solutions to reform violent youth offenders. Functional family therapy (FFT), which has a clinical focus on familial factors that impact risk of criminal involvement, is rated by the National Institute of Justice as effective for violent offenders and shows a decrease in recidivism among participants.[198] A 2010 study found that committed FFT therapists may be effective in reducing felony recidivism by at least 35 percent and violent crime recidivism by 30 percent, even among the most difficult youth and families.[199] FFT has also demonstrated efficacy for youth tried as adults and charged with serious felonies; however, efficacy may depend on both the commitment of the clinicians to the FTT model and the ability of the clinicians to work with challenging clients.[200]

In addition, multidimensional treatment foster care (MTFC) has demonstrated efficacy among severe youth offenders with chronic forms of aggression, antisocial behavior, and other mental health and behavioral concerns.[201] Many juvenile homicide offenders, even the most violent, are not homicidal or violent in nature, but are more so victims of a violent or traumatic environment. Nonetheless, youth who are actively homicidal may be excluded from this option as it places offenders in foster homes to undergo therapy, which may place fear in the families fostering the youth.[202] This presents a significant obstacle to those youth who may face juvenile life without parole sentences due to a homicide conviction. Further research and exploration of the MTFC model should be done to determine the level at which it may accommodate youth offenders convicted of homicide.

D. Adapting to "Permanent Incorrigibility" with Delayed Sentencing and "Livable Term Sentences"

This note has made clear that the "permanent incorrigibility" standard is outdated and scientifically incorrect. However, rather than attempting to determine the "permanent incorrigibility" of juveniles, another suggested alternative that would improve current

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198 *See Program Profile: Functional Family Therapy (FFT)*, NAT'L INST. OF JUST. (June 14, 2011), https://crimesolutions.ojp.gov/ratedprograms/122.

199 *See* Thomas Sexton & Charles W. Turner, *The Effectiveness of Functional Family Therapy for Youth with Behavioral Problems in a Community Practice Setting*, 24 J. OF FAM. PSYCH. 339, 339 (2010).

200 *See* Charles W. Turner et al., *Juvenile Justice Risk Factors and Functional Family Therapy Fidelity on Felony Recidivism*, 46 CRIM. JUST. & BEHAV. 697, 697–717 (2019).

201 *See* Philip A. Fisher & Kathryn S Gilliam, *Multidimensional Treatment Foster Care: An Alternative to Residential Treatment for High Risk Children and Adolescents*, 21 INTERVENCION PSICOSOCIAL 195, 195–203 (2012).

202 *See* Pilnik & Mistrett, *supra* note 190, at 18.

practices is to delay sentencing by a certain period of time to implement therapeutic interventions. This allows a judge to see a youth's demonstrated progress when given the option to reform themselves in a non-carceral, therapeutic environment.[203] This could take the form of diversion programming, which places youth in community-based programs that allow them to stay connected to their families while enrolled in programs aimed at rehabilitation and assistance.[204] Given the severity of homicidal offenses, this would likely take place in a residential facility, but a less confining environment than a detention facility. While diversion programming is primarily available only to non-violent juvenile offenders currently, research demonstrates that it could potentially be effective for violent offenders as well.[205]

Some recent experts have suggested "livable term sentences" as an alternative to juvenile life without parole sentences.[206] This "sentencing scheme" uses a calculation that involves the typical retirement age in the United States, the youth's life expectancy, and the number of years it would require for a juvenile serving life without parole to reenter society with a "meaningful opportunity to fashion a decent life" before their death.[207] While life without parole and de facto life sentences must be eliminated, the problem with this "sentencing scheme" is that it bows its head to the "permanent incorrigibility" standard and is designed to enable United States courts to comply with it. Rather than resentence a child based on the number of years in which they will likely be dead, our sentencing system should treat juveniles as "products of pathological environments rather than intrinsically evil," to help accomplish the goal of "resocializ[ing] youth and provid[ing] them with the necessary tools for adopting a moral lifestyle."[208] Still, several sitting Supreme Court justices create significant barriers to achieving a system which protects rather than punishes disadvantaged youth.[209]

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[203] *See Id.* at 23.
[204] *See Diversion Programs*, OFF. OF JUV. JUST. DELINQ. AND PREVENTION (Feb. 2017), https://www.ojjdp.gov/mpg/litreviews/Diversion_Programs.pdf.
[205] *See* Andrew Day & Patrick Doyle, *Violent Offender Rehabilitation and the Therapeutic Community Model of Treatment: Towards integrated service provision*, 15 AGGRESSION & VIOLENT BEHAV. 380, 380-386 (2010).
[206] *See* Brittany Ripper & Robert Johnson, *Livable Term Sentences as Alternatives to Juvenile Life Without Parole: A Sentencing Framework Based on United States v. Grant*, 3 J. OF CRIM. JUST. & LAW 59, 59-75 (2019).
[207] *Id.* at 60.
[208] AARON KUPCHIK, JUDGING JUVENILES*:* PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURT 11 (2006).
[209] *See* Robert Barnes, *Supreme Court Rules Against Juvenile Sentenced to Life Without Parole,* THE WASH. POST (Apr. 22, 2021, 1:14 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-life-without-parole/2021/04/22/6a633136-a371-11eb-a774-7b47ceb36ee8_story.html.

Conclusion: Juvenile Life without Parole, Youth Rights, and Racial Justice

This note has shown legal and scientific evidence that discredits the "permanent incorrigibility" standard and disproves the efficacy or even purpose of juvenile life without parole sentencing. While some legal scholars may argue that the Court has no obligation to rely on scientific or medical evidence in the legal decision-making process, this note details precedent that demonstrates the prevalent and necessary relationship between science and the Supreme Court. Without physicians, psychologists, psychiatrists, and neuroscientists, among many other types of scientists, Supreme Court justices would be incapable of fulfilling their duties—specifically those which require them to consider "contemporary human knowledge" in decisions regarding the Eighth Amendment. From *Atkins* to *Roper* to *Robinson* to *Graham* and so forth, the Court repeatedly cites evidence from the scientific community to uphold its decisions. While justices are doctors of the law, they can claim expertise in no other field, including developmental neuroscience. In the past several decades, developmental psychologists and neuroscientists have built a corpus of research that illustrates now more than ever the inappropriateness of juvenile life without parole sentencing and presents available alternatives. Up until *Jones*, the Court continuously made strides toward recognizing the significant differences between juveniles and adults and limited the use of juvenile life without parole sentencing. While the Court invented a scientifically problematic standard in the process, the intention to limit severe punishment to only the most severe youth offenders was sincere. *Jones*, however, completely inhibits this progress.

In the United States, approximately 12,000 children and adults are serving life without parole for crimes committed before the age of eighteen—up until 2019, that number included seventy-four-year-old Sheldry Topp, who left prison in a wheelchair.[210] Today, that number includes Brett Jones. When Brett Jones was an infant, he watched his alcoholic father knock his mother's teeth out and break her nose on multiple occasions.[211] Although Brett's father left when he was two years old, his mother remarried another abusive stepfather who beat him with belts and switches throughout his childhood and adolescence.[212] Brett's

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[210] *See also* del Valle, *supra* note 1; Ashley Nellis, *Youth Sentenced to Life Imprisonment,* THE SENTENCING PROJECT (Oct. 8, 2019), https://www.sentencingproject.org/fact-sheet/youth-sentenced-to-life-imprisonment/.
[211] *See Jones*, 141 S. Ct. at 1342 (Sotomayor, J., dissenting).
[212] *See Id.* at 1342.

stepfather did not call him by name, but rather only used cruel nicknames to emotionally torment him.[213] One day when Brett came home, his stepfather choked him with his hands tightly around Brett's neck and prepared to beat him with a belt; this time, Brett fought back and split his stepfather's ear open.[214] The stepfather threatened to kick Brett's mother out if he did not leave—two months after, his mother sent him away to his grandparent's house, where he lost access to the medications that relieved his depression and psychosis.[215] Subsequently, Brett was arrested for murdering his grandfather.[216] When his grandfather attempted to slap him during a fight, Brett, as a fifteen year old boy with a history of severe physical abuse and mental health issues, reacted by eliminating the threat.[217]

There is no doubt that stabbing a family member eight times is an absolutely heinous and disturbing crime. However, this note questions how "unfixable" and "inherently evil" Brett Jones really is, and how much his trauma and mental health disorders played a role in his violent response. Brett attempted CPR on his grandfather and tried to hitchhike to go confess his crime to his grandmother.[218] From the moment he was born, Brett Jones was exposed to some of the most traumatizing forms of violence and abuse. Neurological evidence suggests that Brett's brain, just like the brains of many other youthful offenders with a history of exposure to violence and trauma, did not have a normal path of development.[219] Developmental research demonstrates that Brett, lacking strong cognitive functioning in his frontal lobe, may have relied on his amygdala in the moment that he stabbed his grandfather.[220] Brett lived in a home that was plagued with violence and fear his entire life. Does our society believe that, with these facts, a judge can confidently say that Brett's violent burst is a permanent aspect of his character that can never be changed? Do we believe that a judge can determine that a child with any mitigating circumstances similar to Brett's will never be capable of change? Even further, given the diminished culpability and heightened amenability to rehabilitation of all youth solely due to neurological immaturity, do we believe that life without the possibility of parole is fair or suitable for any youthful offender? Ultimately, the more important question is whether psychologists and

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213 *See Id.*
214 *See Id.* at 1343.
215 *See Id.* at 1342-1343.
216 *See Id.*
217 *See Id.* at 1344.
218 *See Id.*
219 *See also* Konopka, *supra* note 159, at 315-316; Ibrahim et al., *supra* note 159, at 100343; Edwards, *supra* note 159, at 198–208.
220 *See* Stevens et al., *supra* note 147, at 1-2.

neuroscientists believe so—as this note suggests, they do not. Juvenile life without parole sentencing is not only inappropriate based on the scientific evidence, but also cruel and unusual. The Supreme Court has a duty to reject the "permanent incorrigibility" standard and eliminate juvenile life without the possibility of parole altogether. Children deserve a chance to show that they can grow into a person who is capable of becoming a safe and contributing member of society—who can live a single day of their adult lives beyond the walls of a prison cell.

The Power Behind the Prosecutor: An Examination of Prosecutorial Discretion and Potential Institutional Reform

Ella French

Introduction

There is widespread consensus that prosecutors enjoy enormous power in the United States (US) legal system. Legal scholar William Stuntz famously described local prosecutors as "the criminal justice system's real lawmakers."[1] However, much scholarly debate surrounds the potential need to curtail such expansive power. In 1940, former Attorney General of the US, Robert Jackson, warned that "the prosecutor has more control over life, liberty, and reputation than any other person in America."[2] Over the eight decades since Jackson's speech, prosecutorial power has only increased. Given that approximately 95 percent of criminal cases are decided through prosecutorial plea bargains, the unchecked and consequential nature of prosecutorial decision-making requires critical attention.[3]

Throughout the US, both Republicans and Democrats are demanding substantive criminal justice reform. While most academic work points to socioeconomic factors, criminal sentencing statutes, or the growth of the prison industrial complex as the main drivers behind the US' unprecedented incarceration rate, an alternative explanation looks to the people responsible for filing criminal charges - prosecutors. Despite falling crime rates, the US maintains the highest incarceration rate in the world, accounting for 25 percent of the world's

[1] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).
[2] Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940).
[3] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009).

prisoners with only 5 percent of the world's total population.[4] Regardless of the dropping crime rates, prosecutors have increased the filing rate of felony charges over recent decades, which has contributed to the country's prison population explosion.[5] Beginning in the 1980s, prosecutors became increasingly aggressive, and since, the growth of prosecutorial power has only continued.[6] During the early twentieth century, both through the charging function and the growing practice of plea bargaining, prosecutorial discretion came to make up a key function of the criminal justice system.

Since prosecutors are essentially gatekeepers of American justice, it is necessary to define their position within the US legal system. Consistent with every issue within the American criminal justice system, the operation of prosecutorial offices depends on the jurisdiction with prosecutors at the federal, state, and local levels. Appointed by the President and confirmed by the Senate, there are ninety-three United States Attorneys.[7] In addition to these US Attorneys at the federal level, there are approximately 2,400 state and local-level prosecutors, who in combination, are responsible for the imprisonment of nearly 2.1 million people.[8] Chief prosecutors, mainly called District Attorneys (or DAs), represent the government in criminal justice proceedings and are responsible for filing criminal charges against individuals or corporations. DAs decide what crimes to charge and what plea deals will be offered.[9] While prosecutors do not decide whom to detain before trial (the courts do), prosecutors may make recommendations that carry considerable influence. Trial judges are responsible for sentencing, so they decide who will be imprisoned in state facilities. Importantly though, a mandatory minimum sentence effectively lets the prosecutor be the judge for all intents and purposes. The American Bar Association (ABA) *Standards for the Prosecution Function* outlines the function of the prosecutor and provides guidelines for the position's conduct and responsibilities: "The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound

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[4] Lauren-Brooke Eisen & Inimai M. Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, BRENNAN CENTER FOR JUSTICE (Mar. 22, 2018), https://www.brennancenter.org/our-work/policy-solutions/criminal-justice-election-agenda-candidates-activists-and-legislators [https://perma.cc/N9LT-G82J].
[5] John F. Pfaff, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 72 (2017); *see also* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017).
[6] Pfaff, *supra* note 5.
[7] 28 U.S.C. § 541(a) (2006); *See generally* Barkow, *supra* note 3.
[8] Eisen & Chettiar, *supra* note 4.
[9] Barkow, *supra* note 3, at 876 (*citing* Wayte v. United States, 470 U.S. 598, 607 (1985), which recognized the prosecutors' power to decide which charges to file).

discretion and independent judgment in the performance of the prosecution function."[10] The prosecutor's interest to "see that the defendant is accorded procedural justice" is essential to US criminal proceedings.[11]

With approximately 200,000 prisoners, the federal prison system accounts for the largest incarcerated population in the US (in comparison to states).[12] This note focuses on US Attorneys because they represent the most unchecked actors through the exceptional power they hold. Tasked with enforcing federal criminal laws, these prosecutors exercise discretion about whether to bring charges against a defendant. Federal prosecutors today exercise far greater power than just law enforcement.[13] With the vast majority of cases never going to trial, prosecutors essentially become the final adjudicators.[14] Once a plea offer is on the table, defendants are often left with virtually no other option: reject the deal and risk receiving a harsher sentence after trial. Therefore, prosecutors wield extensive influence over who is imprisoned and for how long.

Unchecked prosecutorial discretion is worth addressing because it disproportionately impacts Black Americans and significantly contributes to additional societal costs.[15] Moreover, the combination of both enforcement and adjudicative power in one actor also presents an opportunity for a prosecutor's decision-making to be influenced by personal prejudices and biases. Legal scholars have criticized prosecutors for a variety of reasons, including but not limited to: withholding exculpatory evidence, too quickly relying on incarceration to solve social challenges, contributing to racial disparities within the legal process, and driving mass incarceration.[16] The disproportionate racial composition of the federal prison population presents the critically important possibility that unchecked prosecutorial power may be a contributing factor. The federal prison population is approximately 40 percent Black and nearly one-third Hispanic.[17] Empirical evidence demonstrates that, even after isolating other legal factors, race and gender affect charging and sentencing decisions.[18] The actions of these prosecutors result in crucial consequences

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[10] ABA PROSECUTION STANDARDS, Standard 3.8: *Special Responsibilities of a Prosecutor (2017)*.
[11] *Id.*
[12] Barkow, *supra* note 3, at 870.
[13] *Id.* at 876.
[14] *Id.*
[15] David Alan Sklansky, *The Problems with Prosecutors*, 1, ANN. REV. OF CRIMINOLOGY, 451, 451 (2018).
[16] *Id.*
[17] Barkow, *supra* note 3, at 883.
[18] *Id.* at 884.

for many Americans. Of course, it is worth noting that prosecutors only handle the cases that are brought to them by the police, signaling that racial imbalances in the criminal justice system are not necessarily the fault of the prosecutor alone. Nevertheless, prosecutorial decisions certainly contribute to the system and its disproportionate impact on Black Americans.

American law has equipped prosecutors with nearly absolute and unreviewable discretionary power in determining whether a person will receive a slap on the wrist or a harsh punishment.[19] Without a doubt, discretion serves as a necessary and critical component of criminal justice proceedings. Discretion provides the opportunity for mercy and to decide important outcomes on a case-by-case basis in a system that tends to be strident and detached from real-life circumstances. However, discretion also positions prosecutors to be one of the most powerful actors in the American justice system. While the hope is that most prosecutors act ethically, hope is not enough. Generally, the courts and legislatures have been reluctant to interfere with prosecutorial decision-making. This practice has been justified by the separation of powers doctrine, which will be further discussed in Part I of this note. The separation of powers represents a supposed hallmark of American democracy, and prosecutors present a concerning and noteworthy exemption from its system of checks and balances.[20]

The very existence of prosecutors does not present a social challenge. Rather, the issue lies in their unchecked and extraordinary discretionary power. This note will examine the legal grounds that underpin prosecutorial discretion. While many problems coexist within prosecutorial offices in the US, this note will focus on discretion and how both Congress and the Supreme Court have failed to check that executive function.

Part I will outline the separation of powers doctrine, present a review of the relevant federal case law and precedent related to prosecutorial discretion, and explain further enhancements to discretionary practices. Part II will detail the issues presented by the use of prosecutorial discretion through charging decisions and plea bargaining. This section will also illustrate how the separation of powers doctrine, which primarily serves as the courts' justification for non-interference in prosecutorial decision-making, does not adequately substantiate the scope of prosecutorial discretion that exists today. Part III will explain why

[19] *See generally* Barkow, *supra* note 3.
[20] *Id.*

reforms targeting the institutional design of federal prosecutors' offices will be the most effective and politically viable mechanism to check such expansive prosecutorial power that exists today.

I. The Background of and Legal Precedent for Prosecutorial Discretion

A lack of clear understanding has long characterized prosecutorial discretion within the American federal criminal justice system.[21] However, it is abundantly clear that few legal constraints exist regarding discretion. The constitutional limits that do exist - equal protection and due process - are rarely used to regulate prosecutorial misconduct; and when used, are even more rarely successful.[22] Rather, according to contemporary federal case law, prosecutorial discretion is attributed to the *separation of powers doctrine*, which defines federal prosecutors as agents of the executive branch.[23] Therefore, prosecutors' decisions are generally not subject to judicial review.[24]

A. Separation of Powers Doctrine

According to modern case law, prosecutors are granted broad discretionary power, an authority rooted in judicial theory. Prosecutors would not have such broad discretion without judicial compliance.[25] Although judges could potentially limit prosecutors by reclaiming some discretionary authority, federal courts have been reluctant to do so. Instead, federal case law has determined that judges are constitutionally barred from reviewing prosecutorial decision-making. This argument has most commonly been endorsed by the separation of powers doctrine and used to justify the courts' hands-off approach to prosecutorial decision-making.

The Fifth Circuit's *Cox* decision embodies today's separation of prosecutorial powers doctrine.[26] In *United States v. Cox*, acting on the advice of the Attorney General, Nicholas Katzenbach, the US Attorney for the Southern District of Mississippi, Robert Hauberg, refused a federal grand jury's request to prepare indictments.[27] After refusing a

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[21] Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 3 (2009)
[22] *Id.* at 4.
[23] *Id.* at 10 (*citing* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996), which held that the separation of powers doctrine mandates broad prosecutorial discretion.)
[24] Krauss, *supra* note 21, at 4.
[25] *Id.* at 9.
[26] *Id.* at 10.
[27] United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

District Court Judge Cox's order to comply with the grand jury request, Judge Cox entered an order finding Hauberg guilty of civil contempt.[28] He further ordered Katzenbach to appear and demonstrate cause as to why he should not also be charged with contempt.[29] Hauberg and Katzenbach appealed the case. Ultimately, the Fifth Circuit held that US Attorneys wield executive discretion as to whether to prepare an indictment request by a grand jury.[30] The court ruled that "it is as an officer of the executive department that [the federal prosecutor] exercises a discretion as to whether or not there shall be a prosecution in a particular case."[31] While a prosecutor serves as an officer of the court, he or she is also an executive official with discretionary powers over when to prosecute a case. Accordingly, the court explained that "[i]t follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the US in their control over criminal prosecutions."[32] This theory has been affirmed by the Supreme Court, which noted that "the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."[33] The "Take Care" Clause, which states that the President "shall take care that the laws be faithfully executed," is the most frequently cited constitutional text to substantiate this separation of powers argument.[34] Although this clause does not explicitly categorize criminal prosecutions as an executive function, it continues to serve as courts' justification for prosecutors' expansive discretionary powers.

B. Application of Prosecutorial Separation of Powers in Modern Federal Case Law

Although federal courts have demonstrated consistent reluctance to interfere with prosecutorial decision-making, the law does protect defendants from unconstitutionally motivated prosecutions. For example, vindictive prosecution, in which a prosecutor increases the severity of charges against a defendant for exercising a constitutional or statutory right, violates constitutional due process.[35] However, this legal principle does not apply to the plea-bargaining process. Federal law empowers prosecutors with the exclusive discretionary authority to decide whether to prosecute any crime that is backed by probable

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* United States v. Armstrong, 517 U.S. 456, 463–64 (1996).
[34] Krauss, *supra* note 21, at 10 (*citing* U.S. CONST. art. II, § 3).
[35] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

cause.[36] In *Bordenkircher v. Hayes*, the Supreme Court held that prosecutors are not constitutionally prohibited from threatening defendants with more serious charges if a defendant wishes to take his case to trial.[37] During that 1978 case, the Court rejected Hayes' challenge of his conviction, where he argued that prosecutors violated his Fourteenth Amendment rights of due process when threatening to re-indict him on more serious charges if he did not accept a guilty plea to a lesser offense.[38] In this case, prosecutors recommended a five-year sentence in exchange for a guilty plea, and a mandatory life sentence if the defendant sought to exercise his trial rights.[39] The Court backed this coercive power in its acceptance of the plea-bargaining system as an "important component of this country's criminal justice system," and as long as pleas are accepted "knowingly and voluntarily," the process does not violate the Constitution.[40] Since *Bordenkircher*, "[p]rosecutors have a strong incentive to threaten charges that are excessive, even by the prosecutors' own lights."[41] The plea-bargaining system has become seriously institutionalized, so much so that Justice Anthony Kennedy stated in a 2012 case that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[42]

Similarly, selective prosecution, in which a prosecutor's decision is ruled discriminatory on the basis of race, religion, or other biases, violates the constitutional right to equal protection.[43] In these cases, the heavy burden of proof rests with the defendant.[44] Although prosecutors do face legal constraints on what they can do, those constraints are often weakly enforced.[45] For example, in *Brady v. Maryland* (1963), a landmark case in which the Supreme Court held that the prosecution's suppression of materially exculpatory evidence violated constitutional due process, the Court established an important rule, requiring prosecutors to provide defense counsel with any potentially exculpatory evidence.[46] However, with *Brady's* "reasonable likelihood" standard, disclosing evidence is notoriously

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[36] *Id.* at 364.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 363.
[41] Barkow, *supra* note 3, at 879 (*citing* William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 26 (Harv. L. Sch., Pub. L. Working Paper No. 120, 2005), http://ssrn.com/abstract=854284).
[42] Missouri v. Frye, 566 U.S. 134, (2012).
[43] Wayte v. United States, 470 U.S. 598, (1985).
[44] Krauss, *supra* note 21, at 6.
[45] Sklansky, *supra* note 15, at 457.
[46] Brady v. Maryland, 373 U.S. 83, 87 (1963).

vague, allowing violations to never see the light of day in many cases. After *Bordenkircher*, in the 1996 *Armstrong* decision, the Court ruled that to show selective prosecution, an individual must demonstrate both a discriminatory purpose and an effect in their prosecution.[47] This ruling further emboldened prosecutors by making successful claims of selective or discriminatory prosecution very difficult to bring in practice.[48]

C. Further Enhancements to Prosecutorial Power

Beyond the broad discretion that case law already grants prosecutors, the modern criminal justice system has facilitated even greater prosecutorial discretion in reality. In addition to deciding *whether* to prosecute, a prosecutor has enormous discretion regarding *how* to prosecute. The Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."[49] After a prosecutor has chosen whether to grant immunity, offer a plea bargain, or dismiss a case, "no court has any jurisdiction to inquire into or review" a prosecutor's discretion to address "[t]wo persons [who] may have committed what is precisely the same legal offense" differently.[50] As a result, prosecutorial discretion touches almost every aspect of criminal justice proceedings. The plea-bargaining process positions prosecutors as the ultimate *adjudicators*, absorbing discretionary power otherwise held by judges.[51] The prosecutor is responsible for evaluating guiltiness and choosing the charge that will be accepted in plea negotiations.[52] The charge is then supplemented by an "advisory" sentence from the US Sentencing Commission, and judges tend to sentence according to those guidelines, tending to only deviate from those Guidelines through a government motion.[53] The main basis for a departure rests on a defendant providing "substantial assistance" to the government.[54] In most cases, a substantial assistance claim is the only way to avoid a mandatory minimum sentence, and this also requires a

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[47] United States v. Armstrong, 517 U.S. 456, 463–64 (1996).
[48] *Id.*
[49] United States v. Batchelder, 442 U.S. 114, 123–24 (1979).
[50] Newman v. United States, 382 F.2d 479, 481–82 (D.C. Cir. 1967).
[51] Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?,* 55 STAN. L. REV. 1399, 1403–04 (2003).
[52] Krauss, *supra* note 21, at 8.
[53] *Id.* (*citing* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N (2007)).
[54] Barkow, *supra* note 3, at 878.

motion by the prosecutor.[55] Therefore, in most cases, the prosecutor determines a defendant's final judgment.[56]

Ultimately, the prosecutor exercises broad discretion regulated by remarkably few legal barriers. These discretionary powers, which rest on the doctrinal foundation of the separation of prosecutorial powers theory, are therefore, very difficult to review. Although prosecutorial discretion may be necessary, the separation of powers doctrine does not account for such unreviewable power that exists today, as explained in the following section.

II. Issue of the Scope of Prosecutorial Discretion & the Separation of Prosecutorial Powers Doctrine

The law has facilitated the current scope of prosecutorial discretion. While power and discretion are distinct entities, they are inextricably linked within the role of the prosecutor. Discretion, or the freedom to decide whether to take some action, bolsters prosecutorial power. In addition to how federal case law has allowed prosecutorial decision-making to go essentially unreviewed, prosecutorial discretion has become further concentrated by other features of the criminal justice system. This phenomenon is made evident in the prosecutor's control of the charging function, as well as the plea-bargaining process.

A. The Charging Function

Several legal scholars point to the charging function as the root of prosecutors' expansive discretionary power. The charging function involves two decision-making parts: the "screening function," or the initial decision as to whether or not to charge; and the "selection function," or the decision as to what will be charged and how many charges.[57]

Given the overlapping jurisdictions of the US political system, its wide variety of provisions within criminal codes has effectively given prosecutors the authority to decide *how* criminal conduct will be defined and sentenced.[58] The expansion of prosecutorial power has coincided with the appreciable growth of the federal criminal code over the last two centuries. The 1873 Revised Statutes listed 183 distinct offenses, in comparison to today, in which Title 18 of the US Code includes thousands of separate offenses.[59] Moreover, because

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[55] *Id.*
[56] Stuntz, *supra* note 1, at 509.
[57] Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 645 (2002).
[58] Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996).
[59] Krauss, *supra* note 21, at 7 (*citing* 70 Rev. Stat. (2d ed. 1878)).

ranging criminal statutes often overlap, they essentially serve as "a menu from which the prosecutor may order as she wishes."[60] Therefore, the rule that "when an act violates more than one criminal statute, the Government may prosecute under either" ultimately equips federal prosecutors with even more discretionary power than the Supreme Court initially held in 1979.[61] As many criminal statutes include potentially harsh penalties, the prosecutor's discretion whether or not to enforce such penalties serves to increase their leveraging power. Harsh criminal statutes have shifted a significant amount of discretion away from judges and placed that power within the hands of prosecutors. Because neither the legislatures nor the courts tend to interfere with prosecutorial discretion in the charging process, prosecutors act with nearly unimpeded discretion.

Prosecutorial discretion in the charging process, which is largely uncontrolled, has raised significant concerns. Recent quantitative and qualitative data from the first randomized controlled experiment exploring how prosecutors decide to file charges across the country to assess the influence of prosecutorial discretion seems to confirm such concerns.[62] This nationwide study found that "prosecutors may be harsher, less uniform, and less likely to decline cases than we might have expected based on earlier studies."[63] Because sentencing guidelines and the growth of mandatory minimum sentences have enhanced the significance of the charging function, this data provides important insight into the enormity of prosecutorial decisions.[64]

B. Plea-Bargaining

Another trend that has advanced the power of prosecutors over time is that they face minimal restraints in the plea-bargaining process. With such large caseloads, prosecutors lack the adequate time and resources to bring every case to trial.[65] Prosecutors tend to charge first, then have the power to coerce a plea deal out of the defendant. Although it is difficult to measure the precise amount of power prosecutors may hold, their increasing authority can be tracked alongside the rise of plea bargaining. Today, plea bargains resolve more than nine out of ten of all criminal cases.[66] Persistent concerns surrounding the plea bargain

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[60] William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).
[61] *Id.* at 2550.
[62] Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CALIF. L. REV. 1123, 1129 & n. 99 (2021).
[63] *Id.*
[64] Misner, *supra* note 58, at 734.
[65] Krauss, *supra* note 21, at 8.
[66] Eisen & Chettiar, *supra* note 4.

system in the US motivated the creation of the ABA's 2023 Plea Bargain Task Force. The report emphasizes the need to address the modern plea bargain system, calling attention to the fact: "Indeed, some jurisdictions have not had a criminal trial in many years, resolving all their cases through negotiated resolutions."[67]

Given prosecutors' increased negotiating power, an overwhelming number of defendants plead guilty out of fear of a harsher outcome at trial.[68] Over the past few decades, state legislatures have added more potential charges, enhancements, and harsher sentences, which in turn, gives prosecutors greater power in plea bargaining.[69] A 2013 Human Rights Watch report on plea bargaining in the US concluded that "coercive plea bargaining tactics abound in state and federal criminal cases."[70] The report found numerous examples of prosecutors exerting pressure on defendants to accept plea deals by threatening to file charges with harsher maximum punishments. Furthermore, prosecutors are often evaluated on their conviction rates, which leaves prosecutors with little incentive not to file charges.[71] Additionally, most DA offices give individual prosecutors expansive authority over their cases, enforcing little supervision on each individual basis.[72]

Inextricably intertwined with the immense scope of prosecutorial discretion is the widespread lack of accountability within prosecutorial offices. Insufficient transparency promotes this lack of accountability. It is widely accepted that prosecutorial decision-making represents the public interest. However, the duty of the prosecutor has been clouded by the behind-closed-doors discretionary practices that characterize daily operations in prosecutor offices.[73] Addressing this issue is made difficult by the fact that prosecution operates outside of the public eye, often referred to as the "black box" of the criminal justice system.[74] While

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[67] American Bar Association, Criminal Justice Section, Plea Bargaining Task Force, Evaluating Fairness and Accuracy in State Criminal Justice Systems: The Michigan Project on Indigent Defense, Report of the ABA Criminal Justice Section Plea Bargaining Task Force (2003), https://www.americanbar.org/content/dam/aba/publications/criminal_justice/plea-bargain-tf-report.authcheckdam.pdf.
[68] *Id.*
[69] Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 191, 196 (2015).
[70] *Id.* at 196; *see also* Jamie Fellner et. al., An Offer You Can't Refuse: How the U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty, (HUMAN RIGHTS WATCH 2013), http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.
[71] Jamie Fellner et. al., An Offer You Can't Refuse: How the U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty, (HUMAN RIGHTS WATCH 2013), http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.
[72] Sklansky, *supra* note 15, at 457.
[73] Griffin & Yaroshefsky, *supra* note 5, at 331.
[74] Baughman & Wright, *supra* note 62, at 1130.

police arrests, judicial sentencing, and criminal codes are all disclosed in public records, prosecutorial decisions are incredibly secretive, lacking transparency and accountability.[75] Prosecutors have little incentive to put their decisions up for review, so data on prosecutorial decision-making is hard to ascertain.

C. Separation of Powers Doctrine in Practice

The essentially unreviewable authority underpinning prosecutorial discretion has been mostly attributed to the separation of powers doctrine. According to relevant case law, the separation of prosecutorial powers doctrine backs two primary conclusions: that the prosecutor has discretion in his decision-making to prosecute a case and how to prosecute that case, and that those decisions are unreviewable by the courts.[76] However, this doctrine fails to adequately address such broad prosecutorial discretion that permeates criminal procedure today. Because plea bargains determine the outcome of most criminal cases, prosecutorial discretion has grown beyond its original doctrinal foundation.

One argument against this broad application of such separation of powers is found in a comparison between discretion in criminal versus administrative law. In the context of criminal law, the Court has yet to outline important safeguards against prosecutorial misconduct or abuse. This gap demonstrates a critical difference between the application of the separation of powers doctrine in different areas of the law.[77] For example, administrative agencies are subject to judicial review and possible overturn for "arbitrary and capricious" actions.[78] Whereas these agencies, many of which are under the executive branch, are required to provide legal reasoning for their decisions, federal prosecutors have no such duty.[79] "Kenneth Culp Davis, renowned legal scholar remembered as "the father of administrative law," who remarked on this comparison in 1969, concluded that "[i]n our entire system of law and government, the greatest concentrations of unnecessary discretionary power over individual parties are not in the regulatory agencies but are in police and prosecutors."[80] Such expansive and unreviewable prosecutorial power is a critical deviation from the US system of checks and balances. Although the Framers' desire to design a government that served as checks among the different parts, there exists almost no check

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[75] Vera Institute of Justice, *Unlocking the Black Box of Prosecution* (2018), https://www.vera.org/unlocking-the-black-box-of-prosecution [https://perma.cc/8ZAG-LDG].
[76] *Id.*
[77] Krauss, *supra* note 21, at 4.
[78] 5 U.S.C. § 706(2)(A) (2006).
[79] Krauss, *supra* note 21, at 12.
[80] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969).

on the offices of prosecutors.[81] Therefore, it is remarkably clear that consolidating such power into a single criminal justice actor can result in significant misuse or exploitation.

Notwithstanding this critical comparison between criminal and administrative law, there also exists widespread legal debate surrounding the very conclusion that the separation of prosecutorial power even does determine criminal law enforcement to be an exclusively executive authority. In the 1988 decision, *Morrison v. Olson*, the Supreme Court concluded the Independent Counsel Act to be constitutional by upholding the appointment of a special prosecutor unbeholden to the President.[82] This case inspired relevant debate surrounding executive control over prosecutions.[83] In dissent, Justice Scalia articulated that criminal law enforcement had "always and everywhere" been a quintessential executive function.[84] He wrote how this function is "the virtual embodiment of the power to 'take care that the laws be faithfully executed.'"[85] In the aftermath of *Morrison*, many scholars disagreed with Scalia's assessment that prosecution exists as an exclusively executive power.[86] Several of these scholars reason that the "Take Care" Clause, upon which Justice Scalia relied, does not specifically call for executive authority over criminal prosecutions.[87] Ultimately, most scholars have concluded that the executive branch has only limited control over criminal prosecutions.[88] The Independent Counsel Act sunsetted in 1999 and has not been renewed since.

Another key legal issue stems from the combination of both law enforcement and adjudicative authority into one single actor: the prosecutor. Legal scholar Rachel Barkow labels this aspect to be the most critical institutional design flaw of the criminal justice system.[89] She argues that being a separation of powers theory expert is unnecessary to see the troubling results of allowing one actor to judge their own actions.[90] However, some checks on prosecutorial discretion do exist. First, grand juries provide a minimal check since the prosecutor must persuade them to get an indictment (although it is often - but not always - easy to do so). Trial juries also provide a meaningful check. Even if a prosecutor gets an

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[81] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
[82] Morrison v. Olson, 487 U.S. 654 (1988).
[83] Krauss, *supra* note 21, at 13.
[84] Morrison, 487 U.S. at 706 (Scalia, J., dissenting).
[85] *Id.* at 706, 727 (Scalia, J., dissenting).
[86] Krauss, *supra* note 21, at 14.
[87] *Id.*
[88] *Id.*
[89] Barkow, *supra* note 3, at 871.
[90] *Id.*

indictment, a trial jury can reject a prosecution that lacks merit. Finally, because judges have final control over sentencing, judges will sometimes reject a plea bargained sentence. Still, with over 95 percent of cases not tried before a judge or jury, prosecutors tend to act as the final adjudicators.[91] After *Bordenkircher*, in which the Court upheld prosecutors' coercive practices within plea negotiations as necessary as not to overwhelm caseloads, legitimate concerns surround a defendant's constitutional right to a free trial.[92] At the federal level, defendants who refuse to enter a plea agreement receive an average sentence three times the length than those who waive their right to a jury trial.[93] Even accounting for substantive differences that may exist between the cases that plead out and those that go to trial, conservative estimates of the discount associated with a guilty plea still demonstrate an approximately 35 percent sentence decrease.[94]

Another factor that limits the ability of defendants to bring their cases to trial is that the overwhelming majority of defendants in federal criminal cases are indigent, often depending on appointed counsel.[95] Court-appointed attorneys are typically paid far less for their time than cases involving paying clients.[96] Moreover, public defender offices are regrettably understaffed and underfunded.[97] As a result of the difficulties and costs associated with trials, the right to a jury trial does not constitute an adequate check on prosecutorial power.

Moreover, Congress has further bolstered prosecutorial power. Prosecutors not only wield significant influence over individual cases, but also over criminal justice policies more broadly, lobbying for certain legislation and often acting as the head of local systems.[98] Representatives from the Department of Justice and different United States Attorneys' Offices have the ability to lobby Congress for legislation with harsher or mandatory sentences as those statutes provide prosecutors with the necessary leverage to obtain pleas.[99] Despite widespread agreement by experts - including the US Sentencing Commission - that mandatory minimum sentencing laws contribute to greater disparities in the legal process through their empowerment of prosecutors, Congress has routinely passed these more

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[91] *Id.*
[92] *Id.* at 879.
[93] *Id.* at 881.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Sklansky, *supra* note 15, at 454.
[99] Barkow, *supra* note 3, at 880.

punitive laws.[100] Legislators, pressured by prosecutors and wanting to appear tough on crime, vest in prosecutors the necessary bargaining chips to obtain outcomes through pleas rather than trials.[101] Additionally, office environments have been shown to position prosecutors as less than neutral actors. Research has shown that occupational culture tends to motivate prosecutors toward more punitive actions. For example, one study found that recommending harsher sentences helps further the careers of US Attorneys after they have moved on from the position.[102] Therefore, actions by the Court and Congress have exacerbated the price of a trial for many defendants.

III. Suggested Reforms

Although excessive prosecutorial discretion in the charging and plea-bargaining function has been criticized for decades and the subject of many potential reforms, both Congress and the Supreme Court have failed to check prosecutorial power. Conversely, the criminal justice system has witnessed a meaningful expansion of such discretionary power. Discretion could be curtailed by reforms targeting institutional aspects of prosecutorial offices and looking to other areas of law.

A. Addressing Prosecutorial Power Through Institutional Reforms

In large part, this note suggests applying the Administrative Law Model, as articulated by Rachel Barkow. Barkow's article looks to lessons from administrative law to identify a reform that could effectively curtail broadening prosecutorial power.[103] It suggests focusing on institutional design of federal prosecutors' offices in order to curb prosecutorial overreaching through separation-of-functions requirements and greater supervision.[104] Applying the same model used in administrative law presents the most effective proposal for limiting prosecutorial discretion.[105] This proposal is not only reasonable but also more politically viable than other popular reforms.

Barkow emphasizes how separation of enforcement and adjudicative power is the preferred structural solution to agencies that pursue punitive actions.[106] This alternative suggests a corrective model that follows the Administrative Procedure Act's (APA)

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[100] *Id.*
[101] *Id.*
[102] Sklansky, *supra* note 15, at 451.
[103] *See Generally* Barkow, *supra* note 3.
[104] Barkow, *supra* note 3, at 869.
[105] *Id.* at 874.
[106] *Id.* at 896.

separation mandate, which disentangles the roles of prosecutors and investigators from adjudicators among at least two individuals.[107] In order to ensure fair, unbiased decision-making, administrative law mandates structural separation of powers within agencies or vigorous judicial review of agency records.[108] Because there has long been significant concern about the consolidation of authority in administrative agencies, administrative law dedicates serious attention to the risks of combining prosecutorial and adjudicative powers.[109] While judicial review tends to be regarded as the primary check on administrative agency behavior, agencies are also heavily regulated from within, through institutional checks and balances. Important structural checks of separation and supervision are critical in holding agencies accountable. In contrast, US Attorney's Offices have no such check in place.

Although administrative law clearly differs from the processes of federal prosecutors, the same type of mechanisms that prevent consolidating executive and adjudicative power in the hands of one agency would effectively translate to similarly empowered prosecutors. Whether an individual is prosecuting under a regulatory or a criminal statute, the concern remains the same: the same actor who investigates and enforces the law also determines the final outcome. In any context of imposing punishment, it is critically important for decision-making to be as neutral as possible. When it comes to criminal cases, neutrality must be prioritized even more so than in agency contexts. Criminal inquiries are highly individualized in nature, and above all else, the stakes are higher. Over the course of investigating a particular defendant, a prosecutor likely learns details about a defendant that may threaten that prosecutor's objectivity. Prosecutors represent the government in court, which certainly implicates self-interest - prosecutors want to win. In both criminal and agency cases, the "prosecutor may perceive the issues through a lens that distorts perceptions in the state's favor" because he has "committed himself intellectually and psychologically, as well as having committed institutional resources to the prosecution."[110] Similarly, former prosecutor and law professor Richard Uviller has explained how an individual tasked with advocating for one side of a case is not ideally situated to make neutral adjudicating decisions.[111] Prosecutors tend to aim for high

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[107] *Id.*
[108] *Id.* at 893.
[109] *Id.* at 887.
[110] Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 COLUM. L. REV. 759, 789 (1981).
[111] Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1716 (2000).

conviction rates, making them vulnerable to make decisions based more heavily on securing a conviction, rather than the objective facts of the case. In criminal prosecutions, this could manifest as threatening defendants with harsher charges if they opt for trial and offering lesser charges if they enter plea agreements. Concern over the danger of this "will to win" mentality fundamentally influenced the drafting of the APA.[112]

B. Applying the Administrative Law Model

Barkow thoroughly outlines how responsibilities should be delegated within prosecutorial offices, explaining which tasks qualify as adjudicative decisions and which qualify as enforcement actions.[113] An adjudicative decision should rest on decisions that relate to the defendant's guilt and punishment.[114] Therefore, any charging decisions or plea negotiations should be considered adjudicative. While the charging function is widely accepted as the fundamental responsibility of the prosecutor, this view neglects the importance of charging decisions. In a system where more than 95 percent of cases never make it to trial, charging decisions often amount to a verdict.[115] Similarly, with neutrality as the primary benchmark for an adjudicator, any prosecutor with investigative involvement into a case's pre-trial decisions should be excluded from adjudicative powers.

The ideal separation would entail neither the Assistant US Attorney (AUSA) responsible for investigating a case nor any individual involved in supervising the investigation to be the same individual who ultimately decides what charges to bring, what plea to accept, or whether an individual merits a lesser sentence for their sufficient cooperation by providing substantial assistance to the government.[116] Barkow calls for a different prosecutor, or even better, a panel of prosecutors, not involved in the investigation, to determine a case's final adjudication. While a panel would ensure a variety of perspectives, resource constraints in certain offices might require a single prosecutor to make the adjudicative decisions. This basic model should be feasible in every US Attorney's office, with experienced attorneys making final adjudication decisions and AUSAs performing the enforcement- and investigation-related tasks.[117] Similar to the APA, in which agency heads

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[112] Barkow, *supra* note 3, at 897.
[113] *See generally* Barkow, *supra* note 3.
[114] *Id.* at 898.
[115] *Id.* at 899.
[116] *Id.* at 901.
[117] *Id.* (*citing* Letter from Marie A. O'Rourke, Assistant Dir., Executive Office for U.S. Attorneys to author (Mar. 4, 2005) (on file with author) (stating in response to a Freedom of Information Act request the number of AUSAs in each office)).

are exempt from the separation-of-functions requirement, the US Attorney could remain involved in all decision-making. Failure to differentiate prosecutorial responsibilities has allowed a kind of ad hoc decision-making, which has resulted in misuse of prosecutorial power and potentially discriminatory practices. Applying the administrative model would effectively monitor discretion with respect to charging decisions.

C. Limits on Redesigning the Prosecutor's Office

One criticism of this reform holds that the administrative model is unlikely to work in smaller offices with only a handful of prosecutors already tasked with more than one job. Similarly, a staff with an already understaffed caseload may be unable to divide responsibilities in this manner. However, in the vast majority of US Attorney Offices, it would be possible to task experienced attorneys with making final adjudicative decisions.[118] In even the smallest office, with eleven AUSAs, there are at least two supervising attorneys.[119] Further, some critics point out that this model raises another concern: Unless the person making the charging decisions is also responsible for trying that case in court, there is risk that the "charging" prosecutor over-charges and does not need to face the consequences of proving their decisions in court. However, this model presents an important starting point, and if issues such as these arise, the model will be adjusted as needed. The most basic limitation of this reform is that this model cannot completely guarantee unbiased decision-making.[120] While the investigating prosecutor of a particular case will not be responsible for adjudication decisions, it is possible he or she may confer with the adjudicative prosecutor.[121] However, it is also possible that adjudicating prosecutors will take inspiration from Judge Gerard Lynch, who stated: "Justice is much better served when prosecutors determining whether to indict or making plea offers see themselves as quasi-judicial decision-makers, obligated to reach the fairest possible results, rather than as partisan negotiators."[122]

D. Assessing Political Viability

There are several key reasons why this type of institutional reform presents the most viable solution in today's political climate. First and foremost, this structural separation offers benefits to prosecutors themselves, particularly US Attorneys and the Attorney

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[118] Barkow, *supra* note 3, at 901.
[119] *Id.*
[120] *Id.* at 902.
[121] *Id.* at 903.
[122] Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136 (1998).

General.[123] Just as the Department of Justice issues a variety of directives about standards that should be used to prosecute cases, this reform will also come from the Department of Justice.[124] The Attorney General is certainly incentivized to have AUSAs align with the Department of Justice policies. Similarly, US Attorneys have an interest in making sure his or her subordinating attorneys adhere to office policies. Most US Attorneys' Offices already have established hierarchies and adding the next step of separation functions is unlikely to meet much resistance. This reform should be attractive to US Attorneys, allowing them to maintain greater control over their attorneys and promote unbiased decision-making. No matter which permutation of the model is adopted, supervising attorneys will be able to exercise oversight within their offices. Most US Attorneys' Offices are unlikely to resist a directive from the Justice Department, especially because this restructuring is relatively costless. This reform's feasibility is strengthened by the fact that some US Attorneys have already implemented a similar decision-making model to the one being referred to in this note. For example, the US Attorney's Office for the Southern District of California (San Diego office) utilizes "indictment review" in every investigatory case.[125] Over and above, the benefits of less biased decision-making are plain and should be welcomed. Because this proposal relies on structural separation, rather than major changes in policy, it presents the most politically viable option. With greater attention being paid to the serious racial disparities present in the criminal justice system, today's political climate is well suited for this type of structural reform.[126]

E. Other Potential Reforms on Prosecutorial Discretion

The systemic framework of broad prosecutorial discretion and limited accountability has been maintained by a consistent lack of judicial and legislative oversight. While this note recommends implementing the Administrative Law Model, other types of reform focus on various forms of judicial and legislative oversight that aim to curb prosecutorial power. Because prosecutors do have such broad power, many reform-minded legal scholars call for greater supervision of prosecutorial decision-making by judges. The most commonly suggested reform, a judicial check, would be the ideal mechanism to control

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[123] Barkow, *supra* note 3, at 913.
[124] *Id.* at 914. (*citing* "The Attorney General has the authority to control AUSAs pursuant to 28 U.S.C. § 519 (2006), which gives the Attorney General the authority to "direct all United States Attorneys . . . in the discharge of their respective duties."")
[125] *Id.* at 915.
[126] *Id.* at 921.

discretion in theory, as it would invoke a truly independent actor into decision-making. In his well-known argument for greater judicial review of prosecutors, Kenneth Culp Davis (1971) reasoned that such high stakes, opportunities for abuse, and correcting injustice provide more than enough justification for checking prosecutorial discretion through judicial oversight.[127] This type of reform would seek greater oversight on the discretion of prosecutors when it comes to their charging decisions and plea bargains, making prosecutors more accountable.[128] One of the most prominent scholars calling for judicial review, Professor William Stuntz, contends that in reviewing plea deals, courts could require prosecutors to "point to some reasonable number of factually similar cases in which the threatened sentence has actually been imposed, not just threatened."[129] The courts could review that threatened sentence used to negotiate the plea in order to ensure that it "was fair and proportionate given the defendant's criminal conduct."[130]

However, this proposed reform has repeatedly failed to be politically viable. One major counterargument to greater judicial review of prosecutorial decisions concerns cost and efficiency. Criminal cases account for 21 percent of the already overwhelmed federal docket, which means that review of each criminal plea bargain would place an additional strain on resources.[131] The courts have been largely complicit in the growth of plea-bargaining practices for precisely this issue of practicality. Additionally, counterarguments are rooted in the courts' overall role. As noted in *Armstrong*, "such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[132]

Furthermore, in reality, increased judicial review of prosecutorial decisions has proven difficult. In addition to discretion being a necessary component of the role, prosecutors are politically powerful and have been able to thwart oversight. Today, there are no national guidelines that obstruct prosecutorial decision-making, and instead, court practices may even promote harsher charging practices.[133] The Courts have yet to impose

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127 DAVIS, *supra* note 80, at 211-12.
128 Sklansky, *supra* note 15, at 462.
129 Barkow, *supra* note 3, at 879 (*citing* William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 27 (Harv. L. Sch. Pub. L. Working Paper No. 120, 2005), http://ssrn.com/abstract=854284).
130 *Id.*
131 Barkow, *supra* note 3, at 908.
132 United States v. Armstrong, 517 U.S. 456, 465 (1996).
133 Baughman & Wright, *supra* note 62, at 1174.

strict judicial supervision over prosecutorial discretion, and legislatures have not mandated that they do so. However, some legislatures have taken steps to limit prosecutorial discretionary power, such as in cases of juvenile justice or through requiring local offices to adopt certain written charging criteria.[134] Legislatures and courts have very infrequently interfered with prosecutors' discretion in the charging function, which has granted prosecutors essentially total control over the ability to charge defendants.[135] Calls for legislative checks include legislation that curtails prosecutorial discretion or as suggested by Professor Angela Davis, prosecution review boards.[136] While legislative action to check prosecutorial power may be gaining traction in today's political climate, checking such discretionary power through institutional reform is far more reliable. Decades of legal decisions by both the courts and legislatures have backed prosecutors' broad discretionary powers.

Conclusion

Perhaps the most pressing challenge in the American criminal justice system concerns one of the system's most powerful actors - the prosecutor. With such broad discretion, prosecutors have contributed to the massive proliferation of incarceration. Today, prosecution and the resulting prison population impacts millions of Americans. While prosecutorial discretion presents a glaring case of widespread, unchecked power, it also offers an important potential avenue for criminal justice reform across the US. Of course, there are two sides of the debate that often attempt to reconcile their different agendas. Prosecutorial discretion can go either way - towards leniency or towards toughness. This note argues that separating the enforcement and adjudication responsibilities of the prosecutor into more than one actor will be the most effective solution in protecting against arbitrary or discriminatory conduct. Ultimately, this note in no way seeks to violate the separation of powers doctrine. However, this is an incredibly broad application of the separation of powers principle that requires greater modern justification. Such expansive prosecutorial discretion today must challenge the notion that criminal prosecutors' decisions operate as an unreviewable executive function. Professor Kenneth Culp Davis explained that one of the government's most pressing challenges has to do with discretionary power: too

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[134] Krug, *supra* note 57, at 664.
[135] *Id.* at 645.
[136] Barkow, *supra* note 3, at 918.

much discretion, and "justice may suffer from arbitrariness or inequality;" not enough, and "justice may suffer from insufficient individualizing."[137] Too often, the American criminal justice system gets that balance between discretion and justice wrong. By reforming prosecutorial power, the US can seek to rectify some of its systemic failings.

[137] DAVIS, *supra* note 80, at 50-51.

Mistreatment of Unaccompanied Migrant Children

Alessia Cocconcelli

Introduction

Every year, hundreds of thousands of unaccompanied Latin American children embark on an arduous journey to the United States, longing for a safe haven away from their nations' political, economic, and social turmoil.[1] Over the past year, historically high rates of unaccompanied children have fled to the United States' southern border with Mexico, seeking relief from rampant violence and poverty in their countries of origin.[2] Nearly 130,000 unaccompanied migrant children (UACs) entered the United States government shelter system in 2022 alone.[3] Devastating political unrest and lingering economic disparities from the Covid-19 crisis have driven an influx of minors from Mexico and Central American countries,[4] including Guatemala, Honduras, and El Salvador, and other South American nations, such as Venezuela.[5]

Most children flee to the United States for one or more of three reasons: to reunite with relatives, to escape domestic abuse, local corruption, or criminal gangs, or to seek asylum status upon their arrival based on their families' instructions.[6] However, inordinately lengthy and ineffective processing procedures often prohibit minors from getting the relief they require.

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[1] INT'L HUM. RTS. CLINIC, UNIV. OF CHI. L. SCH., NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION 1 (2018).
[2] *See* Eirini Papoutsi, *The Protection of Unaccompanied Migrant Minors Under International Human Rights Law: Revisiting Old Concepts and Confronting New Challenges in Modern Migrant Flows*, 35 AM. U. INT'L L. REV. 219, 220 (2020).
[3] Camilo Montoya-Galvez, *Nearly 130,000 Unaccompanied Migrant Children Entered the U.S. Shelter System in 2022, a Record*, CBS NEWS (Oct. 14, 2022, 7:00 AM), https://www.cbsnews.com/news/immigration-unaccompanied-migrant-children-record-numbers-us-shelter-system/.
[4] Eirini Papoutsi, *supra* note 2.
[5] *See* Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2021, 10:30 AM), https://www.cfr.org/backgrounder/us-detention-child-migrants.
[6] *Id.*

Upon reaching the southern border with Mexico, children are promptly detained by Customs and Border Protection (CBP) officials and placed in facilities. At the same time, authorities determine whether they qualify as unaccompanied alien children. Once officials have confirmed UACs' identities, Immigration and Customs Enforcement (ICE) transfers UACs to the Office of Refugees and Resettlement (ORR) of the Department of Health and Human Services' which is in charge of "coordinating and administering the care and placement of UAC in appropriate custodial settings."[7] The ORR is responsible for screen each child to determine whether they have been a victim of sexual assault or human trafficking, promptly assigning each UAC with legal representation, assuring that the child's preferences are taken into account when considering options regarding their care and custody, and supervising the facilities and staff at UAC residential institutions.[8]

Long-term shelter in government care may appear as a reprieve for UACs that have traveled long distances, but that is hardly the case. While in CBP custody, migrant children and young adults have reported "prisoner"-like treatment[9] through "subjection to psychological abuse, unsanitary and inhumane living conditions, isolation from family members, extended periods of detention, and denial of access to legal and medical services."[10] The profound uncertainty and trauma faced by unaccompanied minors before and throughout the processing period has led to CBP officials confiscating children's belts and shoelaces to prohibit them from taking their own lives while in custody.[11] Any treatment that arouses thoughts of self-harm, especially in children, must be reviewed and subjected to the harshest scrutiny under constitutional law, the Flores settlement, statutes, and other government policies. As such, this note will evaluate the mistreatment of unaccompanied minors through the scope of legal precedents and contemporary policies and provide plausible solutions to halt this violation of human rights.

Part I will feature a comprehensive analysis of the current policies in place protecting migrant children, including the *Flores Settlement*[12], Customs and Border Protection Procedures

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[7] CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 6 (2021).
[8] *Id.* at 9.
[9] *See* Hilary Andersson & Anne Laurent, *Children Tell of Neglect, Filth and Fear in US Asylum Camps*, BBC NEWS (May 23, 2021), https://www.bbc.com/news/world-us-canada-57149721.
[10] NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 1.
[11] *Children Tell of Neglect, Filth, and Fear in US Asylum Camps*, *supra* note 9.
[12] *See generally* STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV'TL AFFS., 115TH CONG., OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN (2018).

and Directives[13], and the Trafficking Victims Protection Reauthorization Act of 2008.[14] Part I will then evaluate CBP officials' behavior under the scope of the Eighth Amendment "deliberate indifference" standard and the Fifth and Fourteenth Amendment Due Process Clauses. Part II will further explore how processing procedures violate existing legislation and depict why the current policies are ineffective in protecting UAC from experiencing human rights violations. Part III will highlight potential legislation changes and oversight policies that could effectively safeguard the life and liberty of unaccompanied minors.

I. Relevant Policies and Precedents Protecting the Rights of Unaccompanied Alien Children

A. The Flores Settlement

The Flores Settlement is the most specific legislation delineating the detention, treatment, and release of migrant children.[15] The Flores Settlement, established in 1997, originated from the Supreme Court's decision in *Flores v. Reno* (1993), filed by a group of migrant children who were detained by the Immigration and Naturalization Service (INS) in California, and has been applied to cases concerning the mistreatment and detention conditions of immigrant children since its inception.[16] The policy establishes that the government must release children "without unnecessary delay" to the children's parents, legal guardians, other adult relatives, or another individual designated by the parents or guardians.[17] When depicting holding conditions, the law demands that the government place children in the "least restrictive setting" appropriately and should create and implement standards for the care and treatment of immigrant children in detention.[18] Temporary holding facilities must also qualify as "safe and sanitary" by providing access to toilets, sinks, drinking water, food as appropriate and adequate temperature control and ventilation.[19] CBP officials are obligated to "provide for the minor's physical, mental, and financial well-being"

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[13] *See generally* Kiera Coulter et al., *A Study and Analysis of the Treatment of Mexican Unaccompanied Minors by Customs and Border Protection*, 8 J. ON MIGRATION & HUM. SEC. 96 (2020).
[14] CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 6 (2021).
[15] *See generally* STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV'TL AFFS., 115TH CONG., OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN (2018).
[16] *Id.* at 1.
[17] *Id.*
[18] *Id.* at 115.
[19] *Id.* at 6.

by rendering medical assistance if a minor needs emergency services, providing adequate supervision to protect minors from others, and contacting family members arrested with the child.[20]

B. Customs and Border Protection Procedures and Directives

CBP procedures and directives outline standards of behavior that all personnel must abide by during and after they process UACs and other migrants.[21] Officials must "treat individuals with dignity and respect" and use force against migrants only when "objectively reasonable."[22] However, CBP regulations delineate more gentle treatment standards for individuals considered particularly vulnerable, especially minors.[23] Thus, the organization applies the "best interest of the child"[24] standard to inform the conduct of in-facility treatment and immigration removal proceedings. The aforementioned standard is specifically relevant to an immigration authority's decision regarding the child's legal status upon removal from detention facilities, either to an adult or legal guardian, and throughout further deliberations and proceedings.

C. Trafficking Victims Protection Reauthorization Act of 2008

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) increased anti-trafficking prevention strategies and protections for unaccompanied immigrant children.[25] The legislation expanded education efforts to protect asylees and internally displaced persons from sexual exploitation.[26] The TVPRA also amplified the attention granted to UACs by implementing "best interest" standards to identify unaccompanied children as trafficking victims and procure their safe "integration and resettlement."[27] Under the TVPRA, minors from contiguous countries-Mexico or Canada-[28] are screened for evidence of human trafficking within 48 hours of apprehension.[29] Under

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[20] *Id.*
[21] *See* CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 7-9 (2021).
[22] Coulter et al., *supra* note 13, at 96.
[23] *Id.*
[24] CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 11 (2021).
[25] *See Jayapal, Schakowsky, Espaillat, Panetta Introduce the Working for Immigrant Safety and Empowerment (WISE) Act*, OFF. OF CONGRESSWOMAN PRAMILA JAYAPAL (Dec. 8, 2022), https://jayapal.house.gov/2022/12/08/jayapal-schakowsky-espaillat-panetta-introduce-the-working-for-immigrant-safety-and-empowerment-wise-act/ (press release announcing the Working for Immigrant Safety and Empowerment Act).
[26] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, § 104, 122 Stat. 5044, 5046–5047 (2008).
[27] *Id.* at 5.
[28] Marielos G. Ramos, Due Process and the Right to Legal Counsel for Unaccompanied Minors 4 (May 2018) (M.A. thesis, City University of New York) (CUNY Academic Works).
[29] CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 6 (2021).

the Act, a UAC is only returned to their home country if they are not recognized as a victim of human trafficking, do not fear persecution upon returning to their last habitual residence, and can decide independently to return voluntarily to their country of nationality.[30]

D. Broader Constitutional Application: Eighth Amendment

The Eighth Amendment was originally drafted to prevent prisoners' exposure to cruel and unusual punishments; however, in the twenty-first century society, "The Amendment [draws meaning] from the evolving standards of decency that mark the progress of a maturing society,"[31] and thus inhibits conditions of incarceration that do not align with said standards.[32]

The Eighth Amendment is known for protecting the rights of prisoners and, more notably, for prohibiting the imposition of cruel and unusual punishments. *Estelle v. Gamble* established the "deliberate indifference" standard, in reference to the Eighth Amendment protections of prisoners.[33] The Court held that only *deliberate indifference* by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of the Eighth Amendment.[34] In its decision, the Court stated that for behavior to qualify as deliberate indifference*, "*a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[35] In his concurrence, Justice Blackmun alluded that said standard should apply to United States citizens and any person within the United States' jurisdiction or territory.[36] The "deliberate indifference" standard has been applied to numerous cases related to mistreatment or neglect of medical services or assistance for unaccompanied alien children (UACs). However, Eighth Amendment protections are limited for noncitizens as it only applies where a condition of confinement or failure to treat a medical condition amounts to a "punishment," while UACs are generally treated more like pre-trial detainees as opposed to individuals serving a criminal sentence.[37]

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[30] *Id.*
[31] Trop v. Dulles, 356 U.S. 101 (1958).
[32] *See* Ramos, *supra* note 28, at 4.
[33] Estelle v. Gamble*,* 429 U.S. 97 (1976).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Caitlin Barry, *Affirmative Duties in Immigration Detention*, 134 Harv. L. Rev., 1323 (2021).

The Supreme Court further expounded on the definition of deliberate indifference in its decision in *Farmer v. Brennan.*[38] The Court established that to qualify as *deliberately indifferent*, an official's actions are akin to subjective recklessness or to "entail something more than negligence but…something less than acts or omissions for the very purpose of causing harm or with the knowledge that harm will result."[39] For an official's action to qualify as subjectively reckless, and thus deliberately indifferent, there must be evidence that they were aware of and disregarded a risk of harm. Thus, although prison officials have a responsibility under the Eighth Amendment to "provide humane conditions of confinement" by ensuring that inmates receive "adequate food, clothing, shelter, medical care, and protection from violence," they are only liable under the deliberate indifference standard if the alleged deprivation is objectively "sufficiently serious" and if the official was aware that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.[40] This is a difficult standard to meet as UACs have to prove that mistreatment goes beyond mere negligence of carelessness and demonstrates an actual intent to harm.

The deliberate indifference standard has been applied to several cases concerning the treatment of UACs in CBP facilities, as children are often victims of neglect and abuse.[41] Minors have long depicted uncomfortable and unsanitary holding conditions.[42] CBP's short-term detention facilities are often compared to "ice boxes" because of their starkly low temperatures that place children at risk for a myriad of medical complications.[43] Ample testimonies have also depicted the lack of essential resources such as bedding, basic toiletries, feminine hygiene products, and working showers in holding facilities.[44] Finally, UACs have reported not receiving medical assistance when in dire need.[45] While not all of the aforementioned behaviors constitute deliberate indifference, the conditions of CBP holding facilities and the nature of officials' behavior towards UACs make vulnerable children increasingly susceptible to various medical and psychological ailments.

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[38] Farmer v. Brennan, 511 U.S. 825 (1994).
[39] *Id.*
[40] *Id.*
[41] NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 1.
[42] *Id.* at 18.
[43] *Id.* at 16.
[44] *Id.*
[45] *Id.* at *2*.

Due to the degree of difficulty needed to prove "deliberate indifference" the Fourth Circuit relies on a different standard. Moreover, in *Doe v. Shenandoah Valley Juvenile Center Commission,* the United States Court of Appeals for the Fourth Circuit held that the Fourteenth Amendment "professional judgment" standard established in *Youngberg v. Romeo* was the acceptable test to determine the constitutionality of the state's treatment of detained UACs.[46] The plaintiffs in *Doe* were UACs placed by the ORR at the Shenandoah Valley and Juvenile Center in Staunton Virginia, where they were subjected to extreme disciplinary measures including the use of force and physical restraints.[47] Thus, the Court held that situations involving the treatment of UACs should be subject to the "professional judgment" standard "since children have distinct psychological requirements that necessitate a higher degree of care than adults."[48]

E. Fifth and Fourteenth Amendment Due Process

The Fourteenth Amendment Due Process Clause has been distinctly employed since its adoption to protect against the encroachment of caste, class, or group favoring legislation as it occurs against groups of individuals;[49] however, the extension of such Due Process to immigrants who have entered unlawfully comes with complications. In 1886, the Supreme Court emphasized the "universal application" of the Fourteenth Amendment in their decision in *Yick Wo v. Hopkins,* thus extending the right to Due Process "to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality."[50] Ten years later, the Court solidified Fourteenth Amendment protections for non-citizens in *Wong Wing v. United States,* where it held that "all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments and that even [non-citizens] shall not . . . be deprived of life, liberty or property without Due Process of law."[51] By cementing the guarantee of Due Process for non-citizens, the Court further protected unlawful immigrants, including UACs, from human rights violations, lack of legal representation as delineated in the Fifth and Sixth Amendments, and

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[46] Taylor C. Joseph, *Revitalizing the Youngberg v. Romeo Professional Judgment Standard Standard to Require Trauma-Informed Care for Detained Children* 81 Md. L. Rev. 898 (2022).
[47] *Id.* at 1334.
[48] *Id.*
[49] Constitution Center, *Amendment XIV*, Section 1, Clause 1, https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701
[50] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[51] Wong Wing v. United States, 163 U.S. 228 (1896).

cruel and unusual punishments depicted in the Eighth Amendment. Notably, the Fifth Amendment due process clause is applied to claims against the federal government including the federal facilities that detain UACs whilst the Fourteenth Amendment applies in due process claims against state entities.[52]

In a 2011 case known as *Zadvydas v. Davis,*[53] the Court held that the indefinite detention of aliens was unconstitutional.[54] In *Zadvydas,* two lawful permanent residents who were ordered to be deported could not be returned to their home countries due to diplomatic obstacles.[55] The government, relying on a provision of the Immigration and Naturalization Service (INS), sought to detain them. In its decision, the Court articulated that "freedom from imprisonment lies at the heart of the liberty protected by the Due Process Clause." Since the detention of UACs, like the detention of permanent residents in *Zadvydas,* are civil proceedings and therefore "nonpunitive," the "government offers no sufficiently strong justification for indefinite civil detention."[56] Moreover, "the Constitution precludes granting an administrative body," such as the CBP and ORR, "the authority to make determinations implicating fundamental rights" through indefinite imprisonment "if the alien proves that he is not dangerous without significant later judicial review."[57]

The Court's decision in *Zadvydas* raises an issue concerning the extended and indefinite detention of UACs in CBP facilities beyond the 72-hour time frame prescribed by the Flores Settlement. Detention conditions further violate the standard "liberty" outlined in *Zadvydas* as they confine vulnerable children to "inadequate hold room conditions with lack of shower, food, and language access, and inadequate medical care."[58] Some UACs are also denied said standard of "liberty" when they are not placed in the custody of a parent or guarding but instead released into the community without the support and resources they require to navigate the immigration system."[59]

II. Analysis of Current CBP Practices Through the Scope of Existing Legislation

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[52] Victor Zhou, *Unaccompanied Immigrant Children and the Promise of Due Process*, 36 Yale Law & Policy Review 1, 221-56 (2017).
[53] 533 U.S. 678 (2001).
[54] *See Id.* at 690–93.
[55] *Id.* at 679.
[56] *Id.*
[57] *Id.*
[58] Memorandum from Cameron P. Quinn, Officer, Office for Civil Rights and Civil Liberties, to Mark A. Morgan, Acting Commissioner, U.S. Customs and Border Protection 2 (Nov. 26, 2019) (on file with the U.S. Department of Homeland Security) [hereinafter Cameron Quinn Memorandum].
[59] *Id.*

A. Treatment of UACs Migrants in Detention Centers

Over the past few years, immigration has remained at the forefront of national political debates. The issue's expanding relevance has increased the number of public reports of mistreatment towards immigrants in detention facilities, most notably wrongdoing and misconduct toward unaccompanied immigrant children.[60]

Between May 1st and July 31st, 2019, the United States Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties (CRCL) received 677 allegations that United States CBP violated the civil rights and civil liberties of UACs in CBP custody, a figure which has only escalated in recent years.[61]

Allegations of mistreatment and inadequate detention conditions specified glaring issues, including extended time in custody; holding conditions and capacity; access to medical and mental health care; providing meals, clothing, and personal necessities; access to adequate hygiene and sanitation; sleeping conditions; and aggressive disciplinary measures.[62] Conditions worsened during the Covid-19 pandemic as UACs in CBP facilities became more prone to contracting the disease due to a lack of compliance with CDC "hygiene measures, physical distancing policies, testing and care procedures," as well as insufficient access to essential products such as "soaps and masks."[63]

Male and female UACs described comparable unsettling experiences while under CBP custody, including verbal mistreatment, placement in crowded cells, and lack of access to a variety of essential services, such as food, water, and access to bedding.[64] Males described physical mistreatment, and cited "pulling, pushing, or shoving."[65] Females stated they were often tasked with the responsibility of caring for toddlers and infants in custody.[66] One of the most prevalent reports amongst UACs included suffering from cold temperatures and not being provided with adequate materials to keep toddlers and infants warm.[67]

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[60] Julie M. Linton et al., *Detention of Immigrant Children*, 139 Pediatrics 1, (May 2017).
[61] *Id.* at 2.
[62] *Id.*
[63] Harvard Medical School Immigrant Health and Services Program, COVID-19 and Immigrant Children (Sept. 9, 2020), https://info.primarycare.hms.harvard.edu/review/covid-immigrant-children.
[64] *See* Nalleli Perez, Unaccompanied Migrant Children: Experiences and Challenges 43 (Dec. 2021) (M.A. thesis, North Arizona University) (ProQuest).
[65] *Id.* at 43.
[66] *Id.* at 44.
[67] *Id.* at 45.

Lack of access to essential care and services, uninhabitable detention conditions, verbal and physical mistreatment, and extended holding periods all qualify as violations of multiple articles of legislation that recognize and protect the fundamental rights and liberties of unaccompanied immigrant children regardless of their unlawful status.

B. Analysis of UAC Mistreatment Under the Flores Settlement

The Flores Settlement delineates the rights and protections afforded to unaccompanied immigrant children while in INS or CBP custody. The document's language highlights that "the INS shall place each detained minor in the least restrictive setting possible. appropriate to the minor's age special needs… to protect the minor's well-being and that of others."[68] The text further illustrates detention conditions and claims,

> Following arrests, the INS shall hold minors in facilities that are safe and sanitary… facilities will provide access to toilets and sinking, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control, and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor.[69]

The custody conditions described above contradict the language in the Flores Settlement, thus presenting a clear violation of the UAC's fundamental rights. Instead of being placed in an adequate, safe, and livable housing environment that exemplifies the "least restrictive setting possible," UAC's have emphasized their harsh mistreatment against their Due Process rights.[70] According to a statement made by Representative Henry Cuellar (D-Texas), in March 2021, a detention center's pod, with a maximum occupancy limit of 260 people housed, contained "more than 400 unaccompanied male minors."[71] Representative Cuellar cited how overcrowding further strains UAC's access to appropriate and unrestrictive accommodations by distributing images of "dozens of people crowded together, lying side by side, wrapped in mylar blankets."[72]

Other sources paint a similar morbid illustration of detention centers and depict children "crammed into a cold-floored detention center, sleeping side by side with nothing

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[68] Settlement Agreement at 7, Flores v. Reno, No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf [hereinafter *Flores* Settlement Agreement].
[69] *Id.* at 7.
[70] *See generally Protecting Unaccompanied Children: The Ongoing Impacts of the Trump Administration's Cruel Policies: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 116th Cong. (2019) [hereinafter *Hearing on Protecting Unaccompanied Children*].
[71] Josh Stanton, *Substantive Due Process and Pretrial Detention: Implications of Strict Scrutiny for the Law of Bail* 41 REV. LITIGATION 365, 397 (2022).
[72] *Id.* at 397.

more than foil blankets."[73] Shelters were also repeatedly accused of neglect and failed to provide a plethora of services highlighted by the Flores Settlement, including timely medical attention, proper food, needed clothing, and clean, sanitary living conditions.[74] Access to essential hygiene services and items is also limited and denied.[75]

While in DHS custody, UACs also reported "being placed in three-point shackles and held in cold cells."[76] The physical confinement experienced by UACs while in custody details a standard of restrictiveness that surmounts the limitations presented by the Flores Settlement.

The Flores Settlement also establishes that UACs should be processed "without unnecessary delay," or within seventy-two hours of arrival, not spending more than the aforementioned time frame in DHS Detention Centers.[77] However, the extended processing time is common practice amongst DHS and ORR officials, as facilities are under equipped to manage the rising influx of detainees.[78] In a hearing before the Subcommittee on Oversight and Investigations, Oregon Representative Honorable Greg Walden claimed that "unaccompanied children spent far longer in CBP facilities than the seventy-two hours mandated by the Flores Settlement. CBP agents in Yuma told me that, at the peak of the crisis, children stayed in their border patrol facility for seven to ten days."[79] DHS also addressed ample allegations in its 2019 memorandum that United States Border Patrol (USBP) routinely held UAC longer than seventy-two hours, often for a week or longer, before transferring them to the custody of the United States Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR).[80]

Lengthened processing conditions amplify UAC's exposure to precarious and unsettling conditions in said holding facilities and *unnecessarily delay* their ability to be reunited safely with the parents, legal guardians, other adult relatives, or another individual designated by the parents or guardians in the United States.[81]

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[73] Perez, *supra* note 64.
[74] *Id.* at 10.
[75] LAURIE COLLIER HILLSTROM, FAMILY SEPARATION AND THE U. S.-MEXICO BORDER CRISIS (2020).
[76] Perez, *supra* note 64, at 48.
[77] *Id.* at 10.
[78] *See Hearing on Protecting Unaccompanied Children, supra* note 70.
[79] *Id.*
[80] Cameron Quinn Memorandum, *supra* note 58.
[81] *See Flores* Settlement Agreement, *surpra* note 67, at 10.

The consistent violation of the Flores Settlement by ORR officials suggests ambiguity within the legislation that has led to its poor application. In *Walding v. United States,* a 2009 case, twelve Central American minors reported "grave and repeated sexual, physical, and emotional abuse" at an ORR-contracted detention center, Away From Home Inc. (AFH), in Nixon, Texas.[82] "Employees yanked plaintiffs from their beds and threw them to the floor; intoxicated and sober staff beat the plaintiffs and threw them against walls and doors.[83] Eight of the plaintiffs alleged that a female staffer sexually abused them recurrently; another plaintiff claimed a female supervisor sexually assaulted him in the shower."[84]

Despite the gravity of the allegations, the Court held that as a remedial decree, the Flores Settlement "does not in and of itself confer any constitutional rights upon the plaintiffs."[85] Moreover, the Court's decision highlighted the broadness of the language within the Flores Settlement and claimed that the "safe conditions" delineated in the legislation "[do] not provide fact-based, objective criteria" to define such conditions and "instead involves intangible assessments and discretionary factors."[86] Thus, the Flores Settlement's dubious and unspecific standards broadens the range of punishments and conditions permitted under the Flores Settlement, as actions that violate the "dignity and respect"[87] minors are evaluated solely through the Court's discretion therefore establishing vague standards of treatment and behavior that make it difficult to hold CBP officials accountable.

In addition, the Flores Settlement and the protections it affords can easily be terminated or altered. The Trump administration made several attempts to dissolve the settlement. In September 2018 the administration announced a proposal to terminate the Flores settlement and issue new regulations that would allow for the indefinite detention of immigrant families, including children.[88] In August 2019, the administration issued a new regulation, which it argued would terminate the Flores settlement.[89] The regulation proposed

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[82] Alix Bruce, Note, *Broken Bones and Pepper Spray: The State-Sanctioned Abuse of Immigrant Juveniles in Custody*, 27 AM. U. J. GENDER, SOC. POL'Y & LAW 431, 438–39 (2019).
[83] *Id.* at 439.
[84] *Id.*
[85] Rebeca M. López, *Codifying the* Flores *Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1663 (2012) (quoting Walding v. United States, No. SA–08–CA–124–XR, 2009 U.S. Dist. LEXIS 26552, at *12–14 (W.D. Tex. Mar. 31, 2009).
[86] *Id.* at 1663.
[87] *See Flores* Settlement Agreement, *surpra* note 68, at 2.
[88] Dara Lind & Dylan Scott, *Flores agreement: Trump's executive order to end family separation might run afoul of a 1997 court ruling*, Vox (2018), https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration.
[89] Jeff Stein, *Trump Administration Moves to End Flores Agreement, Allowing Indefinite Detention of Migrant Children*, Time (Aug. 21, 2019), https://time.com/5657381/trump-administration-flores-agreement-migrant-children/.

to terminate the twenty day time limit for detaining families and allow for their indefinite detention.[90] The regulation was challenged in court and a federal judge blocked it from taking effect in October 2019. Later, in June 2020, the administration made another attempt to terminate the Flores settlement by issuing an interim final rule that would allow for the indefinite detention of children and families.[91] The rule was challenged in court and a federal judge blocked it from taking effect in September 2020.[92]

C. Analysis of UAC Mistreatment Under the TVPRA of 2008

The "best interest" standard of the TVPRA outlines a series of procedures to identify if UACs are victims of human trafficking and therefore assist in their safe integration, reintegration, and resettlement.[93] According to the legislation's guidelines, a screening process must take place to determine whether an unaccompanied minor is or was a victim of human trafficking to assess further whether they are in danger of persecution in their country or if it is safe for them to return.[94] In addition, the TVPRA also highlights that ORR officials must place UACs with adult sponsors across the United States "who agree to care for them and ensure their appearance at immigration proceedings."[95] Before placing the child in the custody of a sponsor (parent, close relative, distant relative, or unrelated adult), "officers must verify the custodians' identity and relationship to the child and ensure that they are capable of providing for the child's physical and mental well-being."[96]

Although the TVPRA delineates adequate processing requirements and oversight techniques, failure to conduct thorough observations and background checks has placed UACs in precarious conditions. One of the most notable cases took place in 2016 when the Senate's permanent subcommittee on investigations "found that HHS's failure to conduct sufficient background checks contributed to the circumstances that led HHS to place eight children with human traffickers."[97]

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 104, 122 Stat. 5044, 5046–5047 (2008).
[94] *See* Ramos, *supra* note 28, at 4.
[95] *See generally* STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV'TL AFFS., 115TH CONG., OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN, 13 (2018).
[96] *Id.* at 13.
[97] *Id.* at 31.

Similarly, failure to conduct accurate assessments increases the probability of UACs returning to their home countries regardless of their safety. A study in the *Journal of Migration and Human Security* found "that CBP inconsistently screened or accounted for fear of return, trafficking, or age."[98] However, it is possible that UACs consent to deportation is not only attributed to poor CBP practices but to a tendency among vulnerable UACs to underreport abuse to intimidating authority figures.[99] Nonetheless, if that is the case, minors should be placed in a hospitable environment where they feel comfortable enough to share their stories.

The study also revealed that CBP officials often handed UACs forms to acquire their consent to be transported to their country of origin and pressured them to sign them without explaining their contents.[100] The lack of clarification of the forms' contents is distinctly problematic as a lot of UACs are not only extremely young and unable to comprehend formal legal documents, but also do not understand the English language.[101]

Although UACs are not made completely aware of their options, it is plausible to argue that CBP practices align with the "best interests" of unaccompanied minors because of their innate vulnerability. Thus, CBP officials may contend that "vulnerable" children are not equipped to make decisions independently and must rely on the authority figures' discretion. Therefore, CBP officials may consider that persuading UACs to consent to return home may be in their "best interest" as they are afforded greater security in comfort with their parents and in a country they are familiar with.

Nonetheless, inadequate and hasty screening procedures violate TVPRA policies as they do not thoroughly ensure what is in the "best interest" of UAC and can lead to their placement in threatening environments.

D. Analysis of UAC Mistreatment Under the Eighth Amendment Deliberate Indifference Standard

Under the "deliberate indifference" standard established in the Court's decision for *Farmer v. Brennan,* a prison official is culpable if they "recklessly disregard a substantial risk of harm to the prisoner by knowing the risks to a prisoner's health or knowledge of the circumstances imposing a risk."[102] Understanding of substantial risk to a prisoner's health can be verified by "the very fact that risk is obvious."[103]

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[98] Coulter et al., *supra* note 13, at 96.
[99] *Id.* at 104.
[100] *Id.* at 105.
[101] *See* Ramos, *supra* note 28, at 4.
[102] *Id.* at 256.
[103] Farmer v. Brennan, 511 U.S. 825, 833 (1994).

Denial of necessary medical assistance and ghastly detention conditions in CBP facilities qualify as "deliberate indifference" to UAC's welfare and establish a substantial risk of harm to minors' physical and mental health.[104] Multiple memos drafted by the DHS Office for Civil Rights Liberties (CRCL), compiled in a study by the University of Chicago Law School, exhibit CBP officials' tendency to neglect children's basic medical needs purposefully. One document recounts the story of how CBP withheld the prescription medications of a child detained after undergoing spinal surgery.[105] Another minor, detained in the Weslaco, Texas station "complained that agents accused her of lying when she told them she was having an asthma attack.[106] After the girl finally did receive medical attention, agents confiscated her medication."[107] Withholding UACs' medications and denying medical assistance despite their calls for aid place an "obvious" substantial risk on a child's welfare; therefore, these practices constitute a violation of the "deliberate indifference" standard and a form of cruel and unusual punishment.

However, CBP officials may contend that less obvious behaviors—which are frequently portrayed as cruel and unusual—do not constitute "deliberately indifferent" actions because they do not pose a substantial immediate risk to a child's health, such as lack of prompt access to blankets, food, bedding, or clean water.[108] In other words, a reasonable argument would be that the highlighted actions do not constitute a clear danger to a child's health that satisfies the *Farmer* threshold for "sufficiently serious."[109] CBP officials may also argue that they are not at fault for the lack of essential resources in detention facilities as the establishments are not equipped to handle a rising number of UACs.

Supreme Court precedents have established that overcrowding prisons and detention facilities, and the lack of resources that result from that practice, qualify as an Eighth Amendment violation. In *Brown v. Plata*, the Supreme Court determined that California's jail overcrowding qualified as a "cruel and unusual" punishment under the Eighth

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104 NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 1.
105 *Id.* at 21.
106 *Id.* at 22.
107 *Id.*
108 Meredith Harrell, *Incarcerated Persons During a Public Health Emergency*, 35 J.L. & Health (Online) 210, 257, (2022).
109 Farmer v. Brennan, 511 U.S. 825, 833 (1994).

Amendment.[110] The Court explained that overcrowding qualified as a "primary cause of the violation of a Federal right, specifically the severe and unlawful mistreatment of prisoners through the grossly inadequate provision of medical and mental health care."[111] According to Justice Kennedy, overcrowding jails resulted in a lack of resources to provide inmates' fundamental necessities, thus undermining the "dignity of man" that the Eighth Amendment aimed to safeguard.[112]

The Court further established that the dispersal of essential resources within detention facilities was required under the Eighth Amendment in its claim that "to incarcerate, society takes from prisoners the means to provide for their own needs."[113] Prisoners depend on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical 'torture or a lingering death."[114] Furthermore, overcrowding, denial of immediate medical assistance, and lack of availability of necessary resources in CBP facilities all meet the requirements of the "sufficiently serious" clause of the "deliberate indifference" standard and are thus considered cruel and unusual punishments under the Eighth Amendment.

E. Analysis of UAC Mistreatment Under the 5th and 14th Amendment Due Process Clause

As highlighted previously, the Supreme Court established non-citizens' right to Due Process under the law in *Yick Wo v. Hopkins* and *Zadvydas v. Davis*. In the latter case, the Court delineated only two acceptable instances in which the infringement of an alien's "freedom from detention, government custody, and other forms of physical restraint"[115] does not violate the Due Process Clause. The first was that extended "detention is ordered in a criminal proceeding," and the second that discussed "certain special and narrow nonpunitive circumstances, where special justification, such as a harm-threatening mental illness, outweigh the individual's constitutionally protected interest to avoid physical restraint."[116]

Even though undocumented presence in the United States qualifies as a civil infraction rather than a criminal offense, the detention of non-criminal immigrant children mirror the criminal detention conditions rather than the processing they should receive due

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[110] Brown v. Plata, 563 U.S. 526 (2011)
[111] *Id.* at 3.
[112] *Id.* at 12.
[113] *Id.*
[114] *Id.*
[115] Stanton, *supra* note 71, at 365-405.
[116] *Id.* at 399.

to their civil classification.[117] "Brutal conditions in immigration detention emulate those of pretrial detention in criminal proceedings, and can often be even worse."[118] The appalling circumstances of CBP detentions expose UACs to a lack of "snacks, meals, clothing, personal necessities, hygiene and sanitation, adequate sleeping conditions, and personal privacy,"[119] therefore emulating conditions of criminal detention. Vulnerable children in such facilities often experience "physical restraint," as they are "cuffed,"[120] "chained,"[121] and placed in "crowded cells."[122] Moreover, the physical restraint and exposure of vulnerable children to uniquely abhorrent detention settings for periods longer than the seventy-two hours mandated by the Flores Settlement and CBP Procedures constitute a violation of their constitutional liberty, protected under the Due Process Clause.

Although officials may argue that overcrowding in CBP facilities provides a narrow and special justification for the indefinite detention of UACs, the Court in *Zadvydas* ruled that, in the case of undocumented aliens, provisions authorizing extended periods of detention did "not apply narrowly to a small segment of hazardous individuals… but broadly to aliens."[123] In the case of extended detention periods for UACs, CBP officials do not narrowly subject a unique group of "dangerous individuals" to fulfill a special cause that outweighs "the individuals constitutionally protected" right against physical restraint but rather generally apprehend a large demographic of especially vulnerable children.[124] The Zadvydas ruling emphasizes that the extended detention of unaccompanied immigrant children cannot be justified by narrow justifications such as overcrowding and that this practice may be unconstitutional and violate their right against physical restraint.[125]

III. Potential Short-Term and Long-Term Solutions to Prevent Mistreatment of UACs

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117 Rebeca M. López, *supra* note 85, at 1635.
118 Stanton, *supra* note 71, at 365-406.
119 Memorandum from Peter E. Mina, Office for Civil Rights and Civil Liberties, to Mark A. Morgan, Acting Commissioner, U.S. Customs and Border Protection 2 (Jul. 25, 2019) (on file with the U.S. Department of Homeland Security).
120 Perez, *supra* note 64, at 48.
121 *Id.* at 55.
122 *Id.* at 43.
123 Stanton, *supra* note 71, at 365-406.
124 *Id.* at 400.
125 *Id.*

A. Short-Term Solutions

a. Expansion of Detention Facilities, Personnel, and Resources

According to data compiled by the United States Border Patrol, there has been a sharp rise in the number of unaccompanied children who have been detained between ports of entry along the southwestern border with Mexico.[126] Contemporary reports reveal a seventeen-fold rise in the number of UACs detained by CBP officers,[127] primarily emigrating from Guatemala, Honduras, El Salvador, and Mexico.[128]

It is not novel that CBP detention facilities struggle to provide adequate resources to detainees, so much so that they threaten UACs' "dignity and respect."[129] A plethora of firsthand accounts and internal government reports have documented abhorrent detention conditions: "children held in freezing rooms with no blankets, food, or clean water; denied necessary medical care; bullied into signing self-deportation paperwork."[130] Funding challenges and a lack of resources in CBP and HHS facilities resulted in UACs remaining in custody for periods extending the seventy-two hour processing time delineated by the *Flores Settlement.*[131]

Due to the fact that current detention facilities are not equipped to handle the constantly increasing flow of unaccompanied minors, UACs are often deprived of proper accommodations and essential resources while in CBP stations. Thus, Congressional funding to support the expansion of existing detention facilities, incorporating supplemental emergency centers, and increasing essential resources and personnel and medical professionals in all stations could substantially improve processing times and ensure that UACs are provided adequate care and accommodations. Kentucky Representative Brett Guthrie proposed an analogous solution. He emphasized the gravity of the matter in a hearing before the Subcommittee on Oversight and Investigations, where he claimed "whether it is bed capacity, challenges with hiring and retaining personnel, or ensuring that grantee staff is appropriately screened and trained before being hired or being allowed to

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126 CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2021).
127 *See generally Growing Numbers of Children Try to Enter the U.S.*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 28, 2022), https://trac.syr.edu/immigration/reports/687/.
128 CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2021).
129 NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 1.
130 *Id.* at 3.
131 *See Hearing on Protecting Unaccompanied Children, supra* note 70.

interact with minors, all of these components are critical to ensuring that these children are cared for in the best available and safest way possible."[132]

In the same hearing, CBP Deputy Chief John R. Molin admitted that "additional funding for temporary facilities, consumables, and medical support" has improved the CBP's ability "to respond to crisis."[133] Chief Molin clarified that prior to the acquisition of additional Congressional funding in 2018, "funding was absolutely the problem. If we ever fell short of our standards, it was because we were overwhelmed, it wasn't because of callousness."[134] In his statement, Molin also emphasized that funding was provided at "the height of the crisis,"[135]; however, the influx of UACs detained at the Southern border with Mexico has continued to escalate exponentially since 2018.[136] The CBP's 2021 Transactional Records reveal that "the total number of apprehended unaccompanied children from countries other than Mexico and the Northern Triangle grew from 2,830 in FY 2019 to 3,655 during FY 2021."[137] The escalating trend in UAC apprehension suggests that the initial emergency funding package in 2018 remains insufficient to adequately provide resources and accommodation conditions to satisfy the increasing number of unaccompanied children.

Therefore, it is imperative that CBP and DHS facilities receive an adequate Congressional funding package to finance the expansion of centers, consumable resources, and modernization of facilities necessary to support the influx of UACS. Congressional funding could be secured in the form of a legislative bill ensuring that the federal government administers sufficient funding to CBP and DHS facilities to respond to escalating numbers of unaccompanied minors. The aforementioned bill would also delineate a stringent budget for said facilities stipulating where each location must allocate the money to ensure that UAC standards of care and processing are met. More specifically, the law would require each facility to spend a minimum quantity of funds that each facility must devote to location infrastructure, in-house resources such as sanitary items and food, and officials' wages. Creating a Congressional budget would also establish oversight measures to ensure that the

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *See generally Growing Numbers of Children Try to Enter the U.S.*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 28, 2022), https://trac.syr.edu/immigration/reports/687/.
[137] *Id.*

money is being adequately spent and that UACs are afforded safe and livable conditions during their processing periods.

If provided with sufficient funds, the CBP and DHS will not be compelled to allocate less money to essential infrastructure and supplies or to utilize "operational funds" intended to "secure the border" to "pay for consumables" such as "sanitary items, non-perishable food, formula, and diapers."[138] However, if officials feel inclined to utilize their federal stipend on other costs that are not associated with improving facility infrastructure or maximizing UAC processing efficiency and care, specific facilities would be penalized under Congressional legislation.

Thus, by remediating the collateral damage resulting from overcrowding and lack of supplies and personnel, CBP officials will be properly equipped to expedite the processing and transfer of UACs from Border Patrol stations "to the kind of comprehensive care and services that HHS is set up to provide."[139]

b. Improve Oversight on ORR Officials in Charge of Processing UACs and placing them in the Custody of a Sponsor

Once unaccompanied minors are processed, they are sent to the Office of Refugee Resettlement (ORR), which is responsible for assigning legal representation, taking into account the child's preferences, and supervising UAC residential institutions. ORR officials screen each child for sexual assault, trafficking, persecution risk, and possible asylum claims.[140] The ORR coordinates with sponsors or relatives for placement, conducts an investigation to ensure the adult's identity and they have no history of abusive behavior and can provide for the UAC's physical and mental well-being.[141]

Although the ORR possesses a plethora of significant responsibilities when it comes to ensuring the present and future safety of all minors in custody, the considerable increases in UAC referrals in recent years have weakened the ORR's ability to meet the demand for its services while preserving child welfare protocols and administrative standards.[142]

Inconsistencies and negligence in ORR processing have threatened the secure placement of children with custodial representatives, increased unaccounted children, and situated UACs in unstable and potentially fatal environments. One of the first and most

[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*

conspicuous instances of ORR malpractice was confirmed by a Senate investigation in 2016 which revealed that a group of UACs, who were sponsored by distant relatives and parental-approved guardians, were placed in the custody of human traffickers[143] Similarly, an HHS official testified in April 2018 before the Senate Homeland Security Committee that ORR was unable to account for 1,475 of the 7,635 unaccompanied children placed with sponsors between October and December of 2017.[144]

In a 2019 testimony of CBP Deputy Chief John R. Modlin before the United States House of Representatives Subcommittee on Oversight and Investigations, Rep. Yvette Clarke claimed that one of the most prevalent issues "highlighted across multiple reports from the Office of Inspector General (OIG) relate to certain facilities' failures to conduct background checks as required by ORR policy"[145] and noted that "ORR had granted waivers to certain non-influx facilities allowing them to hire employees without conducting Child Protective Services checks."[146]

Representative Clarke also raised the glaring issue of violence and sexual assault of UACs while in ORR custody. The Senator veered attention to the lack of investigation of 23 official complaints of sexual abuse of UACs in ORR and CBP custody alike in the fiscal year 2018.[147]

The negligible and blatantly lurid occurrences at ORR facilities demonstrate that oversight measures must be instituted to ensure that all personnel are screened to ensure that they are equipped to deal with vulnerable children and possess their best interest. In order to ensure the oversight of ORR and CBP officials and the protection of UACs the government must revisit the language of the Flores Settlement and expressly define and specify the term "safe conditions" to include adequate medical care, protections against physical or emotional abuse, comfortable housing, mental health counseling, and access to suitable food and sanitary facilities. The Court is also responsible for ensuring that processing times are adhered to and that the seventy-two-hour processing time stipulated in the Flores Settlement is upheld by ORR officials.

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143 *Id.*
144 *See generally* STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV'TL AFFS., 115TH CONG., OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN, 13 (2018).
145 *See Hearing on Protecting Unaccompanied Children, supra* note 70.
146 *Id.*
147 *Id.*

The ORR should strive to improve oversight by supporting individual facilities in overcoming challenges to hiring, screening, and retaining employees- including mental health professionals and youth care workers. Rather than devoting a substantial budget to the incarceration of UACs, a Congressional bill should be instituted allocating and delineating the use of funds to CBP and ORR facilities. The legislation should mandate that these locations devote funds to combat these challenges by ensuring that the employed candidates are sufficiently trained, qualified, and recommended, and if possible, bilingual, in order to limit the chances of UACs being placed in the hands of unsafe sponsors.

Upon their employment, said clinicians should be assigned a maximum number of cases to prioritize the screening and care of each UAC.[148] As of 2019, over half of ORR facilities were facing difficulties retaining adequate staff, fifteen facilities were unable to meet the clinical ratios required by ORR, and numerous clinicians were overwhelmed by sizable caseloads that prevented them from providing suitable care to all the children under their supervision.[149]

The aforementioned Congressional bill should also require that the ORR establish various-sized monitoring teams across jurisdictions. An effective oversight team based in the official District of Columbia ORR office should oversee the overall functions of the facilities, review detention facility inspection reports, develop corrective action plans to address shortcomings in individual centers, and coordinate follow-up procedures to assess UACs' status and safety after placement with a sponsor.[150] Monitoring teams should be stationed at each facility to conduct on-site monitoring and ensure that sexual assault and violence screening of UACs is conducted thoroughly and delicately. In-house oversight teams should also ensure that UACs are not coerced into signing documents authorizing their relocation to their countries of origin and that ORR officials conduct thorough investigations of custodial appointments, including verifying identities and screening. Finally, to prevent violence and sexual abuse within the organization, separate teams should be instructed to conduct unannounced facility monitoring.[151]

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[148] *Id.*
[149] *Id.*
[150] Sarah Herman Peck & Ben Harrington, The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions, R45297 (Cong. Research Serv., updated Sept. 17, 2018), https://sgp.fas.org/crs/homesec/R45297.pdf
[151] *See Hearing on Protecting Unaccompanied Children, supra* note 70.

To accurately compile, assess, and access information concerning UAC detention, processing, relocation, and status after placement with a sponsor, the federal government should propose the creation of a shared singular database among all DHS agencies, including the CBP and ORR. The database would allow members of all agencies and departments to access information concerning a child's identity, processing, and transfer to another agency or facility, as well as grant them the ability to register each immigrant child in custody and report updates on their status. The system would streamline communication between all enforcement agencies to ensure that children are being processed in under seventy-two hours, transferred to verified custodial representatives, and remain secure for extended periods after their transfer.[152]

The ORR must refrain from leaving vulnerable children in the hands of law enforcement officers; not only are they figures of authority, but they are not properly trained to manage the welfare of children.[153] Conversely, only child welfare professionals and qualified mental health counselors should be employed to screen children at the border and adopt standards that are aligned with the best interests of the child.[154] Furthermore, while other officials seek a minor's custodial accommodations, child welfare specialists with expertise in human trafficking should focus on decreasing the danger of exploitation and addressing mental health demands in ORR institutions.[155]

B. Long-Term Solutions

a. Codifying the Flores Settlement

While "additional funding for temporary facilities, consumables, and medical support has improved the CBP's ability to respond to the rapid influx of migrants in 2019,"[156] rising numbers of UACs and the lack of resources and personnel available to accommodate them demonstrate that comprehensive legal and congressional action is needed to address the humanitarian crisis at the border.[157]

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[152] Rebeca M. López, *supra* note 85, at 1635.
[153] Song, S. (2021). Mental health of unaccompanied children: Effects of U.S. immigration policies. BJPsych Open, 7(6), E200. doi:10.1192/bjo.2021.1016
[154] *Id.*
[155] *Id.*
[156] *See Hearing on Protecting Unaccompanied Children, supra* note 70.
[157] https://lawblogs.uc.edu/ihrlr/2021/10/13/the-current-unaccompanied-minor-crisis-at-the-border/#post-308-footnote-20

An initial step to solidifying and protecting the rights of children apprehended at the border and processed at border patrol stations is to codify the Flores Settlement so that it "confers constitutional protections and rights upon plaintiffs"[158] who seek relief from humanitarian abuses within detention centers. The current broadness of the language within the settlement inhibits the application of procedural safeguards that "protect the minor's well-being and that of others."[159]

Attempts to codify some of language within the Flores Settlement protecting UACs have been undertaken through multiple Congressional bills that have been introduced to the House but failed to pass. The 2018 Border Security and Immigration Act, prohibited intimidation of UACs by stating that a UAC "must be interviewed by a dedicated United States Citizenship and Immigration Services immigration officer with specialized training in interviewing child trafficking victims. Such officers shall be in plain clothes and shall not carry a weapon."[160] Nonetheless, the Republican-backed act also included diction limiting the acceptance of immigrants into the United States and proposed funding for the construction of a wall across the United States southern border and ultimately did not pass in a majority-democrat House.[161] Most recently, the Biden administration introduced the United States Citizenship Act, which highlights protections for UACs after they have been placed in the custody of a sponsor. The bill also emphasizes the importance of proper screening to preclude the repatriation of UACs to child traffickers. Nonetheless, the bill fails to include protections for UACs during CBP processing and ORR screening.[162]

Currently, "Congress solely relies on appropriations bills to direct the DHS and fails to pass legislation explicitly outlining the standards for detaining all children."[163] In light of this information, Congress should strive to codify the Flores Settlement through legislation that explicitly outlines statutory minimum standards that permit the enforcement of UAC housing and processing requirements alluded to in the document. Among such minimum standards, the law identifies protection against physical or emotional abuse of UACs, livable

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158 Rebeca M. López, *supra* note 85, at 1635.
159 *See Flores* Settlement Agreement, *surpra* note 67, at 10.
160 Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Congress §3101(3).
161 Melanie Zanona & Scott Wong, *House GOP Struggles to Win Votes for Compromise on Immigration Plan*, The Hill (June 20, 2018, 11:50 AM), https://thehill.com/homenews/house/393237-house-gop-struggles-to-win-votes-for-compromise-immigration-measure/.
162 H.R. 1177 – U.S. Citizenship Act of 2021, Congress.gov: https://www.congress.gov/bill/117th-congress/house-bill/1177/text
163 Rebeca M. López, *supra* note 85, at 1635.

housing conditions, access to food, water, sanitary facilities, and medical assistance. By establishing legislation that definitively standardizes procedures for UAC detention, processing, and screening into federal custody, judges will be compelled to enforce standards imposed by the Flores Settlement and provide remedies for children who are not provided adequate resources or suffer abuse in detention.

In order to enhance the protection of children and ensure the proper implementation and enforcement of the Flores Settlement, it is crucial for the United States Congress to establish clear and identifiable minimum standards. This can be achieved through passing legislation that standardizes the process of detaining non-criminal children in federal custody. By codifying the Flores Settlement, judges will be better equipped to enforce the established standards and provide appropriate remedies for children who may experience abuse while in detention.[164] Furthermore, the existence of a binding piece of legislation outlining CBP and ORR procedures would ensure that agencies are more proactive in providing essential resources to minors and in supervising staff behavior, as they would be more vulnerable to litigation regarding human rights violations."[165]

b. Providing Aid to Vulnerable Communities in Central and Southern American Countries to Reduce the Number of UACs arriving at the Southern Border

It is not news that unaccompanied immigrant children are driven to flee their countries of origin for a plethora of grave issues that are often multi-faceted and difficult to measure analytically.[166] Nonetheless, UAC out-migration is due to ""intractable" violent crime, economic conditions, poverty, climate crises, and the presence of transnational gangs in Mexico and "Northern Triangle" countries such as Guatemala, El Salvador, and Honduras, thus driving children to seek better futures abroad."[167]

Significant "push" factors have driven, and will continue to drive, an exponential number of UACs to the southern border. In order to reduce the number of unaccompanied children seeking asylum in United States territories and preclude overcrowding and mistreatment in CBP facilities, it is imperative that the current, and any future, administration should strive to facilitate progressive political reform and economic development in Mexico

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[164] *Id.* at 1669.
[165] *Id.* at 1670.
[166] CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2 (2021).
[167] *See* Kerri Evans et al., *A Human Rights Approach to Macro Social Work Field Education with Unaccompanied Immigrant Children*, 6 J. HUM. RTS. & SOC. WORK 67, 68 (2021).

and Central American countries. To effectively assist in improving the welfare of vulnerable demographics within said nations and ease concerns within the government, the United States should allocate a sizable aid package, spanning for approximately four to five years, to indigenous and low-income communities and international organizations active within regions.[168]

The United States Citizenship Act of 2021 highlights the importance of promoting the rule of law, security and economic development in Central America and proposes the instatement of a four-year strategy known as the "United States Strategy for Engagement in Central America."[169] The Strategy includes "efforts to strengthen democratic governance, combat corruption, confront and counter violence, and enhance the capability of governments in Central America to protect and provide for vulnerable and at-risk populations."[170] According to the Act, the Strategy would be funded with bilateral and multilateral donors and partners including the "Inter-American Development Bank, the World Bank, the International Monetary Fund, the Andean Development Corporation–Development Bank of Latin America, and the Organization of American States."[171] Although the Act highlights a plausible strategy to limit "push" factors that attract UACs to the United States border it has not passed and yet faces opposition from conservative lawmakers who argue that it does not do enough to address border security.

Conclusion

The mistreatment of UACs in CBP detention facilities and ORR establishments constitutes blatant human rights violations. This uniquely vulnerable demographic of individuals flee their country hoping to escape the dreadful and debilitating consequences of extreme poverty, gang violence, domestic abuse, and climate crises. As they seek reprieve, mercy, and aid on United States shores after their arduous journey to safety, young children and teenagers are instead deprived of essential resources, subjected to extended detention periods, and often physically constrained and sexually and physically abused in CBP facilities. Upon their transfer to ORR centers, UACs have also experienced abuse, been coerced to sign documents transferring them back to their countries of origin regardless of threats of

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[168] *See* Peter Marguiles, *Biden's Border Problem, and How to Fix It*, LAWFARE (Apr. 19, 2021, 10:48 AM), https://www.lawfareblog.com/bidens-border-problem-and-how-fix-it.
[169] U.S. Citizenship Act of 2021, H.R. 1177, 117th Congress §2101 (2021).
[170] *Id.*
[171] *Id.*

persecution, and even been misplaced in the custody of human traffickers and dangerous groups.

As the number of apprehended UACs at the Southern Border with Mexico continues to escalate exponentially, Congress must impose oversight measures to supervise all individual DHS-affiliated facilities handling unaccompanied children and that codify laws that protect the elemental rights of these unaccompanied and ensure that they receive due process of law in case their liberty is infringed upon by undue imprisonment or restraint.

Exploring Section 230: The Fine Line of Reform

Mia Coppola

Introduction

Section 230 of the Communications Decency Act (CDA) of 1996 has emerged as a highly contested issue. Some stakeholders regard it as a crucial legal protection for online free speech, while others assert that it enables providers of online services to engage in harmful and reckless conduct with impunity, thereby endangering their users.[1]

Former President Donald Trump became notorious for his chaotic behavior on Twitter and was subject to multiple restrictions prior to his account's suspension. On May 28, 2020, former President Trump signed Executive Order No. 13925 on Preventing Online Censorship, with the goal to "defend free speech from one of the gravest dangers it has faced in American history."[2] This Executive Order sought to reinterpret the critical 1996 law, Section 230 of the CDA, which protects platforms like Twitter from lawsuits in which they escape liability for either content moderation or hosting illegal content.[3]

The discourse on the role of social media platforms in facilitating free speech and protecting against hate speech has become increasingly complex in the context of Section 230 of the CDA. Elon Musk argued that platforms like Twitter should function as a "de facto public town square" where First Amendment principles of free speech are paramount.[4] In recent years, studies have shown that the Internet has transformed into a vessel for hate speech, leading to a rise in both emotional and physical violence.[5] For example, on January 8, 2021, Twitter permanently suspended former President Trump's account due to the "risk

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[1] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET, 13 (Cornell University Press, 2019).
[2] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).
[3] CONG. RES. SERV., *The National Flood Insurance Program: An Overview*, 1 (Oct. 31, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10484.
[4] Elon Musk, Twitter post (Mar. 26, 2022), https://twitter.com/elonmusk/status/1374857269857986562, archived at Internet Archive's Wayback Machine (last accessed Jan. 10, 2023).
[5] Silvio Waisbord, *Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism*, 1030–1046 DIGITAL JOURNALISM 8, no. 8 (Sep. 24, 2020).

of further incitement of violence."[6] Thus, Musk's vision of free speech, which calls for minimal moderation of user-generated content, may conflict with the goals of Section 230. While Section 230 made the news headlines for the debate surrounding censorship and over-moderation, the much more grave issue is its role in neglecting or enabling serious harms.[7]

This note provides an analysis of the ongoing bipartisan debate over the reform of Section 230 of the CDA. The note argues that while intermediary immunity for internet platforms is essential to uphold free speech on the Internet and prevent overly restrictive content moderation practices, it is also necessary to carefully reform Section 230 to ensure that its immunities are not abused. Properly crafted reform of Section 230 is critical to protect the First Amendment while also addressing concerns around harmful online conduct that should not be immune from liability. The note contends that intermediary immunity for internet platforms is essential to uphold free speech. Without such immunity, platforms may be forced to restrict user-generated content to avoid legal liability heavily. However, the note acknowledges that there is a need for proper definitions and interpretations of "good faith" and "bad faith" actions to ensure that immunity is not granted in cases where platforms engage in harmful conduct. Part I of the note provides a historical overview of Section 230 and discusses the legal complexities that arise from its current immunities. Part II examines the challenges that arise from the current state of Section 230 and considers the practical issues that may arise from its reform. Part III outlines potential solutions for reforming Section 230 that promote and protect free speech on the Internet while addressing constitutional concerns. The note concludes by emphasizing the need for a balanced approach to reforming Section 230, which protects free speech and ensures accountability for harmful conduct on online platforms.

I. The Background and Legal Precedent for Section 230 of the Communications Decency Act

A. The Application of the First Amendment

The First Amendment of the United States Constitution ensures that the people have basic rights to practice their religion, express their opinions, have a free press, gather

[6] Twitter, Inc., *Permanent suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.
[7] KOSSEFF, *supra* note 1, at 65.

peacefully, and petition the government for change.[8] The First Amendment's protections have been interpreted and applied in a variety of ways by the courts over the years.[9] Without the protection of the First Amendment, the government would have the power to suppress dissenting voices and control the flow of information.[10] This protection has been further interpreted through Supreme Court cases, such as *New York Times Co. v. United States*, where the government was prohibited from limiting the publication of information before its release.[11]

The freedom of the media in the United States is the guaranteed right that expression and communication through printed, published, and electronic media can be exercised freely.[12] However, this amendment is only applicable to actions made by the government.[13] It is a frequent misperception that the First Amendment forbids private, non-governmental institutions from restricting free expression.[14] This is incorrect as these entities are not bound by the First Amendment's provisions.[15] The Bill of Rights, including the First Amendment, is primarily concerned with limiting the power of the government over individual rights, rather than dictating how private institutions should operate. In addition to the existing exception, a plethora of judicial rulings on freedom of speech have established multiple limitations to the safeguards provided by the First Amendment. For example, there are exceptions to speech that involve "obscenity, incitement to violence, defamation, and discrimination."[16] As previously stated, Musk had articulated his goal of transforming Twitter into the "de facto public town square"; however, it is worth noting that there are certain constraints on the nature of speech that can be expressed, irrespective of the medium in which it is conveyed, be it in person or on the Internet.[17]

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[8] U.S. CONST. amend. I.

[9] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 2 (1969) (holding that students do not lose their constitutional rights when they enter the schoolhouse gate); Citizens United v. Federal Election Comm'n, 558 U.S. 310, 4 (2010) (holding that the government cannot restrict independent political expenditures by corporations, associations, or labor unions).

[10] Nadia Imtanes, Should Corporations Be Entitled to the Same First Amendment Protections as People, 39 W. St. U. L. REV. 204 (2012).

[11] New York Times Co. v. United States, 403 U.S. 713, (1971), https://www.law.cornell.edu/supremecourt/text/403/713.

[12] U.S. CONST. amend. I ("Congress shall make no law … abridging the freedom of speech, or of the press").

[13] *Id.*

[14] Jena McGregor, *The Google memo is a reminder that we generally don't have free speech at work*, WASH. POST, (Aug. 8, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/08/08/the-google-memo-is-a-reminder-that-we-generally-dont-have-free-speech-at-work/.

[15] U.S. CONST. amend. I.

[16] David A. Anderson, *The First Amendment and the Media in the Court of Public Opinion* (2001).

[17] Elon Musk, Twitter post (Mar. 26, 2022), https://twitter.com/elonmusk/status/1374857269857986562, archived at Internet Archive's Wayback Machine (last accessed Jan. 10, 2023).

It is crucial to keep in mind that the interpretation and application of the First Amendment are continually evolving and can vary based on the context and the particular situation.[18] The courts play a significant role in determining the extent of the First Amendment's protections, and new court cases and decisions can affect how the amendment is understood and enforced.[19] The interaction between the First Amendment and Section 230 creates a complex framework for online speech in the United States, with a constantly evolving interpretation of the law.

B. The Establishment of Liability

Prior to the creation of the Internet, it was necessary to clearly establish liability when handling cases involving illegal content. It is important to note that establishing liability for a specific action is more difficult in the context of the Internet.[20] The Internet has a vast global user base and an aspect of anonymity, making it challenging to determine who is accountable for their actions.

In *Smith v. California,* the distinction between publishers and distributors of the content was evidently established.[21] Paul Smith, the owner of a bookstore, was charged under a California statute that made it a crime for "any person to have in their possession any obscene or indecent writing or picture for the purpose of sale."[22] Smith argued that the statute he was charged under violated the freedom of speech and press protected by the First Amendment.

Under this case, the Supreme Court ruled in favor of Smith and deemed the California statute unconstitutional.[23] This was supported by the idea that the distributor could not be held liable for possessing obscene materials unless they had "reason or intent," as well as "knowledge of the contents of the material."[24] In contrast, a publisher would bear legal responsibility for any illicit content, given their complete knowledge of the said content.[25] This decision was made under the assumption that placing liability on the

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[18] Nadia Imtanes, Should Corporations Be Entitled to the Same First Amendment Protections as People, 39 W. St. U. L. REV. 203 (2012).
[19] *Id.* at 204.
[20] Jennifer Rexford, *The Structure of the Internet and the Principles Behind It*, 89 Proc. IEEE 304 (2001).
[21] Smith v. Cal., 361 U.S. 147, (1959), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/smith.html.
[22] *Id.*; *see* Brent Skorup & Jennifer Huddleston, The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation, 72 OKLA. L. REV. 637 (2020).
[23] Smith v. Cal., 361 U.S. 147, (1959), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/smith.html.
[24] *Id.*
[25] *Id.*

distributor would result in a broader limitation of free speech.[26] *Smith v. California* has been cited as a benchmark case in the regulation of obscenity, serving as a legal precedent for subsequent rulings.

As technology advanced, the radio became a method of communication and, thus, required the reevaluation and reinterpretation of the First Amendment's protections. In *Federal Communications Commission v. Pacifica Foundation*, the United States Supreme Court ruled on the Federal Communications Commission's (FCC) power to regulate indecent speech on the radio.[27] The dispute in the case arose from a complaint made to the FCC regarding a radio station airing comedian George Carlin's "Filthy Words" monologue, which included explicit language.[28] The FCC claimed that the broadcast was "indecent" and demanded that the station prohibit similar material during hours when children were likely to be in the audience.[29] In opposition, the Pacifica Foundation argued that the FCC's demands were in violation of the First Amendment's protection of freedom of speech.[30]

The Supreme Court upheld the FCC's decision, ruling that the government has a "legitimate interest in protecting children from indecent material."[31] This decision established a precedent that the government has a greater ability to regulate speech on the radio than on other mediums, such as newspapers or books, because of children's unique accessibility to the radio.

When the television was invented, television programming underwent a similar process of establishing liability. In *Anderson v. Fisher Broadcasting, Inc.*, it was claimed that the television station, Fisher Broadcasting, defamed the plaintiff in a news broadcast.[32] The court ruled in favor of Fisher Broadcasting because Anderson had failed to provide evidence to show that the station had acted with malice against her, which is required under the First Amendment to establish liability for cases of defamation.[33] This case is a prime example of the complex relationship between the First Amendment and the media, highlighting the importance of balancing the First Amendment's guarantees with the government's interest in promoting the public welfare.

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[26] *Id.*
[27] F.C.C. v. Pacifica Foundation, 438 U.S. 726, 3 (1978). Supreme Court Case Files Collection, Box 53, Powell Papers, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.
[28] F.C.C. v. Pacifica Foundation, 438 U.S. 726, 3 (1978).
[29] *Id.*
[30] *Id.*
[31] *Id.* at 5.
[32] Anderson v. Fisher Broad., Inc., 570 P.2d 633, 3 (Or. 1977).
[33] Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39 (1992).

Although cases that regulate broadcast content are designed to restrict certain materials from being aired, it is worth noting that there are instances where the courts have encouraged the airing of specific programs, particularly those with educational value. In *Action for Children's Television v. Federal Communications Commission*, a case was brought forward by Action for Children's Television (Television), a non-profit organization, challenging the FCC's rules that required television networks to broadcast a specific amount of educational programming for children.[34] Television argued that the rules were an unconstitutional restriction on the broadcaster's freedom of speech.[35]

However, the Supreme Court ruled in favor of the FCC, stating that the rules were reasonable and "uniquely important" to the children's educational interest.[36] The Supreme Court upheld that the regulations did not burden the broadcaster's freedom of speech, despite Television's claims that enforced broadcasting limits the network's ability to focus on what they want to produce.[37] This case established the government's interest in the well-being of the children and furthered the idea that minors are a significant priority for the government.[38]

C. The Communications Decency Act of 1996

The Communications Decency Act of 1996 (CDA) was established due to concerns about the types of content that could be found on the Internet and how it would affect children.[39] The CDA was meant to address these concerns by criminalizing the transmission of "indecent" and "patently offensive" material to minors via the Internet and by imposing penalties for those who broke the law.[40] The CDA was created in response to the lack of regulation in the Internet industry and the need for laws to be put in place to keep up with the fast-paced development of the Internet.[41]

The CDA encountered substantial opposition and controversy from both advocates of free speech and the technology industry as a whole. It was feared that the CDA would

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[34] Action for Children's Television v. FCC, 58 F.3d 654, 2 (D.C. Cir. 1990).
[35] Tracy L. Halcomb, *Action for Children's Television and the Federal Communications Commission: A Comprehensive Assessment from 1968-1992*, ProQuest Dissertations Publishing, 10 (1998).
[36] *Id.*
[37] *Id.*
[38] Julia Saladino, *Hold the Phone: The Incongruity of Prosecuting Sexting Teenagers under the Prosecutorial Remedies and Other Tools to End Exploitation of Children Act of 2003*, 10 WHITTIER J. CHILD. & FAM. ADVOC. 319 (2011).
[39] Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity*, 68 CATH. U. L. REV. 597 (2019).
[40] Alan Lewine, *Making Cyberspace Safe for Children: A First Amendment Analysis of the Communications Decency Act of 1996*, 18 HAMLINE J. PUB. L. & POL'y 78, 80 (1996).
[41] *Id.* at 81.

digress the United States and endanger the protective nature of the First Amendment.[42] The authors of *A Conflict of Visions: How the 21st Century First Amendment Violates the Constitution's First Amendment* contended that the CDA imposed an unprecedented level of government control over the Internet and online speech, which could have a chilling effect on free expression.[43] The CDA's provisions, which aimed to regulate indecent and obscene content online, were vague and overbroad, and could potentially lead to censorship.[44] Another argument against the CDA was that the market and technological innovation could address concerns about inappropriate content more effectively than government intervention.[45]

Reno v. American Civil Liberties Union in 1997 was a landmark case in which the United States Supreme Court struck down key provisions of the CDA as unconstitutional.[46] The Supreme Court held that the restrictions imposed by the CDA were not "narrowly tailored" to achieve the government's interest defined as the protection of children from harmful online content.[47] There were found to be less restrictive means of protecting the children from harmful online content, such as "filtering software" or "parental control tools."[48]Additionally, the Supreme Court affirmed that the Internet is entitled to the same degree of First Amendment protections as more traditional forms of communication.[49] The Internet was found to be a unique medium that reaches more universal audiences. On this basis, the Supreme Court ruled that the CDA's provisions would impact the Internet more greatly than other forms of communication.[50] Though several provisions of the CDA were short-lived, Section 230 of the CDA remained in effect.

D. Section 230 of the Communications Decency Act of 1996

The rapid pace of technological advancements has brought about a transformative evolution in the media landscape, expanding it beyond the traditional means of communications to encompass the vast expanse of the Internet. This paradigm shift has

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[42] Geoffrey A. Manne, R. Ben. Sperry, Tom Struble & Berin Szoka, *A Conflict of Visions: How the 21st Century First Amendment Violates the Constitution's First Amendment*, 13 First AMEND. L. REV. 324 (2014).
[43] *Id.* at 320.
[44] *Id.* at 324.
[45] *Id.* at 327.
[46] *See* Rafic H. Barrage, *Reno v. American Civil Liberties Union: First Amendment Free Speech Guarantee Extended to the Internet*, 49 MERCER L. REV. 625 (1998).
[47] Reno v. American Civil Liberties Union, 521 U.S. 844, 4 (1997).
[48] *Id.*
[49] Rafic H. Barrage, *Reno v. American Civil Liberties Union: First Amendment Free Speech Guarantee Extended to the Internet*, 49 MERCER L. REV. 628 (1998). (explaining traditional forms of communication as newspapers, books, and television).
[50] *Id.*

resulted in a significant expansion of the dissemination and accessibility of information. The Internet enables the widespread distribution of ideas and reaches audiences around the globe.[51] The 1990s witnessed a notable transformation in the way individuals interacted with one another, as the Internet offered new means to engage in discussions and share content through online forums and platforms.[52] Consequently, a considerable number of legal disputes have emerged involving service providers and their role in managing user-generated content.[53] This trend highlights the challenges and complex legal landscape faced by internet companies as they navigate the intersection of user-generated content and liability.

Cubby, Inc v. CompuServe Inc., Stratton Oakmont, Inc. v. Prodigy Services Co., and *Zeran v. Am. Online, Inc.* were landmark cases that laid the groundwork for Section 230 of the CDA. They were monumental in the early development of internet law and the first to address the issue of intermediary liability for user-generated content on the Internet.[54]

Cubby, Inc. v. CompuServe Inc. considered the issue of whether an online service provider (CompuServe) could be held liable for defamatory statements made by its users.[55] Cubby, Inc. deemed CompuServe as responsible for the defamatory statements that were posted on one of its bulletin boards, but the court held that CompuServe was not liable.[56] This was upheld on the basis that CompuServe was not the creator of the content, and it did not have editorial control over the content.[57] The court asserted that CompuServe simply provided a forum for communication among its users, and it did not have control over the content to the extent of being held liable for defamatory statements.[58] CompuServe simply provided a platform for others to post content and did not review or alter the content before it was publicized.

Cubby, Inc. v. CompuServe is a significant case because it established that online service providers are not liable for defamatory statements made by their users.[59] Immunity to the

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[51] Johny Ryan. *A History of the Internet and the Digital Future*, Reaktion Books (ProQuest Ebook Central, 2010). 120 & 121. https://ebookcentral.proquest.com/lib/gwu/detail.action?docID=618772.
[52] R. Hayes Johnson Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.* , 49 ARK. L. REV. 589 (1996).
[53] Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. Sci. & TECH. L. REV. 1. 3. (2016).
[54] CONG. RES. SERV., *supra* note 3, at 2.
[55] Anthony J. Sassan, *Cubby, Inc. v. Compuserve, Inc.: Comparing Apples to Oranges: The Need for a New Media Classification*, 5 Software L.J. 824 (1992).
[56] *Id.* at 825.
[57] *Id.*
[58] *Id.*
[59] *Id.*

service provider is upheld as long as they do not create the statements and do not have editorial control over the content.[60] The immunity granted to online service providers under Section 230 of the CDA, which shields interactive computer services from responsibility for third-party material, is similar to this idea.

Alternatively, in *Stratton Oakmont, Inc. v. Prodigy Services Co.,* a state court produced an opposing outcome. The court held the owner of an online bulletin board (Prodigy) liable as the publisher of the defamatory posts on the basis that they had "exercised editorial control" over the offensive content.[61] Specifically, Prodigy selectively monitored the content of their bulletin boards in an effort to maintain a civil online environment. Prodigy's actions went beyond simply providing a platform for user-generated content and instead involved active editorial control, which removed their immunity under the common law of defamation.[62] Prior to the enactment of Section 230, the only way to receive significant protection and immunity was for the website to avoid regulating its content at all.[63] This case was a cause for concern for websites and for Congress, as this ruling was thought to discourage online platforms from regulating possibly harmful content.[64] These concerns were subsequently addressed by the introduction of Section 230 of the CDA.

Section 230, alternatively known as the "Good Samaritan" provision, was enacted in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*[65] Congress was concerned that this ruling would discourage online platforms from regulating their content in totality to avoid liability.[66] Therefore, section 230 of the CDA was intended to be "speech protective."[67] One of the main purposes of Section 230 is to protect internet service providers (ISPs) from liability for third-party content that they transmit or host.[68] The law's legislative history reflects a clear intent to shield ISPs from liability for the actions of their users. Online

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[60] *Id.*
[61] R. Hayes Johnson Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.* , 49 ARK. L. REV. 593 (1996).
[62] *Id.* at 594.
[63] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (noting that *Stratton Oakmont* created "disincentives to self-regulation").
[64] *Id.*
[65] Stratton Oakmont, Inc. v. Prodigy Serv. Co., 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), https://h2o.law.harvard.edu/cases/4540.
[66] *Id.*
[67] CONG. RES. SERV., *supra* note 3, at 2.
[68] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET, 13 (Cornell University Press, 2019).

platforms were encouraged to host user-generated content and engage in the moderation of objectionable content without being treated as the publisher.[69]

Thus, Section 230 brought forth two different provisions that act as liability shields for online platforms. Section 230(c)(1) states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[70] In simpler terms, Section 230 removes legal responsibility from and protects online intermediaries, which allow users to voice themselves online. This immunity has been broadly interpreted throughout the years to protect online platforms from liability for claims of negligence, defamation, and discrimination.[71] Online platforms enjoy Section 230(c)(1) as the immunity applies regardless of the amount they police their site.[72] Further, Section 230(c)(2) of the CDA affords online providers with immunity from legal liability in cases where they take "good faith action" to limit access to or availability of content that is considered objectionable by either the provider or the user.[73] Such objectionable content may include material that is classified as obscene, lewd, lascivious, filthy, excessively violent, harassing, or any other material deemed objectionable under the law.[74] This provision is rather broad in terms of what "good faith" is defined as, but immunity can be disqualified if the federal court finds the provider's motives to be of "bad faith."[75] In theory, Section 230(c)(2) would encourage platforms to prevent harmful or illegal content from circulating.[76] However, the Internet has dramatically evolved since this provision's enactment.

The first case that explored the implications of the newly established immunity provision was *Zeran v. Am. Online, Inc.*[77] In *Zeran*, the Fourth Circuit Court of Appeals addressed the liability of American Online (AOL) for defamatory messages posted by a user on the bulletin service.[78] The Court determined that AOL was immune from liability, despite

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[69] *Id.* at 2.
[70] 47 U.S.C. § 230(c)(1) (1996).
[71] Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir.1997); *see also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 985 (10th Cir. 2000).
[72] 47 U.S.C. § 230(c)(1) (1996).
[73] 47 U.S.C. §230(c)(2) (1996).
[74] Daphne Keller & Emma Llansó, *Platforms, Speech, and Truth: Policy, Policing and Impossible Choices,* Center for Democracy & Technology, 11, (Nov. 20, 2019).
[75] Enigma Software Group USA, LLC v. Malwarebytes, Inc., 964 F.3d 1020, 7 (9th Cir. 2019), https://www.supremecourt.gov/opinions/20pdf/19-1284_869d.pdf.
[76] 47 U.S.C. § 230(c) (1996).
[77] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).
[78] *Id.*

its ability to monitor or remove the offensive comment.[79] This was ruled because the company was acting as a "publisher" rather than a "speaker."[80]

It is important to note that Congress had different concerns depending on the transmitter of content and its ability to police material. In the case of AOL, AOL were considered a "pipe" ISP, meaning they provided internet access as a utility without actively monitoring the content that passed through their servers.[81] Congress recognized the need to distinguish between different types of online service providers and crafted Section 230 accordingly to provide the appropriate level of immunity based on the online service provider's roles and functions. Since the enactment of Section 230, courts have progressively broadened the extent of the statute's definition of "interactive computer services" from ISPs to a wide array of cyberspace services.[82]

These three landmark decisions were crucial in establishing the legal framework for imposing liability on online platforms.[83] These decisions largely aligned with the notion that online intermediaries should not be held accountable for user-generated content posted by third parties, as doing so could lead to excessive censorship and potential violations of the First Amendment.[84]

II. The Misapplication of Section 230 of the Communications Decency Act

Section 230 of the CDA lacks a clear definition of protected content. Courts have had difficulty interpreting and applying the law consistently, leading to legal ambiguity and confusion over the scope of protection offered by Section 230. Before the enactment of the CDA, online platforms faced the "moderator's dilemma."[85] The platform could choose whether to risk liability for leaving a post online or for taking it down.[86] The legal immunity provided to online platforms under Section 230 has led to a shift in the approach to harmful

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[79] Walter Stillwell, *Carafano v. Metrosplash.com: An Expansion of Tort Immunity for Web Service Providers under 47 U.S.C. 230, Even When They Take a Greater Editorial Role in Publishing Material from Third Parties*, 6 TUL. J. TECH. & INTELL. PROP. 310 (2004).
[80] *Id.*
[81] Frank LoMonte. *The First Amendment, Section 230, and Online Liability,* 13 (2021).
[82] *See* Batzel v. Smith, 333 F.3d 1019, 1029 n.15 (9th Cir. 2003).
[83] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 62 (1996).
[84] *Id.*
[85] U.S. DEPT. OF JUST. "Department of Justice's Review of Section 230 of the Communications Decency Act of 1996," (2021), https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996.
[86] *Id.*

content moderation. While the original intention was to incentivize platforms to remove such content, the broad immunity granted has resulted in a situation where platforms are hesitant to remove certain content due to fear of losing out to their competitors.[87] The current interpretation of Section 230 has offered no motivation for online platforms to respond to "clear instances of criminality," thus encouraging some online platforms to abuse their immunity.[88] Additionally, it has created an environment where platforms are more likely to turn a blind eye to harmful or illegal content, instead of removing it as intended. Therefore, it is argued that the legal immunity granted to platforms for their user's content, in fact, reduces online platforms' incentives to "proactively remove content causing social harm."[89]

A. The Abuse of Platform Immunity

Section 230 of the CDA grants immunity to online platforms for the content generated by their users, even when the platform fails to remove harmful or illegal content.[90] Throughout the years following the creation of Section 230, hundreds of rulings have been made to broaden the immunity with comparably less work to restrict or deny it.[91] The breadth of immunity granted to intermediaries creates a "safe haven" for those who engage in hate speech and crimes on the Internet.[92]

It is without a doubt that social media platforms have had a positive impact on society by providing opportunities for social movements to gain momentum and global visibility. For example, #MarchForOurLives and #ClimateStrike utilized social media to organize and promote nation- and world-wide protests for their cause.[93] However, social media platforms have also been exploited to communicate or encourage dangerous events. For example, Twitter has been used by terrorist organizations as a means to recruit members.[94] Hamas and Hezbollah have used social media to further their objectives,

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[87] *Id.*
[88] Citron, D.K., & Wittes, B. *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*. FORD. L. REV., 86(2), 401-432, 408 (2017).
[89] *Id.*
[90] 47 U.S.C. §230(c)(2) (1996).
[91] Ambika Doran & Tom Wyrwich, *Section 230 of the Communications Decency Act Turns 20*, LAW360, (Jan. 10, 2023, 11:20 AM), https://www.law360.com/articles/836281/ section-230-of-the-communications-decency-act-turns-20 [http://perma.cc/4P5P-4FF7].
[92] Danielle Citron, *Hate Crimes in Cyberspace,* HARVARD UNIVERSITY PRESS, 101 (2014).
[93] This movement, which began in 2018, used social media to organize and promote a nationwide march to demand stricter gun control laws in the wake of the school shooting in Parkland, Florida. *See* Jennifer L. Lawless & Richard L. Fox, *March for Our Lives: Youth Activism and the Politics of Gun Control*, 14 J. CHILD. & POL'Y 1, (2018); Emma L. L. Fitzsimmons, *Youth-led climate strikes and the global politics of education*, 35 J. EDUC. POL'Y 489, (2020).
[94] K.C. Johnson, *Terrorist Organizations and Social Media: An Analysis of the Use of Twitter by Hamas and Hezbollah*, 60 J. CON. RESOL. 1457, 24 (2016).

including through "propaganda and recruitment efforts."[95] According to Johnson, both organizations have been successful in utilizing Twitter to influence public opinion and spread their messages.[96] Online platforms have no legal obligations to remove this harmful content from their sites.[97] In fact, under Section 230, Twitter is not found to be liable for this content despite its ability to regulate or remove the organizations from its platform.[98]

In *Jane Doe No. 1 v. Backpage.com, LLC,* the plaintiffs alleged that Backpage enabled sex trafficking' efforts by advertising trafficking information to minors.[99] It was a fact that Backpage operated as a hub hosting "80 percent of the online advertising for illegal commercial sex in the United States."[100] Throughout the case, the plaintiffs presented arguments and supporting evidence that Backpage intentionally designed and organized its website to facilitate and encourage trafficking communications.[101] For example, the defendant engaged in moderate regulation and took action in certain instances to remove posts that discouraged sex trafficking.[102] Evidence showed that Backpage made efforts to remove detection of trafficking, including "anonymized emails," "photographs stripped of metadata," and "anonymized payments."[103]

There were overwhelming facts that suggested that the defendant had an active role in soliciting content that intended to "make sex trafficking easier."[104] Despite this, Backpage invoked Section 230 of the CDA as its defense, arguing that it was third-party content posted on its site which affords the platform immunity.[105] The court agreed to dismiss the case as they found that Backpage was entitled to immunity under Section 230, alongside other insufficiencies involving evidence of Backpage's malice.[106] This is an abuse of the span of immunity offered by Section 230 of the CDA, as Backpage acted as the exact opposite of a "Good Samaritan" and did not take regulatory efforts against the illegal activity happening

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[95] *Id.*
[96] *Id.*
[97] Gabriel Weimann, *Terrorism in Cyberspace,* COLUMBIA UNIVERSITY PRESS, 206 (2015).
[98] Citron, D.K., & Wittes, B. *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity.* FORD. L. REV., 86(2), 401-432, 408 (2017).
[99] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, (1st Cir. 2016).
[100] Citron, D.K., & Wittes, B. *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity.* FORD. L. REV., 86(2), 401-432, 408 (2017).
[101] *Jane Doe* 817 F.3d at 16.
[102] *Id.* at 20.
[103] *Id.* at 21.
[104] *Id.* at 12.
[105] *Id.*
[106] *Id.*

on their page. This case highlights the challenges that victims face in holding intermediaries liable for the criminal activities they facilitate.[107]

Another prominent example of intermediaries being granted immunity, despite criminal activity taking place on their platforms, is *Doe v. MySpace, Inc.*[108] A minor was a victim of sexual assault by a man she met through MySpace.[109] It was argued by the victim that MySpace failed to adequately monitor and remove sexual predators from its platform.[110] However, MySpace was granted immunity because the harmful content (i.e., the predator's profile) was created by a third party (i.e., the predator).[111] The court noted that they could not hold MySpace liable for the criminal activities because Section 230's purpose is to protect online platforms and encourage the growth of the Internet.[112] It is important to note that MySpace, and other intermediaries, benefit from having more users on their platforms.[113] The exponential increase in users enables online platforms to "gain more valuable data, increase network effects, and leverage economies of scale to drive down costs and increase profitability."[114] However, this motivates certain online platforms to prioritize financial gain over responsible content moderation, as evidenced by MySpace's reluctance to remove sexual predators from its site. Section 230 was not intended to provide a safe harbor for online platforms to profit from their dereliction of duty.[115]

The Internet has rapidly evolved into a global network full of possibilities and dangers.[116] Section 230's breadth of immunity was not curated with any intention of abuse by online platforms. At the time of Section 230's conception, the Internet was not at a point in which the current abuses happening could have been foreseen and prevented through

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[107] Danielle Citron, *Hate Crimes in Cyberspace,* HARVARD UNIVERSITY PRESS, 101 (2014).
[108] Michael D. Marin & Christopher V. Popov, *Doe v. MySpace, Inc.: Liability for Third Party Content on Social Networking Sites*, 25 COMM. LAW. 3 (2007).
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id; see* 47 U.S.C. § 230(c)(2) (1996).
[113] Geoffrey G. Parker, Marshall W. Van Alstyne, & Sangeet Paul Choudary, *The Platform Revolution: How Networked Markets are Transforming the Economy—And How to Make Them Work for You*, 94 HARV. BUS. REV. 1, (2016).
[114] *Id.*
[115] Danielle Citron, *Hate Crimes in Cyberspace,* HARVARD UNIVERSITY PRESS, 101 (2014).
[116] The enactment of the CDA assumed that the Internet was similar to other technologies, such as the telephone, and could be regulated similarly. *See* Robert Cannon, *"The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway,"* FED. COMM'N L. J. 49, (1996): Article 3. at 53, 57, 73–75.

prior interpretations or laws. It is important to clarify that the Internet is no longer a "fragile new means of communication."[117]

B. Vagueness of Section 230: Backlash

Twitter is often subject to fierce debate regarding over-moderation and under-moderation. This is because Section 230 lacks clarity and precise language, resulting in a public uproar when content is ignored or banned. The ambiguities in Section 230 leave online platforms with full discretion as to what content they allow.[118] Online platforms face major backlash in balancing content moderation with free speech protections.[119] Section 230 does not offer legal guidance or universal, transparent language to aid online platforms throughout this process.[120]

In *Jared Taylor et al v. Twitter, Inc.,* the plaintiffs claimed that Twitter violated their rights to equal protection and free speech after the online platform banned their accounts.[121] Taylor argued that Twitter engaged in "viewpoint discrimination and censorship" with the aim of "silencing conservative and nationalist voices."[122] However, Twitter argued that given its position as a private company, it had the right to control the content on its platform.[123] Ultimately, the court dismissed this case on the grounds that Twitter's decision to suspend the account did not violate the First Amendment, as Twitter is a private company.[124] Additionally, the suspension was not found to be based on any discriminatory intent.

The dominant narrative in the topic of over-moderation surrounding Section 230 often suggests that online platforms can use it to silence certain voices and evade legal consequences.[125] This is not the case because, as a private platform, online providers have the flexibility to enforce their terms of service and control the content that appears on their

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[117] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) ("The Internet is no longer a fragile new means of communication that could be easily smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses").
[118] *See* Sabine Neschke, *The Moderation Dilemma: An Analysis of Section 230 and its Implications for the Future of Online Content Moderation*, 24 J. OF INTERNET L. 1, (2020).
[119] *Id.*
[120] *Id.*
[121] Jared Taylor et al. v. Twitter, Inc., Case No. 16-cv-00213-WHO, 3 (N.D. Cal. 2016). https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2910&context=historical
[122] *Id.*
[123] *Id.* at 5.
[124] ELEC. FRONTIER FOUND., Jared Taylor et al. v. Twitter, Inc.: *A Free Speech Lawsuit Against a Social Media Company*, EFF.ORG, (last visited Feb. 5, 2023), https://www.eff.org/cases/jared-taylor-et-al-v-twitter-inc.
[125] *Id.*

platforms.[126] This case was brought in a time of increased debate and scrutiny regarding the role of online providers in protecting free speech and shaping public discourse.

Jared Taylor et al. v. Twitter, Inc. exemplifies the challenges and controversies surrounding the interpretation and application of Section 230. This case highlights the importance of the immunity provisions under Section 230, but it also raises questions about the responsibilities of online platforms to balance protecting free speech and protecting the public from harmful or abusive speech online.[127] Greater discourse regarding online platforms encroaching on the public's First Amendment is dangerous for the Internet and for the future of free expression online, considering Section 230 lacks the proper language to support platforms in this balancing process.[128]

C. Current Congressional Efforts That Could Promote Over-Moderation

The Supreme Court announced in 2022 that it would hear two cases that could fundamentally change the future of the Internet: *Twitter, Inc. v. Taamneh* and *Gonzalez v. Google.* This marks the first time the Court will consider the scope of Section 230.[129]

In *Gonzalez v. Google,* the central issue was whether YouTube could be deemed responsible for the content it recommends to users.[130] This case is considering YouTube's responsibility in amplifying terrorist organization content, following a series of ISIS-sympathizer terrorist attacks in Paris in 2015 that killed Gonzalez's loved ones.[131] According to Gonzalez, the algorithmic services offered by YouTube were "critical to the growth and activity of ISIS."[132] It is argued that the current interpretation of Section 230 has allowed online platforms to evade responsibility for hosting harmful content.[133] Thus, a desirable outcome for Gonzalez would be a narrower interpretation of Section 230 that limits liability only to cases where the platform did not play an active role in creating or developing the content.

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] American Civil Liberties Union, Google v. Gonzalez, ACLU, https://www.aclu.org/cases/google-v-gonzalez-llc/.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] Gonzalez v. Google LLC, No. 21-1333, Petition for a Writ of Certiorari (2022). https://www.supremecourt.gov/DocketPDF/21/21-1333/220254/20220404211548101_GonzalezPetPDF.pdf

More importantly, this case will analyze whether Section 230(c)(1) of the CDA "immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider" or only limits the "liability of interactive computer services when they engage in traditional editorial functions with regard to such information."[134] In the instance that the Supreme Court rules in favor of Gonzalez, online platforms will need to seriously consider their business models.[135] Intermediaries would need to reevaluate the way they operate, as they could be held liable for information that is promoted on their sites.[136]

Similarly, the Supreme Court will also consider *Twitter, Inc. v. Taamneh,* which examines whether or not online platforms are liable in the instance of harmful speech that led to the death of Nawras Alassaf in an ISIS-related attack in 2017.[137] Taamneh argued that Twitter failed to control terrorism and went as far as to say that the platform provided the necessary infrastructure for ISIS to promote its posts.[138] If the Supreme Court rules in favor of Taamneh and considers Twitter's moderation decisions subject to First Amendment review, it could have substantial implications for how social media platforms moderate content. This may result in more legal challenges to platform's moderation decisions and increased legal liability for social media companies hosting user-generated content. Alternatively, if the Court rules in favor of Twitter, it could reinforce the current broad discretion online platforms have in moderating content without fear of legal liability.[139]

Twitter, Inc. v. Taamneh will analyze whether Twitter's lack of preventative measures made them an aid to acts of terrorism, despite the platform's ongoing efforts to remove terrorism from its site.[140] This case will have broader implications on content moderation and liability protections, as promised in Section 230. In the instance if the Court rules in Taamneh's favor, then greater content moderation and restrictions on user-generated content will need to be considered.

III. Section 230 of the Communications Decency Act: A Call for Amendment

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[134] *Id.*
[135] Tomer Kenneth & Ira Rubinstein, *Gonzalez v. Google: The Case for Protecting 'Targeted Recommendations',* 72 DUKE LAW JOURNAL, 13 (2023).
[136] *Id.*
[137] *Twitter, Inc. v. Taamneh*, 21-1496, U.S. Supreme Ct. (Oct. 3, 2022), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3512&context=historical.
[138] *Id.*
[139] *See* Danielle Citron, *Hate Crimes in Cyberspace,* HARVARD UNIVERSITY PRESS, 101 (2014).
[140] *Id.*

It is unrealistic to imagine the Internet as a place that fosters expression and speech without addressing the associated consequences of harmful speech and illegal activity. Case law has provided Section 230 of the CDA with broad immunity from liability, which has stripped any incentive for online platforms to proactively regulate their users' content. Immunity, to the extent it has been interpreted, has allowed online platforms to neglect their civic responsibilities.[141] The abuse of Section 230 is counterintuitive to what the CDA set out to do. Courts are tasked with finding an interpretation of Section 230 that strikes a balance and aligns with its text, historical background, and contextual factors. Additionally, Section 230's immunity should not be a guarantee, considering the technology and power that online platforms have to make conscious efforts against internet crimes.[142]

The absence of clear guidance regarding the interpretation of Section 230 presents a daunting challenge. Section 230 has been subject to criticism for providing internet platforms with an avenue to shirk the responsibility of regulating potentially harmful content. Nevertheless, social media giants such as Twitter and Facebook have implemented additional measures to moderate potentially harmful content in the wake of the COVID-19 pandemic.[143] There were conflicting views following these online platform's regulatory intents; some argued that this was a positive while others suggested this moderation was an infringement on free speech.[144]

This note suggests that the reform of Section 230 should focus on defining the language of Section 230(c)(2) and limiting the use of immunity to incentivize platforms, through fear of legal liability, to remove content that is not protected by the First Amendment.[145] Efforts to remove or reform Section 230 without careful thought could potentially threaten free speech and innovation. Therefore, the reforms to Section 230 need to be precise and targeted. Section 230 of the CDA should absolutely not serve as a shield

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[141] Doe v. Backpage.com, LLC, 817 F.3d 12, 3 (1st Cir. 2016).
[142] Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?,* 68 CATH. U. L. REV. 597 (2019) https://scholarship.law.edu/lawreview/vol68/iss3/11.
[143] Meysam Alizadeh, Fabrizio Gilardi, Emma Hoes, Jonathan Klüser, Maël Kubli, & Nahema MarchaL, "Content Moderation As a Political Issue: The Twitter Discourse Around Trump's Ban," JOURNAL OF QUANTITATIVE DESCRIPTION: DIGITAL MEDIA, 5, https://doi.org/10.51685/jqd.2022.023.
[144] *Id.*
[145] The attempts to incentivize online platforms to regulate their content are often poorly conceived, as they focus on defining a point at which regulation can remove illicit content without limiting free speech. However, because each actor may interpret this line differently, it is unlikely to be successful. U.S. DEPT. OF JUST. "Department of Justice's Review of Section 230 of the Communications Decency Act of 1996," (2021).

for negligence or inaction by online platforms, but the language should still protect online platforms to an extent for the future of the Internet.

A. Defining "Good Faith" in Section 230(c)(2)

Under Section 230(c)(2), online platforms are required to act in "good faith" in order to receive immunity from liability over moderation-related issues.[146] At the time of Section 230's enactment, the Internet was in its infancy in the realm of politics, economics, and entertainment. The good faith clause in Section 230 requires online platforms to moderate its user-generated content, to the extent to which they are capable, to minimize harmful or illegal activities.

The primary controversy with Section 230's good faith standard is that platforms may possibly interpret their censorship abilities to include politically unpopular viewpoints.[147] The Department of Justice (DOJ) has proposed a set of guidelines that can be used to determine if an online platform has acted in "good faith" when moderating content."[148] The DOJ has also suggested a statutory definition of "good faith" that limits immunity for content moderation decisions.[149] In order to be defined as acting in "good faith," the decision must be made in accordance with the explicit terms of service and a reasonable justification, unless it obstructs law enforcement or puts others in immediate danger.[150] This framework is considered advantageous for all parties because it does not venture into specific content that platforms can or cannot censor beyond the First Amendment's protections and the platform's terms of services. Instead, it aims to define the process through which platforms can enforce their censorship policies in a fair and universal manner.[151] By defining "good faith," platforms can be encouraged to be more open and accountable to their users rather than relying solely on Section 230's wide protections. Essentially, it offers a way to evaluate whether a platform's moderation practices align with the newly defined principles of good faith and are consistent with the intended purpose of Section 230.

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[146] 47 U.S.C. § 230 (c)(2)(a) (1996).
[147] *See* U.S. DEPT. OF JUST., *Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations*, 6, (2020), https://www.justice.gov/media/1072971/dl?inline=.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*

One major problem with the "good faith" standard is the requirement for an "objectively reasonable belief" that content falls within certain categories.[152] The DOJ's proposed solution is to adopt a "reasonable person" standard, which aims to promote transparency and neutrality in content moderation.[153] However, this could lead to issues with how the platform interprets this standard, which could be easily manipulated. A better approach would be to focus on violations of the platform's terms of use, rather than a subjective standard. If the "good faith" standard is interpreted solely based on the platform's interpretation of it, it could result in unconstitutional outcomes, such as in the case of *Fair Housing Council v. Roommates.com, LLC*. In this case, a distinction between active and passive conduct was created when the court decided that Roommates.com would be liable for only certain actions in question.[154] To avoid such problems, efforts to reform Section 230 should use clear and measurable language instead of relying on ambiguous standards.

B. "Bad Samaritans" Exclusion from Immunity

In addition, the DOJ suggests reforming Section 230(c)(2) further by retracting the extent of the broad blanket of immunity.[155] The DOJ seeks to define "Bad Samaritans" as those who facilitate or promote illegal content.[156] This is an extremely advantageous approach as it would narrow the ability for bad actors to manipulate Section 230's immunity.[157] Additionally, it would limit the dangers of the moderator's dilemma from occurring in the regulation of harmful or illicit content.[158] This approach would address the constitutionality concerns in the *Fair Housing Council v. Roommates.com, LLC* case aforementioned by creating clear and transparent language for platforms to follow.[159]

Section 230's reform should focus on language that aims to limit the breadth of immunity defaulted to online platforms and place safeguards to ensure companies are not profiting off harmful content. Online platforms, such as Backpage, have been successful in arguing for Section 230's immunity.[160] By interpreting and giving immunity in this manner,

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[152] U.S. DEPT. OF JUST., *supra* note 148, at 6.
[153] *Id.*
[154] *Id.* Roommates.com was found to be liable for certain parts of their questionnaire but not for discriminatory housing requirements posted by third party users.
[155] *Id.*
[156] *Id.*
[157] U.S. DEPT. OF JUST. "Department of Justice's Review of Section 230 of the Communications Decency Act of 1996," (2021), https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996.
[158] *Id.*
[159] *Fair Hous. Council* 521 F.3d at 1174.
[160] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 4 (1st Cir. 2016).

Congress's intention to encourage self-regulation is undermined.[161] Courts should not extend immunity to intermediaries actively engaging in or blindly ignoring illegal activity. This contributes to the "safe haven" issue where online platforms become a breeding ground for hate speech and crimes.[162] It is imperative that courts do not conflate platforms that engage in abusive behavior with those that uphold virtuous principles, as the two should be treated as distinct entities. While distinguishing between platforms acting as "good" and "bad" Samaritans will be difficult to define, it is necessary to ensure that legal decisions are made with greater precision and accuracy, as the ramification of conflating the two can be severe.

Another area of concern regarding Section 230 pertains to its effectiveness in encouraging online platforms to remove defamatory and pornographic content.[163] This issue is exacerbated by the limited efforts made in this regard. One potential solution to this problem would be to amend Section 230 such that immunity is only granted to online platforms that can demonstrate they were not negligent or were unaware of illicit content, specifically defamation and pornography. This should be included in the DOJ's definition of "Bad Samaritans." The National Association of Attorneys General has proposed the removal of immunity from all criminal law cases, which can be viewed as an extreme approach.[164] Alternatively, a more moderate approach would involve removing immunity from cases involving extreme criminal content in which the online platform had prior knowledge. For instance, the platform should lose its immunity if it fails to take down a user or post that has been reported multiple times. In such cases, there should be no automatic protection provided to the platform. It would be up to the lawmakers to determine what content this would pertain, but it would more than likely include child pornography, terrorist propaganda, incitement to violence or hatred, threats of violence or harm, promotion of drug or human trafficking, and fraudulent schemes.

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[161] U.S. DEPT. OF JUST., *Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations*, 6 (2020) https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 [https://perma.cc/B3RW-SBKA].

[162] Danielle Citron, *Hate Crimes in Cyberspace,* HARVARD UNIVERSITY PRESS, 101 (2014).

[163] U.S. DEPT. OF JUST., *Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations*, 8 (2020) https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 [https://perma.cc/B3RW-SBKA].

[164] Mike Masnick, *More Details Emerge as States' Attorneys General Seek to Hold Back Innovation on the Internet*, Techdirt, (2013). https://www.techdirt.com/blog/innovation/articles/20130619/01031623524/more-detailsemerge-as-states-attorneys-general-seek-to-hold-back-innovation-internet.shtml [https://perma.cc/WM2X-V3DC].

The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 indicates that Congress is taking positive steps toward modifying Section 230.[165] A new Section 230(e) explicitly states that Section 230 does not "limit the ability of the states or victims to file lawsuits against websites for knowingly assisting, supporting, or facilitating online sex trafficking."[166] By removing the immunity protection provided under Section 230 in these instances, victims and states can seek legal recourse against platforms that knowingly facilitate online sex trafficking, thereby promoting greater accountability and deterring such illegal activities.[167]

Section 230 needs additional revisions that broaden the duty of care placed on online platforms. Following repeated notice of illegal content or harmful activities, those harmed should be able to seek legal recourse against online platforms for being complicit in the crime. Section 230's current breadth of immunity allows online platforms to ignore "speech-ignited" harms that they have the ability to control.[168] Furthermore, the extension of immunity to online platforms acting against the well-being of their users fundamentally undermines the purpose of Section 230 of the CDA.

Conclusion

In the words of Justice Richard Lewis:

> "Why a website alerted to impermissible content posted by a customer of its service may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?"[169]

The immunity granted by Section 230 of the CDA represents a privilege afforded to online platforms; however, it is often perceived as a guarantee. It is important to recognize that Section 230 can be revised without compromising the First Amendment or inhibiting internet use. In its current form, the broad scope of immunity has allowed online platforms to operate with little concern for the harmful content they facilitate or the welfare of their users. The courts' strict interpretation of broad immunity under Section 230 has led to an environment in which online platforms have the ability to neglect, or even tailor, their

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[165] 34 U.S.C. § 20301
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Doe v. America Online, 783 So. 2d 1010 (Fla. 2001).

platform to benefit from illicit content, while evading responsibility for any negative impact that may result.

This note suggests that Section 230's immunity has been increasingly abused. Intermediaries' abuse of immunity from liability has consequently created a "safe haven" for those who engage in hate speech and crimes on the Internet and have been successfully utilized by terrorist organizations to spread messages and organize in-person attacks.[170] Online platforms have the ability to regulate or remove the organizations from their platform without repercussion, yet often times, they do not.

It would be inaccurate to place the entirety of the blame for the issues stemming from online platforms on the platforms themselves, as the vague nature of Section 230 has undoubtedly contributed to the current state of affairs. Court cases such as *Jared Taylor et al v. Twitter, Inc.* have brought into question the extent to which online platforms should prioritize safeguarding free speech versus protecting the public from harmful or abusive online content.[171] Nevertheless, it is evident that Section 230 would benefit from a clearer and more objective definition of moderation that is capable of accounting for a range of viewpoints and perspectives.

Given the shortcomings of the current interpretation of Section 230 and its impact on the proliferation of harmful content on online platforms, two moderate proposals are suggested in this note. First, in order to provide a clearer and more objective standard for determining the responsibility of online platforms for content moderation, it is recommended that Section 230(c)(2) adopt a "reasonable person" standard that is grounded in the platform's own terms of use. By doing so, courts would be able to make a more informed decision without facing constitutional concerns, while also setting forth a clearer definition of moderation obligations. Secondly, it is proposed that Section 230(c)(2) include a definition of "Bad Samaritans" as those who knowingly facilitate or promote illegal content. The current automatic shield from liability has enabled some platforms to overlook harmful content, and this proposal would ensure that platforms are held accountable for their actions or inaction. By setting this standard, online platforms would be incentivized to take necessary measures to limit the spread of illegal content, without fear of liability for good-faith content moderation practices.

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[170] Danielle Citron, *Hate Crimes in Cyberspace,* HARVARD UNIVERSITY PRESS, 101 (2014).
[171] *Id.*

"Women, Life, Freedom" – Evaluating Social Media's Impact on Modern Day Social Movements and Democratization through International Human Rights Law

Anmol Chowdhary

Introduction

On September 13, 2022, Mahsa Amini, a twenty-two year old woman, was arrested and murdered by the Iranian morality police on allegations of breaking Iran's hijab dress code.[1] Mahsa Amini was detained, beaten, and killed by the morality police, acting as a pawn to the government's attempt of enforcing new policies that limit the rights of women.[2] The death of Mahsa Amini led to widespread rage in Iran and abroad, catalyzing protests and social movements in favor of strengthening women's rights and bringing light to the situation in Iran.[3] Particularly, Mahsa Amini has become a symbol for change, unifying women across Iran and the globe. Despite the tragedy of her death, apart from supporting the movements in Iran, the international legal community has acted minimally, calling into question the significance and effectiveness of large-scale social movements. However, on the other hand, the Mahsa Amini Iran protests represent a new wave of women-run movement organization through the evolving role and use of social media to motivate social change.

This note will analyze the effectiveness of large-scale protests and social movements by evaluating the human rights violations in the Mahsa Amini Protests in Iran in relation to international human rights law. Part I discusses social movements, while Part II focuses on

[1] Maggie McGrath, *Mahsa Amini: The Spark That Ignited A Women-Led Revolution*, FORBES (Dec. 6, 2022), https://www.forbes.com/sites/maggiemcgrath/2022/12/06/mahsa-amini-the-spark-that-ignited-a-women-led-revolution/?sh=7e6556285c3d.

[2] *Id.*

[3] *Id.*

the Arab Spring protests. Part III will describe and examine the Mahsa Amini protests in Iran. Finally, the note will discuss the connections between these movements and international human rights law. Ultimately, the Arab Spring and Mahsa Amini protests represent the power the media holds in catalyzing social movements, yet recognizes their often lacking durability. This clearly demonstrates the necessity for international legal institutions to play a stronger role in managing the momentum of social movements fighting for democracy.

I. Background on Social Movements and the Arab Spring

A. Social Movements

Social movements can serve as a method for individuals to catalyze change in a country through large-scale protest aiming toward social reform.[4] However, the effectiveness and strength of social movements vary in the international system. In order to understand how social movements operate, it is crucial to understand the role of civil society within the state. Particularly, civil society and the state operate under the international system, in which "change comes from above and below."[5] Within the international system, international pressure can be effective, as while "transnational human rights networks can rarely stop state repression, but human rights movements can use transnational networks to survive, save lives, delegitimize the state, and foster new mechanisms and institutions during a transition."[6] Because of this, it is critical that the international system develops stronger transnational frameworks to thus develop a more active role in addressing inequities and supporting social movements across the globe.

With social movements often being internally and domestically driven, the role of international courts must be evaluated to better understand how international human rights law should respond to human rights violations and consequent social movements. Legal mobilization operating within international human rights courts can create connections between social movements and the international playing field.[7] There are a few different ways to evaluate social movements, such as analyzing the structure of social movements and

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[4] Alison Brysk, *From Above and Below: Social Movements, the International System, and Human Rights in Argentina*, 26 COMPAR. POL. STUD. 259, 260 (1993).
[5] *Id.*
[6] *Id.* at 261.
[7] Julieta Lemaitre & Rachel Sieder, *The Moderating Influence of International Courts on Social Movements: Evidence from the IVF Case Against Costa Rica*, 19 HEALTH AND HUM. RTS. 149 (2017).

how they develop. This method recognizes the emergence, coalescence, institutionalization, and decline.[8] This approach describes the varying levels of involvement that individuals have throughout the advancement and engagement of a social movement with members of society.[9] Considering this process, the role of international courts is quite limited, due to movements initiating and catalyzing from local populations.

B. Background on the Arab Spring

The Arab Spring is often argued to be the first human rights revolution in the world, lending its importance to analyzing the effectiveness of social movements.[10] The Arab Spring is a series of protests, with a focus on democratization, that occurred across the Middle East and North Africa from 2011 to 2012. The majority of the protesters were "middle-class, educated, and underemployed, relatively leaderless, and technology-savvy youth."[11] Thus, it is important to recognize that the Arab Spring represents a different type of protest for the international community. Particularly, within international human rights law, the Arab Spring can be challenging to analyze because of the internal catalyzation of events and the limited presence of international institutions.[12]

This series of protests depicts significant regime change, in favor of democratization, across the Middle East and Northern Africa from 2011 to 2012.[13] The large-scale social movement produced varying violent and nonviolent uprisings across the Middle East and North Africa.[14] Despite this call for change, the lack of significant impact in many countries must be recognized.[15] There are diverse sets of thoughts when building conclusions surrounding the Arab Spring, some focusing on the notable role of activists, others on the role of authoritative leaders in these regimes, and finally an overall significant historical event.[16] When evaluating the role of authoritative leaders, most notably, it can be argued that the actual regime change in four Arab countries, based on the changing of

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[8] Elham Hoominfar, *Social Movements in Iran: How Well Does the Dominant Narrative Work?*, 47 CRITICAL SOCIO. 1313 (2021).
[9] *Id.*
[10] Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 GEO. UNIV. L. CENTER 714 (2013).
[11] Muzammil M. Hussain & Philip N. Howard, *What Best Explains Successful Protest Cascades? ICTs and the Fuzzy Causes of the Arab Spring*, 15 INT'L. STUD. REV. 49 (2013).
[12] *Id.*
[13] Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L. L. J. 2 (2013).
[14] Valentine M. Moghadam, *What is democracy? Promises and perils of the Arab Spring*, 61 CURRENT SOCIO. 393 (2013).
[15] Tarek Masoud, Jason Brownlee & Andrew Reynolds, *Tracking the "Arab Spring": Why the Modest Harvest?,* 24 J. OF DEMOCRACY 29 (2013).
[16] *Id.*

dictators, hardly represents the establishment of long-lasting democracy.[17] This said regime change occurred in the minority of countries part of the Arab Spring, and many scholars claim that there were no apparently significant conditions that allowed the establishment of democracy in some rather than others.[18] However, this regime change and ability to replace dictators can be deemed influenced by the variables of, "oil wealth (which endows the ruler with enough material resources to forestall or contain challenges) and the precedent of hereditary succession (which indicates the heightened loyalty of coercive agents to the executive)."[19] These factors, or their lack thereof, are claimed to have influenced the ability for domestic protests to overthrow authoritative dictators.[20] Particularly, these factors can be notable in relation to how an autocrat retains power, when these aspects are put into question due to their missing roles, some scholars claim that is when domestic protests can cause impact.[21] In regards to oil wealth, "oil wealth endows the dictator with sufficient means to stave off mass challenges."[22] Similarly, with strong hereditary systems of rule emplaced, loyalty is retained and managed by emplacing rule of power to family succession.[23] These political structures account for the extent to which some countries had greater tokened success than others during and as a result of the Arab Spring, but the role of activists and social movements in conjunction with these factors must be further considered and clarified.[24]

Additionally, when considering these social movements, it is crucial to recognize the role of gender, feminism and the power of women during these movements in a push for democracy.[25] The Arab Spring began with movements in Tunisia in 2010, then influencing activism in other states in the region.[26] There are multiple factors that potentially lead to democratization ranging from "a society's wealth; socioeconomic development; an educated population; a large middle class; civil society; civic culture; human empowerment and emancipative values; an homogeneous population; foreign intervention."[27] There are

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Masoud, Brownlee & Reynolds, *supra* note 15.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Moghadam, *supra* note 14.
[26] *Id.*
[27] *Id.*

exogenous and endogenous factors that can motivate democracies. Endogenous variables focus on the aforementioned socioeconomic factors, whereas, exogenous variables emphasize global or regional factors such as the use of the media or social networks.[28] With women often pushed to the outskirts of political and civil society, studies have found that "mass social movements for change show that women's rights movements are not 'identity movements' but rather democratic and democratizing movements."[29]

C. Social Movements during the Arab Spring

With the presence of social movements and uprisings in Tunisia and Egypt prompting the start of the "Arab Spring," many citizens of states, such as Morocco, followed in organizing movements to question authoritarian governments in power.[30] This is most notably seen in Morocco with the February 20, 2011 movement, in which a group of young Moroccans developed demonstrations.[31] When considering social uprising during this time, the changing nature of social movements must be considered, namely through social media and technology to heighten participation.[32] For this period, the rise of technology, specifically, with internet and social media platforms such as Facebook, played an apparent role in ousting political leaders, or organizing political movements at the very least, during the Arab Spring.[33] However, the role of social media acting as a factor of democratization is up to dispute, where some scholars are optimistic in its ability to organize movements effectively; whereas, others argue that technology can only do so much, as government repression will still occur to mitigate the success of movements and, broadly, democracy.[34] Regardless, it is fundamental to recognize that "online activities intersect and influence offline practices and vice versa, creating a continuous interaction which exerts an influence on both worlds." [35] Especially amongst young activists this intersection of the online and real worlds can allow for more effective movements and political participation with the ease of online organization and accessibility with in-person action and results.[36]

With Morocco being a highly democratic Islamic state, it is a notable case study

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[28] *Id.*
[29] *Id.*
[30] Lenie Brouwer & Edien Bartels, *Arab Spring in Morocco: Social media and the 20 February movement*, 27 AFRIKA FOCUS 9 (2014).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Brouwer & Bartels, *supra* note 30.

when evaluating the role of social movements powered by social media.[37] First, young Moroccans viewed the protests in Tunisia and Egypt as an example of uprisings they wanted to bring to their own country. The media was not controlled by the state, so movements were organized on platforms such as Facebook.[38] With politics in Morocco historically being controlled by older generations through corruption and bureaucratic systems, the young activists with the 20 February Movement were new in a number of ways from younger generations harnessing political inclusion and using technology as a means to do so.[39] Considering the network social media platforms create, the activists were "demanding freedom, equality, real democracy, social justice and dignity, issues that are related to an international human rights discourse. With the introduction of these new international terms, they were demonstrating that they rejected the old meanings of mainstream politics, but at the same time were trying to get access to an international public debate."[40]

This movement represented diverse groups coming together from disparate political affiliations, as well as included, "Islamist groups, veiled women, bearded men walking with young modern people in tight jeans, short sleeveless blouses, and girls without veils."[41] Following the demonstration, videos and additional online platforms were created to increase the movement's visibility and increase mobilization.[42] A fundamental aspect of this movement to consider is the lack of "a central formal leader," as it was organized through online meetings, with a purpose based on the concept of unity and being Moroccan.[43] The lack of a single leader represents how social media has transformed social movements, in that individuals can come together and collectively organize and operate, rather than a single individual managing the movement. However, in the case of Morocco, ultimately, despite the push for democracy, the movement did not achieve long-term success or significant change to the authoritarian regime due to violent government repression with police brutality and beatings.[44]

The role of social media can also be seen in a new light in Turkey, especially, in relation to feminist activism and movements, which worked toward legislative policy

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Brouwer & Bartels, *supra* note 30.
[43] *Id.*
[44] *Id.*

changes.[45] Here, the use of social media replaced traditional activist tools such as leaflets and posters in Turkey, which led to the development of online networks, established stronger activist movements.[46]

D. The Social Media Framework of the Arab Spring

The Arab Spring represents a wave of pro-democracy movements across the Middle East, which was especially catalyzed by the use of social media.[47] Particularly, a six-stage framework can be used to evaluate "contextual variables that were in play before the Arab Spring" and describe the political implications of the protests.[48] The framework was built using patterns seen with Tunisia and Egypt, which were able to maintain their peaceful protests.[49] The framework is described as follows:

> A preparation phase, involving activists' use of digital media across time to build solidarity networks and identification of collective identities and goals; an ignition phase, involving symbolically powerful moments which ruling elites and regimes intentionally or lazily ignored, but which galvanized the public; a protest phase, where, by employing offline net- works and digital technologies, small groups strategically organized on large numbers; an international buy-in phase, where digital media networks extended the range of local coverage to international broadcast networks; a climax phase, where the regime maneuvered strategically or carelessly to appease public discontent through welfare packages or harsh repressive actions; and finally, a follow-on information warfare phase, where various actors, state-based and from international civic advocacy networks, compete to shape the future of civil society and information infrastructure that made it possible.[50]

This framework is useful to understand the precursors to the successful social movements that followed in other countries of the region to staggering degrees of success and effectiveness.[51] When considering the series of social movements of the Arab Spring, the role of information infrastructure, including "mobile phones, personal computers, and social media," are crucial to consider.[52] Despite there being disparate motivating factors of the Arab Spring, people came together through technology and "were inspired to protest for many different and always personal reasons. Information technologies mediated that inspiration, such that the revolutions followed each other by a few weeks and had notably

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[45] Hande Eslen-Ziya, *Social Media and Turkish Feminism: New resources for social activism*, 13 FEMINIST MEDIA STUD. 860 (2013).
[46] *Id.*
[47] Hussain & Howard, *supra* note 11.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

similar patterns."[53]

E. Arab Spring and International Law

It is fundamental to evaluate the response of international legal institutions in the mass social movements of the Arab Spring. When considering international human rights law, it is important to consider the perception of this field and rights by Arab states, given the Arab states' "numerous instances of torture, executions, and the deprivation of freedom of expression and religious liberty" coupled with the lack of ground understandings of the present legal institutions.[54]

First, the difference between individual and collective rights must be discussed to understand the Arab analysis of international human rights law. Violations of collective rights describe a violation of abuses collective, literally, such as genocide.[55] The legal concept of self-determination is also an example of a collective right. Self-determination is complex describing "numerous instances of torture, executions, and the deprivation of freedom of expression and religious liberty," as well as it being deemed as *jus* cogens, "a peremptory norm of general international law."[56] Arab states have a strong emphasis on collective rights, but most notably self-determination.[57]

Despite this focus, the attitudes should not be over-simplified given the region's diverse cultures, as well as differing ideology and practices, which includes the different sects of Islam and the fact that not all Arabs practice Islam.[58] However, within institutions such as the Arab League, there are notable aspects such as the lack of initial inclusion of individual human rights in the League's doctrine, which contrasts with the United Nations (UN) Charter.[59] Yet, the Arab League did progress to include human rights language in 1982 with, "Article 1(2) of the revised Pact, which enumerates the purposes of the League of Arab states, states that one of these purposes is 'to guarantee to man his fundamental liberties, and to consider him as the goal of all political, economic and social action.'"[60] Despite this reference, the League lacks significant and adequately established legal frameworks such as

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[53] Hussain & Howard, *supra* note 11.
[54] Istvan Pogany, *Arab Attitudes Toward International Human Rights Law*, 2 CONN. J. INT'L. 367, 368 (1987).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 371.
[59] *Id.*
[60] Pogany, *supra* note 54, at 372.

an Arab Court of Justice or Arab Commission on Human Rights to protect these rights.[61]

A few principles can be evaluated when determining the role of international law with the Arab Spring. Particularly, the Arab Spring has,

> reaffirmed predominant patterns of human expectation and claims occurring worldwide regarding individual dignity and worth; self-determination of peoples; human rights with respect to relatively free and genuine participation in governmental processes and the standard of legitimacy for governments; democracy as a universal core value; and the right of rebellion or revolution and the concomitant right of a given people to seek self-determination assistance.[62]

These elements can help explain the relevance of international law with social movements. Human dignity is a fundamental trait of universal human rights.[63] This value is engrained in the UN's Universal Declaration of Human Rights, where "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom."[64] Within the Arab Spring, this right was argued to be violated because of the constraints on the political rights that individuals deserved access to.[65] The right to self-determination is held by the people of the State to and facilitated through the UN, in which a goal "is to develop friendly international relations based on respect for the 'principle of equal rights and self-determination of peoples.'"[66] This recognizes that individuals have a right to be politically active in their government with an equal set of rights.[67]

In addition to these values, the right to democracy as a core value is important to continue to establish, which recognizes the international community's commitment to safeguard populations, while individual states, "[have] the responsibility to protect [their] populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[68] With the Arab Spring, Libya represents a State that violated these conditions, especially of self-determination and democracy as a core value because of its denial and shutdown of Libyan protests, which was done through violent means.[69] The last two principles of

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[61] *Id.* at 53, 373.
[62] Paust, *supra* note 13.
[63] *Id.*
[64] *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).
[65] Paust, *supra* note 13.
[66] U.N. Charter art. 1, 2.
[67] Paust, *supra* note 13.
[68] *Id.*
[69] *Id.*

unlawful political oppression and the right of rebellion or revolution are crucial to recognize in terms of human rights law. Unlawful political repression includes any act of the State to withhold political power or say from its people. With the Arab Spring, this oppression was clearly visible with illegitimate regimes restricting media coverage or civic duties through violent undertakings.[70] Finally, "rights of revolution and self-determination are rights of the people; therefore, they are rights that are often exercised by a majority or in their name against an oppressive minority elite."[71] Ultimately, these fundamental expectations were being challenged, which were being fought for during the Arab Spring.[72]

When evaluating the Arab Spring, there are a few different theories developed regarding its analysis. The first theory, "describes the Arab Spring as a "pristine" popular movement," similar to the Iranian Green Movement.[73] The second theory focuses on the Arab Spring as a being reform controlled by the "greater powers" such as the United States.[74] Finally, the third theory is described as, "Here Comes Everybody," in which, "social media, the rise of the Muslim Brotherhood, and pan-Arab satellite television such as Al-Jazeera have empowered populations and made simultaneous revolutions possible in disparate contexts and at a rapid pace."[75]

Yet in these three theories, the obligation of international institutions regarding their role in social movements is relatively ambiguous. As many scholars argue that it was the first human rights revolution in the world, the Arab Spring is a helpful case to evaluate when evaluating the role of international legal institutions.[76] Initially, many international institutions and frameworks seemed irrelevant to the Middle East due to the nature of the authoritative regimes.[77] Hence, this creates an interesting relationship, where on one hand individuals of states look to institutions for support to maintain traction for movements pushing toward democratic ideals, yet these institutions are not always fully dedicated or equipped to make decisive actions. Therefore, amidst the protests occurring in the Middle East, when the UN Security Council "referred the situation in Libya to the ICC and when

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[70] *Id.*
[71] *Id.*
[72] Brooks, *supra* note 10.
[73] Hannibal Travis, *Wargaming the "Arab Spring": Predicting Likely Outcomes and Planning U.N. Responses*, 46 CORNELL INT'L. L. J. 75, 76 (2013).
[74] *Id.*, at 76.
[75] *Id.*
[76] Brooks, *supra* note 10.
[77] *Id.*

the Libya intervention was justified in terms of the international "responsibility to protect" (R2P)," the validity of legal institutions appeared to be improving.[78] The R2P was introduced by the Canadian International Commission on Intervention and State Sovereignty (ICISS).[79] The ICISS recognized the R2P as a Security Council authorization with "measures short of military force, from humanitarian aid to economic sanctions. The use of force to protect populations should be a last resort."[80] But, this understanding of R2P is still being disputed, especially whether a Security Council authorization is necessary.[81]

Prior to this moment, international institutions had little value to social movements, let alone supporting a series of movements, as seen with the Arab Spring.[82] This international recognition required the members of the Security Council to address the situation in the Middle East, in which they also "referred Libya to the International Criminal Court but provided no additional resources to assist the already-overwhelmed prosecutor with his investigations, making effective ICC actions difficult."[83] In the situation of Libya, NATO came to the population's assistance, but the international institutions at play showed little support for the populations' resistance to authoritarian governments across the Middle East.[84] However, the introduction of "R2P" applied, "may reflect a substantial shift in the international consensus on sovereignty, intervention, and the use of force."[85] The idea of sovereignty was greatly questioned with R2P, but the P5 of the Security Council have come to terms, "that sovereignty implies a legal duty to protect civilian populations, and that states that fail in this duty can no longer assume a sovereign right to be free of outside interference, including the use of force."[86] R2P allowed for international legal institutions to take a greater role in resolving international disputes, as well as being able to assist populations at risk or support relevant ongoing social movements for instance.

II. Iran and Ongoing Mahsa Amini Protests

As a result of the death of Mahsa Amini, protests have erupted across the streets of

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Brooks, *supra* note 10.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

Iran.[87] These protests have ignited a new fuel for change in Iran; however, this is not the first significant social movement in Iran.

A. Historical Social Movements in Iran

There are several important social movements to consider in Iran's history such as the Islamic Revolution of 1979, the student protests of 1999, and the Iranian Green Movement.[88] When examining social movements, the variety of theories of the causes for movements must be recognized, in which grievances, rooted in dissatisfaction, are a popular rationale.[89] Yet, over time, this rationale evolved with resource mobilization (RM), describing that, "social movements only occur when social movement organizations (SMOs) and activists can accrue enough resources for creating and sustaining a movement," creating political opportunity structures and political process theory.[90]

When evaluating the Islamic Revolution of 1979, the period of international change and instability through revolution and civil war must be recognized.[91] However, during this period is when the Islamic Republic's regime was established.[92] The causes for the Revolution can be described through structural factors, such as "economic grievances, political opportunities, and uneven development," Shi'a ideology, and a combination of the two facilitated by more external factors such as the greater role of the media.[93] Particularly, in regards to structural factors, the land reform program is notable, in which, ideally land was re-distributed to peasants, but was not successfully managed or carried through, leading to grievances rooted in government discontent.[94] Similarly, "uneven development," despite economic and cultural modernization, the regime lacked significant democratic changes, causing similar resentment.[95] The next factor of Shi'a ideology can also be perceived as fundamental due to the regime's repression through using Muslim Shi'a principles as a tool to control, leading to revolution.[96] Finally, the last theory anticipates both prior theories

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87 Farnaz Fassihi & Cora Engelbrecht, *Tens of Thousands in Iran Mourn Mahsa Amini, Whose Death Set Off Protests*, NEW YORK TIMES (Oct. 26, 2022), https://www.nytimes.com/2022/10/26/world/middleeast/iran-protests-40-days.html.
88 Bashir Tofangsazi, *From the Islamic Republic to the Green Movement: Social Movements in Contemporary Iran*, 14 SOCIO. COMPASS. 1 (2020).
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 Tofangsazi, supra note 88.
94 *Id.*
95 *Id.*
96 *Id.*

playing a role in conjunction with the role of the media and culture such as narratives and poems depicting anti-regime sentiments.[97]

Additionally, the role and participation of women in the Revolution must be evaluated.[98] Despite participation, many argue that women lost significant rights as a result of the Revolution. [99] Similarly, "although the Shah did make legal reforms in favor of women's rights, he did not allow for an independent feminist movement to flourish," and "women's rights were largely ignored by most, if not all, of the revolutionary groups."[100] Yielding stricter codes such as women's dress code, protests pushing reform have followed as well.[101]

The Iranian Revolution was followed by many social movements questioning the regime's rule.[102] The "the reform movement," sought to implement greater "rule of law, democratization, opening of the political sphere, and appreciation of ethnic minorities' rights," demonstrations once again hit the streets initially on a the University of Tehran's campus, thus yielding the student protests of 1999, which were motivated by the forceful termination of a reformist newspaper, *Salam.*[103] An important aspect to consider with the student protests is the unification present amongst demonstrators, motivated by "their perception of political opportunities and what they viewed as the solution to bringing about their desired change."[104]

Finally, the Iranian Green Movement represents another social movement that motivated significant public involvement.[105] Motivated by the threat of election manipulation of the tenth Iranian election in 2009, protestors took to the streets to voice their opposition, which was met with regime repression.[106] The election had hopes of bringing, "Ahmadinejad's belligerent government" to an end, but failed to do so due to government influence in the election.[107] In particular, young activists pushed for reform beginning with the "where is my vote?" initiative through non-violent protests demonstrating discontent for

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[97] *Id.*
[98] *Id.*
[99] Tofangsazi, supra note 88.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Tofangsazi, supra note 88.
[106] *Id.*
[107] Omid Payrow Shabani, *The Green's Non-Violent Ethos: The Roots of Non-Violence in the Iranian Democratic Movement*, 20 CONSTELLATIONS 1 (2013).

the regime and defending their rights.[108] Not only does the Green Movement represent a large social movement of Iran, but is also deemed as the "Twitter Revolution," representing its strong presence on social media platforms and the online sphere as a whole, unifying the movement's participations and supporters.[109] However, the regime installed greater internet management following the Movement, leading to internet repression by the regime.[110] Focusing on structural factors, the Green Movement can be said to have been motivated by economic grievances, in addition to the election.[111]

In addition to these movements, several other protests are important to consider such as the environmental movements and upheaval, representing the challenges faced in enacting regime action or reform.[112] Social movements have been a part of Iranian history and continue to have a presence.

B. Mahsa Amini Protests

The recent protests in Iran represent a new wave of social movements. However, the presence of social movements in Iran is far from new. Particularly, the late nineteenth century to 1980s saw a period of social movements in Iran centered around, "women, workers' associations, Islamic groups and organizations, national minorities, students and intellectuals."[113] A few particularly important protests include the "tobacco protest of 1890, the constitutional revolution (1906 to 1911), the oil nationalization movement of 1951, the secular left, religious and nationalist movements of the 1960s and 1970s, the revolution of 1979 and the foundation of the reform movement in the late 1980s."[114] These movements represent the history of protesting in Iran, giving way to the more recent protests. Despite these protests serving as responses to changing social standards and a shift toward democracy, it is also important to note that social movements were, "a product of modernity in the Middle East, as elsewhere in the world."[115]

The current ongoing Mahsa Amini protests share both similarities and differences with prior social movements in Iran. The Mahsa Amini protests represent a new wave of protests motivated by women. With the death of Mahsa Amini on September 16, 2022 at

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[108] *Id.*
[109] Tofangsazi, *supra* note 88.
[110] *Id.*
[111] *Id.*
[112] *Id.*.
[113] TARA POVEY, SOCIAL MOVEMENTS IN EGYPT AND IRAN 40 (2015)
[114] *Id.*, at 40.
[115] *Id.*, at 40.

the hands of the Iranian Morality Police "for allegedly violating the Islamic Republic's strict hijab," a social movement was sparked for increased rights and freedoms for women in Iran.[116] The protests have spread across the country and had immediate strong public support.[117] Chants of "Women, Life, Freedom" and "We will fight and take Iran back," spread across social media.[118] Protesters fighting for rights were met with violence from the regime through tear gas and beatings.[119]

Despite a strong government crackdown on these protests challenging the regime, demonstrations and protests remain active. With the regime's dwindling stability due to public unrest, the Supreme Leader Ayatollah Ali Khamenei relies on the repressive response of arrests and killings to silence the public.[120] In spite of the protests' origins, the activists are now "calling for the end of Iran's cleric-led regime."[121]

These protests represent a unique social movement on the rise in Iran. Being women-organized with no clear leadership maintaining its momentum, it leaves questions regarding the built-up motivations for this movement, as well as its durability.

C. Women in Social Movements

An aspect of the Mahsa Amini protest that is imperative to consider is the role of women in this social movement. Despite women participating in prior social movements, such as the Revolution in 1979, the Mahsa Amini protests represent a movement led by women for women.[122] Before evaluating the significance of this women-focused movement in Iran, it is fundamental to evaluate the past involvement of women in reform as well. In regard to the Revolution of 1979, women supported the Revolution, despite losing fundamental rights and increased restrictions on their way of life.[123] Particularly, "Women played a contradictory role during and after the 1979 revolution. They participated in the revolution against the Shah's regime – which boasted to have transformed women's legal status and social rights – and they supported clerics – who had for decades actively opposed social reforms such as uniform education, women's enfranchisement, new family laws and

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116 Richard Horton, *Offline: Women, life, freedom—and Twitter*, 400 SCIENCEDIRECT 1090 (2022).
117 Fassihi & Engelbrecht, *supra* note 87.
118 *Id.*
119 *Id.*
120 Peter Kenyon, *Iran demonstrators vow to continue protests despite ongoing crackdowns*, NPR (Jan. 6, 2023), https://www.npr.org/2023/01/06/1147376644/iran-protests-crackdown-mahsa-amini.
121 *Id.*; Fassihi & Engelbrecht, *supra* note 87.
122 Haideh Moghissi, *Women, Modernization and Revolution in Iran,* 23 REV. OF RADICAL POL. ECON. 205 (1991).
123 *Id.*

abortion rights."[124] However, there were multiple groups of women supporting this movement such as educated women of the middle class with no objectives of increasing women's rights during the movement, urban and lower class women hoped for way of life changes, and the last group did not support the Shah's new policies and were acting against these changes.[125] When women organized social movements in 1979, the women of the educated middle class were part of the movement due to their, "fight for democracy and national liberation," due to their discontent with, "the events in the aftermath of the revolution and by the fundamentalists' attempts to reverse the gains of women during the pre-revolutionary era."[126] These social movements catalyzed the development of women's organizations, but did not have long-lasting impact with only the brief withdrawal of the regime.[127] Even prior to the Revolution, the modernization of socioeconomic practices should have brought forth greater opportunities for women, yet women were outcasted and isolated on many fronts such as in family life, through their education, in the workplace, and in the political arena.[128] Despite a movement for women's rights following the Revolution, there was not significant reform due to its conflict of interest with the Islamic regime and strict fundamentalist policies.[129] Additionally, the movement did not yield long-term stability as,

> The lack of a feminist political culture and organizational experience meant that women activists in post-revolutionary Iran, some of whom led women's organization, could not adequately deal with women's spontaneous protests in defense of their rights, nor mobilize masses of women to successfully protect democratic rights and civil liberties under the fundamentalists' assaults.[130]

Ultimately, these challenges, facilitated by the ongoing threat of government repression, led to the weak and eventual collapse of the organized movements.[131]

III. International and Human Rights Law on Mahsa Amini Protests

A. Social Movements

Social movements have an important role in international human rights law and are

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Moghissi, *supra* note 122.
[129] *Id.*
[130] *Id.*
[131] *Id.*

able to motivate changes to better human rights and practices.[132] Particularly, social movements have paved the way for international human rights laws between civil society actors and state actors.[133] With the increasing role of human rights legal infrastructure, some states have ratified treaties to support international human rights law, whereas others have been hesitant to do so.[134]

Despite this, it can be said that, "social movements served as de facto enforcement mechanisms to improve local practices."[135] Social movements are said to have this impact in society due to the role of globalization in creating political opportunity and the significance of implementing law on social movements.[136] Political opportunities can be described as, "the relative openness or closure of the institutionalized political system, the stability or instability of elite alignments, the presence or absence of elite allies, and the state's capacity and propensity for repression."[137] In terms of the institutionalized political system, "international human rights law has given social movements access to many new venues for contestation."[138] This can be described as different authorities such as the UN Human Rights Committee or more regional institutions.[139] The second factor of stability or instability of elite alignment or absence of elite allies describes how, "Social movements for human rights benefited from competition between the two superpowers over which side had the more legitimate social system," which can particularly be seen with the Cold War.[140] Finally, "elite allies at the United Nations or in powerful foreign governments have helped social movements for human rights," as the strength of the social movement is able to flourish with support.[141]

There are several factors used to indicate the level of effectiveness social movements may have, including the level of financial support, resources, human networks such as international forums, legal expertise, and activist networks.[142] Additionally, the manner in which social movements are presented to gain support and represent the "problem/injustice

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132 Kiyoteru Tsutsui, Claire Whitlinger & Alwyn Lim, *International Human Rights Law and Social Movements: States' Resistance and Civil Society's Insistence*, 8 ANN. REV. OF L. AND SOC. SCI. 367 (2012).
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 Tsutsui, Whitlinger & Lim, *supra* note 132.
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*

and proposes solutions," defined as framing, is fundamental in effective mobilization.[143] Finally, culture and identity is crucial to developing a strong social movement in that, "rights become legal symbols that generate solidarity and identity."[144] With these tools, effective mobilization is able to be met with social movements.

However, the challenges that come with organizing must also be addressed which include aspects such as professionalization, selective mobilization, and overextension.[145] The rise of professionalization describes how "the institutional context of international human rights circumscribes civil society actors' engagement with international laws and can direct social movements in more professionalized and institutionalized directions," which can lead to a loss or reduced ability of meeting the movement's initial interests and agendas."[146] Second, selective mobilization relates to the idea that, "those causes that rank high in priority for powerful social movement organizations are more likely to see mobilization around them while issues that at- tract support from smaller groups can fall by the wayside," with causes related to civil and political realms being more effective in mobilization than ones focused on human rights violations or economic and social rights.[147] Finally, overextension yields social movements expanding beyond their bandwidth, as, "in promoting rights issues, activists can overreach their limits and face some backlash."[148] These aspects of the interaction between international human rights law and social movements describe the tools social movements require to be effective and potential obstacles they may face.

B. Analyzing the Mahsa Amini Social Movements

First, it is fundamental to evaluate the effectiveness of these social movements. The Iranian government has responded to the ongoing protests in a repressive manner with "alleged arbitrary arrests and detentions, gender-based and sexual violence, excessive use of force, torture, and enforced disappearances."[149] Yet by using the social movement framework, there are interactions occurring between civil and state actors, despite these interactions being rooted in violence. In terms of the political opportunity presented, it is fundamental to recognize the role of "the relative openness or closure of the institutionalized

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[143] *Id.*
[144] Tsutsui, Whitlinger & Lim, *supra* note 132.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Press Release, Special Procedures, Iran: Crackdown on peaceful protests since death of Jina Mahsa Amini needs independent international investigation, say UN experts, UN Press Release (Oct. 26, 2022).

political system, the stability or instability of elite alignments, the presence or absence of elite allies, and the state's capacity and propensity for repression."[150] Here, it is still fundamental to recognize that the Iranian regime is actively working against the social movement with objectives or "propensity" of repression. However, this globalization has allowed the social movement to move forward, fueled by the public's discontent with the regime's repressive actions, and can be seen with some of the factors of an effective social movement, which are financial support and resources, human networks, framing, and culture and identity.[151] Despite little information regarding the resources or finances available for the demonstrations, the protests can be evaluated on the ground of human networks, framing, and culture. Particularly, in terms of human networks, the media has played a significant role in mobilizing these protests, as well as drawing international attention.

In terms of human network, the media has played a fundamental role in the Mahsa Amini protests by fueling discontent and anger.[152] Protesters across Iran have been displaying their demonstrations online to continue passion for the movement and document progress.[153] However, the Iranian government has taken note of the crucial role of the internet, which has led to the regime repressing internet access through blackouts and blocking social media platforms to limit access to information.[154] In addition to this, the protests have gained significant international traction with organizations such as various media outlets channeling press as well as international institutions such as the UN.[155] Thus, it is fundamental to recognize that little action has been taken by international legal institutions to address the situation in Iran, despite notable international importance.

With framing and culture, the Mahsa Amini protests have unified Iran bringing forth knowledge of the injustice present. Particularly, through framing the protests as a response to the unjust death of a young woman Mahsa Amini, not only are the protests recognizing the injustice done to Mahsa Amini, but are also recognizing the significant challenges facing women in Iran. Additionally, it is crucial to recognize what the protests have expanded to.

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150 Tsutsui, Whitlinger & Lim, *supra* note 132.
151 *Id.*
152 Weronika Strzyżyńska, *Iran blocks capital's internet access as Amini protests grow*, THE GUARDIAN (Sept. 22, 2022), https://www.theguardian.com/world/2022/sep/22/iran-blocks-capitals-internet-access-as-amini-protests-grow.
153 *Id.*
154 *Id.*
155 Press Release, Special Procedures, Iran: Crackdown on peaceful protests since death of Jina Mahsa Amini needs independent international investigation, say UN experts, UN Press Release SP/**press release number (Oct. 26, 2022).

In fact, "the compulsory hijab has become the symbol of gratuitous state oppression bearing down most directly on Iran's women."[156] These protests have inspired broad participation surrounding the system of repression motivating all Iranians of different backgrounds to come together to fight for Mahsa Amini and justice.[157]

However, despite these factors representing success and effectiveness of the social movement, the durability is left in question. Most notably, it is fundamental to realize that these protests and this movement have no leader and no centralized leadership.[158] The lack of leadership is in relation to the success and reliance on technology. These protests were fueled by social media platforms creating greater unity and interconnectedness, along with resentment, but the response has been just the same: a unified response, with no set timeline in check.[159] Considering the 1979 Revolution's similar lack of "a single charismatic leader nor a centralised structure, and lacks the characteristics typically associated with successful insurgencies," the success of this movement is unknown with an unfortunate fallout likely.[160]

C. Connections Between the Arab Spring and Mahsa Amini Protests in Terms of The Media

The role of the media must be explored when evaluating the connections between the Arab Spring in relation to the Mahsa Amini protests. During the Arab Spring, the example of Moroccan students interacting in both the online and offline worlds to invoke movements is particularly important.[161] With the Arab Spring demonstrating an initial use of technology to motivate political participation, the Mahsa Amini protests represent an advancement in the harness of media for political movements. However, the dynamic and proportion of offline and online interactions must be changed to attain more effective results, as both movements lacked a central leadership. Thus, the centralization of leadership is necessary to maintain a movement's durability, which can be mediated with a redistribution of offline to online interaction time.[162] Additionally, with the Arab Spring, scholars were unclear of the role of social media as being a tool of democratization.[163] Despite the lack of democratization in Iran, following the Mahsa Amini protests, it can be claimed that social

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156 Mahsa Rouhi, *Women, Life, Freedom in Iran*, 64 SURVIVAL 193 (2022).
157 *Id.*
158 Karl Vick, *With Regime Strongholds Joining Protests, Iran's Leaders Appear Nervous*, TIME (Oct. 11, 2022), https://time.com/6221004/iran-protests-mahsa-amini-change/.
159 Rouhi, *supra* note 156.
160 *Id.*
161 Brouwer & Bartels, *supra* note 30.
162 *Id.*
163 *Id.*

media is a tool for effective social movements.

D. Connections between Arab Spring, Mahsa Amini Protests, and International Legal Frameworks

Most notably, the Mahsa Amini protests do represent a similar response to the lack of human rights expectations that were fought for during the Arab Spring. Through evaluating international law principles, it is apparent that the Arab Spring and Mahsa Amini protests lack basic human rights expectations which include, "individual dignity and worth; self-determination of peoples; human rights with respect to relatively free and genuine participation in governmental processes and the standard of legitimacy for governments; democracy as a universal core value; and the right of rebellion or revolution and the concomitant right of a given people to seek self-determination assistance."[164] In terms of individual dignity and worth, the Mahsa Amini protests began due to the inequitable treatment of women and men, specifically the strict regulations imposed on women, which, coupled with government repression, which led to the death of Mahsa Amini.[165] With protests flooding the streets and individuals being met with violent government opposition, the rights of self-determination and government participation, as well as the right of rebellion are put into question.[166] The lack of democratic ideals is met by the regime's authoritative reactions to public dissent.

Despite the clear denial of human rights expectations, international legal institutions have not responded to the Mahsa Amini protests. With the Arab Spring, Libya was eventually recognized by the UN and the International Criminal Court with the R2P.[167] However, actions of this scale have not been induced for Iran and the activists of the Mahsa Amini protests. No international legal institution has taken to significant response to protect Iranian human rights. Despite R2P being a debated and often controversial principle, the International Criminal Court, and other comparable institutions, must develop a more effective intervention protocol to call upon the use of R2P to ensure international social justice objectives are met and upheld.

E. Efficacy for Democratization

When considering what the protests mean for society, it is first fundamental to

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[164] Paust, *supra* note 13.
[165] Bill Chappell & Joe Hernandez, *Why Iranian women are burning their hijabs after the death of Mahsa Amini*, NPR (Sept. 21, 2022), https://www.npr.org/2022/09/21/1124237272/mahsa-amini-iran-women-protest-hijab-morality-police.
[166] Ellen Loanes, *Despite its brutal tactics, Iran's regime fails to contain mass protests*, VOX (Nov. 21, 2022), https://www.vox.com/2022/11/19/23466689/brutal-suppression-iran-regime-mass-protests.
[167] Brooks, *supra* note 10.

recognize what is considered democracy. Democracy can take different forms, such that it can be described as "a type of political system in which power alternates through regular, competitive elections, and citizens enjoy certain basic rights" or "a political regime in which citizens enjoy an array of civil, political, and social/economic rights that are institutionalized, and citizens participate through the formal political process, civil society, and social movements."[168] Active and unrestrained civic engagement is a fundamental aspect of democracy.

There are multiple routes a state can take to democratize including political pacts, civil and military elite breakdowns, international pressure, and grassroot organizations' motivation and pressure.[169] To effectively democratize institutionally, countries must go through phases of liberalization, transition, and consolidation. First, liberalization describes the active pressures against the government pushing for change.[170] Next, transition represents a period that moves away from a, for instance, authoritative government with pacts and negotiation through creating institutions. Finally, consolidation describes the presence of democracy or the collapse of said democracy in favor of the previous regime.[171] It is imperative to consider that pushing for democracy also includes the presence of a few structural factors such as "socioeconomic development, modern social classes, and resources for coalition-building and mobilization."[172] Thus, for a strong democracy, there must be an active civil society with public participation including women.[173]

In fact, women are fundamental to pro-democracy movements. This is significant as movements fighting for women's rights are fundamentally representations of democratic engagement and democracy as a whole.[174] This is because "women's movement activism and advocacy – whether in the form of social movements, transnational networks, or professional organizations – contribute to the making of vibrant civil societies and public spheres, which are themselves critical to sustaining and deepening democracy."[175]

When considering the significance of women in pushing change in favor of democracy, four factors must be evaluated to predict the degree of efficacy of

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[168] Moghadam, *supra* note 14.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Moghadam, *supra* note 14.

democratization: "pre-existing gender roles, or women's legal status and social positions prior to the revolutionary outbreak/democratic transition," "the degree of women's mobilization, including the number and visibility of women's organizations and other institutions," "the ideology, values, and norms of the movement or new government," and "the new state's capacity and will to mobilize resources for rights-based development."[176] Thus, not only do women play an important role in initiating democracy, but their ability to be active citizens in society and have access to democratic rights is critical to the preservation of democracy.

In terms of the Mahsa Amini protests, it is fundamental to recognize that not only were women part of these social movements, but they organized large-scale protests, that represented a push toward democracy in Iran.[177] Following the democratization framework, liberalization, transition, and consolidation will be evaluated.[178] In terms of liberalization, it can be said that the liberalization has taken place in the form of the Mahsa Amini protests.[179] Liberalization can be evaluated through using the six-stage framework from Egypt and Tunisia that describes precursors needed for effective social movements and will be applied to the Iranian protests to determine the likelihood of its success.[180]

Using the framework's points of preparation, ignition, climax, and information warfare phases, the Mahsa Amini protests can be analyzed.[181] It is first important to consider the nature of how these protests arose: the death of Mahsa Amini. The movement began with the population's disapproval of the young woman's murder, but it also transformed into having broader significance in terms of women's rights.[182] Therefore, it is difficult to recognize a preparation phase for the protests. Mahsa Amini's funeral took place on September 17, 2022, with the first protests beginning afterwards in the Kurdistan province. However, the protests picked up relevance and importance quickly, moving across Iran and in Tehran.[183] Despite a lack of initial preparation, the role of social media is deeply present as it increased the speed at which information of Amini's death and ongoing protests fled

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[176] *Id.*
[177] Kenyon, *supra* note 120.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] Hussain & Howard, *supra* note 11.
[182] Kenyon, *supra* note 120.
[183] Anisha Kohli, *What to Know About the Iranian Protests Over Mahsa Amini's Death*, TIME (Sept. 24, 2022), https://time.com/6216513/mahsa-amini-iran-protests-police/.

the digital sphere and soon thereafter the streets.[184] The next phase of ignition could be argued to have taken place prior to preparation for this movement. The death of Mahsa Amini clearly catalyzed this moment. The protest phase quickly followed her death and represents the unique collision of digital and physical spaces, reducing the time to organize and take to the streets of Iran. As the social movements spread across mass media platforms, the international community began to grow more aware of the protests in Iran, leading to the international buy-in phase. The next phase of the climax is unfortunately leaning in favor of the government due to its repression, which reduces the potential for true policy success. In response to the protests, the Iranian government has continued to incite violence to shut the protests down and induce fear in the population.[185] Therefore, the ability for the movement to reach the last phase of follow-on information warfare is dwindling in terms of its projected degree of success. [186]

Because of the lack of complete fulfillment of liberalization, it is challenging to evaluate transition and consolidation to describe the future of democracy in Iran. Despite protesters making their desires for greater gender equality known to the regime as an attempt to strengthen civil society, the Iranian regime appears to have little interest in making changes or succumbing to civic pressures.[187] With the lack of positive change the government has made and its response of violence, the movements unfortunately do not appear to be yielding significant success. Therefore, it is important to recognize the unification of the Iranian population because of this social movement, which creates the possibility of future demonstrations against the regime and the potential for change.

Conclusion

The Mahsa Amini protests represent a change in social movements due to their women- and media-driven nature. However, this new wave of protests in Iran also has striking similarities to the Arab Spring. Despite successes in terms of maintaining a media presence, the durability of the Iran protests is left largely unknown, especially considering the lack of any centralized organization to manage protests and reform.[188] This leaves in

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[184] Sarah Baniak et al., *Iranian exile wounded in demonstrations against regime speaks out*, ABCNEWS (Feb. 1, 2023), https://abcnews.go.com/International/iranian-exile-wounded-demonstrations-regime-speaks/story?id=96792022.
[185] *Id.*
[186] Hussain & Howard, *supra* note 11.
[187] *Id.*
[188] Kenyon, *supra* note 120.

question the true significance of the media in mobilizing these movements and sustaining them. Given the Arab Spring's movement and the Mahsa Amini protests growth through harnessing new and expanding technology, these evolving movements must be supplemented with the response of international legal institutions and stronger internal structure to maintain their momentum and make long-standing reform. Thus, social movements must be further recognized by legal protocols such as R2P to keep regimes accountable and provide support to these technology and media-centered movements in managing their progress to retain international human rights expectations for all.

Cultural Appropriation: What Intellectual Property Law Does and Does Not Cover

Shruti Vadada

Introduction: The Current Legal Opinion of Cultural Appropriation

Cultural appropriation is a widespread, historical, and harmful issue that has been long-standing nationally and globally. Appropriation, as defined by the GQ magazine, is "taking something from a less-dominant culture in a way its members find undesirable and offensive – so that its heritage is misused by those in a position of privilege."[1] Many people tend to confuse what appropriation entails in comparison to what is simply cultural exchange. Writer Maisha Z. Johnson says that "there [is] no power imbalance involved in an exchange…those who tend to see appropriation as exchange are often the ones who profit from it."[2] The issue of cultural appropriation has been recognized socially and in terms of communities. However, the legality of cultural appropriation is yet to be identified and acknowledged. Culture itself cannot be owned, so instead, this note will focus on cultural products. Cultural products are "intangible creations of a cultural group [which] are 'accidental' property in the sense that neither commodification nor reduction to ownership serves as the primary impetus for their development."[3] They are also known as cultural heritage, patrimony, and antiquities and are seen as the embodiment of a community's spirits and self-expression.[4]

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[1] George Chesterton, *Cultural appropriation: everything is culture and it's all appropriated*, BRITISH GQ (Sept. 1, 2020), https://www.gq-magazine.co.uk/article/the-trouble-with-cultural-appropriation.
[2] K. Tempest Bradford, *Commentary: Cultural Appropriation Is, In Fact, Indefensible*, NPR (June 28, 2017), https://www.npr.org/sections/codeswitch/2017/06/28/533818685/cultural-appropriation-is-in-fact-indefensible.
[3] Susan Scafidi, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 24 (2005).
[4] *Id.*

The law does not protect a majority of cultural products. They are considered "legally invisible and… their appropriation is largely unregulated."[5] The Centre for International Governance Innovation published an article by Brigitte Vézina called "Cultural Appropriation Keeps Happening Because Clear Laws Simply Don't Exist."[6] This note expands on how there are no legal definitions that have been set for the term cultural appropriation and no effective laws to stop cultural appropriation from happening. In the fashion industry, for instance, many designers are often perplexed regarding what is acceptable to 'borrow' from cultural groups such as indigenous communities. Vézina states that "the task of the legal system should not be to protect a unitary vision of culture but to establish a means of creative self-determination among source communities."[7] However, this task is not as simple as criminalizing the act of cultural appropriation. While making cultural appropriation illegal would give marginalized communities a form of direct action that can legally protect them,[8] lines of accountability and ownership would remain blurry and involve many gray areas. The United States' legal system must find a way to establish guidance to diminish the ambiguity of appropriation and appreciation.

The United Nations is "pushing for three pieces of international law to put sanctions in place…[to] expand international property regulations to protect indigenous property ranging from designs to language."[9] James Anaya, former Dean of Law at the University of Colorado, stated that we should "obligate states to create effective criminal and civil enforcement procedures to recognize and prevent the non-consensual taking and illegitimate possession, sale, and export of traditional cultural expressions."[10] However, current United States Intellectual Property (IP) law does not take any of these measures. An article from Tylt states that "when protected by law, the intangible aspects of creations of the human mind constitute intellectual property."[11] Boundaries and clarity must be established in United States IP Law so that intangible property can also be protected from the harms of cultural

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[5] *Id.* at 1-4.
[6] Brigitte Vézina, *Cultural Appropriation Keeps Happening Because Clear Laws Simply Don't Exist*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (Dec. 24, 2019), https://www.cigionline.org/articles/cultural-appropriation-keeps-happening-because-clear-laws-simply-dont-exist/.
[7] *Id.*
[8] *Should cultural appropriation be illegal?*, TYLT (June 20, 2017), https://thetylt.com/culture/should-cultural-appropriation-be-illegal.
[9] *Id.*
[10] *Id.*
[11] *Id.*

appropriation. This note will discuss the legal background of cultural appropriation, shortcomings and challenges in current United States laws, and a possible framework of solutions.

I. Legal Precedents and Background for the Issue of Cultural Appropriation

A. Intellectual Property in the United States

Article 1 Section 8 Clause 8 of the United States Constitution elaborates upon intellectual property. It grants Congress the enumerated power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] The 1884 case *Burrow-Giles Lithographic Co. v. Sarony* states that an 'author' is an "originator; maker; one who completes a work of science or literature."[13] Additionally, the word 'writings' in Article 1 Section 8 Clause 8 is defined as encompassing "all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given . . . expression."[14] The powers in this article allow Congress to grant authors exclusive rights to their works and inventors their discoveries. "Under the IP Clause, copyrights and patents are based on a utilitarian rationale that exclusive rights are necessary to provide incentives to create new artistic works and technological inventions."[15]

Current copyright law covers "any original work of authorship, including literary works; musical works; dramatic works; choreography; audiovisual works; pictorial, graphic, and sculptural works; sound recordings; and architectural works."[16] The 1976 Copyright Act expands upon the IP clause in the Constitution to "prevent others from, among other things, reproducing and distributing creative expression without the copyright holder's permission."[17] These regulations allow for authors, inventors, and copyright holders' work to be protected and given their rightful ownership of their works. However, the Fair Use Doctrine outlines an exception for some uses of copyrighted work. The Doctrine excuses

[12] U.S. CONST. art. I, § 8, cl. 8.
[13] U.S. CONST. art. I, § 8, cl. 8.3.1.
[14] U.S. CONST. art. I, § 8, cl. 8.3.1.
[15] U.S. CONST. art. I, § 8, cl. 8.
[16] U.S. CONST. art. I, § 8, cl. 8.3.1.
[17] U.S. CONST. art. I, § 8, cl. 8.3.3.

"purposes such as criticism, comment, news reporting, teaching[,] scholarship, or research" and also for 'transformative' purposes."[18]

The 2022 court case *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* "ask[ed] the Supreme Court to determine whether a work of art that visually resembles its source material but transforms its meaning constitutes fair use under copyright law."[19] Lynn Goldsmith, a celebrity portrait photographer, took a photograph of the artist Prince in 1981. Three years later, her agency gave Vanity Fair magazine a license to use the picture. Vanity Fair then commissioned Andy Warhol, an artist, to create an illustration based on the photograph. Warhol eventually created the Prince Series, a series of fifteen works, which is copyrighted by the Andy Warhol Foundation for the Visual Arts ("AWF").[20] In 2016, Goldsmith notified AWF that she did not receive credit for being the creator of the source image after AWF licensed a picture of the Prince Series to a publication in the magazine Condé Nast.[21] A year later, AWF sued Goldsmith, stating that the Prince Series utilized fair use and was transformative of Goldsmith's photograph.[22] "AWF emphasizes that the use of a copyrighted work is transformative under *Campbell v. Acuff-Rose Music, Inc.* when it conveys a 'new expression, meaning, or message.'"[23] AWF supported this 'meaning-or-message test' since Warhol intended to remove the vulnerability of Prince in the photographs that Goldsmith portrayed.[24] Goldsmith countered with a claim for copyright infringement. She stated that Warhol did not contribute anything new to the work and did not have a different purpose and that her original photography was not necessary for Warhol to create his series.[25] The case went through the United States District Court for the Southern District of New York, where fair use was concluded, but then the Second Circuit favored Goldsmith, denying that AWF's use was fair.[26] "The United States Court of Appeals for the Second

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[18] 17 U.S.C. § 107.
[19] Legal Information Institute Supreme Bulletin, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, CORNELL LAW SCHOOL (Oct. 12, 2022), https://www.law.cornell.edu/supct/cert/21-869.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, Oyez, https://www.oyez.org/cases/2022/21-869 (last visited Feb. 3, 2023).

Circuit [held] that because the Prince Series remained "recognizably derived" from the original, it failed to transform and was thus not fair use."[27]

Furthermore, another example is the 2013 court case *Cariou v. Prince et al.* Artist Richard Prince was accused of copying Patrick Cariou's photographs in his 30 pieces of artwork from his Canal Zone series.[28] The court ruled in favor of fair use for Prince, concluding that Prince's work had a completely different "expression, meaning, and message."[29] "The artworks were transformative because they manifested an entirely different aesthetic from the photographs since the artist's composition, presentation, scale, color palette, and media were fundamentally different."[30] The Warhol case may have contradicted this case. United States Copyright Law involves the reasonable observers' view, not just the artists' opinion.[31] As shown by these two court cases, the concept of transformative fair use is often subject to interpretation, making it difficult to be helpful in cases of stopping cultural appropriation.

Furthermore, trademark laws are an important part of intellectual property law. "Trademarks are signifiers used by manufacturers and merchants to identify goods or services and to distinguish them from those of other manufacturers and merchants. A trademark may protect words, marks, designs, colors, sounds, names, symbols, clothing, and buildings."[32] In the issue of cultural appropriation, collective and certification marks are utilized as a tool. Trademark law has proven to be effective against instances of cultural appropriation, such as in *Navajo Nation v. Urban Outfitters, Inc* (2012) where the Navajo people's culture was protected, which will be further expanded upon later.[33] However, the First Amendment of the United States Constitution, which includes the freedom of speech, can limit intellectual property ownership.

The 1946 Lanham Act is the primary federal statute dictating trademark registration and outlining the requirement for trademark infringement. The Act "recognizes that individuals associate a mark or symbol with a party's goodwill and reputation in goods or

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[27] Legal Information Institute Supreme Bulletin, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, CORNELL LAW SCHOOL (Oct. 12, 2022), https://www.law.cornell.edu/supct/cert/21-869.
[28] *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)
[29] *Id.*
[30] Christine Steiner, INTELLECTUAL PROPERTY AND THE RIGHT TO CULTURE 6 (1998).
[31] *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, Oyez, https://www.oyez.org/cases/2022/21-869 (last visited Feb. 3, 2023).
[32] *Id.*
[33] *Navajo Nation v. Urban Outfitters, Inc.*, 212 F. Supp. 3d 1098 (D.N.M. 2016).

services. It restricts the mark's use to the exclusive trademark owner, rewarding the party that expended resources to develop a mark of identification for the product."[34] Section 45 of the Lanham Act defines a trademark as a "word, name, symbol, or device . . . used by a person, or . . . which a person has a bona fide intention to use in commerce."[35] Copyright and trademarks are integral in protecting tradition-based creations and stopping infringement and disrespectful reproduction. Trademark law has a widespread history of protecting artists as well as ethnic groups. One example is the court case *Matal v. Tam* from 2017.[36] In this case, Simon Tam and his band *The Slants* went to trademark the band name from the United States Trademark Office.[37] The Lanham Act has a Disparagement Clause, "which prohibits trademarks that '[consist] of or [comprise] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.'"[38] So, Tam's request was denied because the office found that the name was "disparaging towards 'persons of Asian descent.'"

B. Increased Presence of Moral Rights Protection in the United States Legal System

There have been specific instances where the United States has made efforts to protect cultural heritage and moral rights. In 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works, an international assembly, which:

> [A]dopted in 1886, deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters, and others with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles: rights in translation, making arrangements and performing musical works, and protecting the originality of work. It also contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them.[39]

The Berne Convention has played a significant role in shaping the United States copyright system over the years by introducing 'moral rights.' Article 6b is one of the primary

[34] *Id.*
[35] *Id.*
[36] *Matal v. Tam*, 137 S. Ct. 1744 (2017).
[37] *Id.*
[38] *Id.*
[39] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, W.I.P.O.

provisions of the treaty that gave "authors with both the right to claim paternity of their works and the right to their works' integrity," protecting their reputation and honor.[40]

Furthermore, the Visual Artists Rights Act (VARA), passed in 1990, made it clear that the rights of an individual override property rights in some instances. The Act "provides limited rights of attribution and integrity to prevent intentional distortion or mutilation of work prejudicial to author's reputation."[41] These rights are personal to the author and protect their visual works. VARA "'gives the 'author of a work of visual art' the right to sue to prevent the destruction of [the] work if it is one of 'recognized stature.'"[42] The court case *Cohen v. G&M Realty LP* (2013) dealt with the issue of the nature of the art, such as how temporary it is and how the temporary nature of art relates to how much protection it receives.[43] 5Pointz, a location in Queens, New York, is an area that had become a place of collections of graffiti art that, over time, ended up a tourist attraction for photo and video shoots. However, when news came that buildings at 5Pointz would be demolished, the graffiti artists sued the owners under VARA to protect their work.[44] Wolkoff, the defendant, whitewashed the graffiti art instead of waiting for the Court to issue a written opinion in an eight-day interim, and the case concluded in favor of the artists stating that Wolkoff violated the VARA rights.[45] The "work of an exterior aerosol artist—given its general ephemeral nature— [is] worthy of any protection under the law."[46] This case is a step forward in combating cultural appropriation and protecting indigenous people because it involves a nature of art that is not completely defined, as is culture.

The rights of indigenous people have consistently been an issue with the topic of cultural appropriation. To protect the rights of indigenous people, there have been numerous laws and acts passed in the United States. In 1990, the Indian Arts and Crafts Act ("IACA") was passed.[47] This Act "prohibits misrepresentation in the marketing of Indian art and craft products within the United States."[48] Further, under this Act, "it is illegal to sell, offer, or display any art or craft product in a manner that falsely suggests it is Indian produced, an

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[40] Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 172 (2016).
[41] Steiner, *supra* note 30, at 5.
[42] *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018)
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] 18 U.S.C. § 1159
[48] *Id.*

Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization."[49] This Act makes efforts to effectively protect a multitude of cultural appropriation instances and prohibit disrespectful copying of traditional items such as art and crafts.[50] Additionally, the Native American Graves Protection and Repatriation Act (NAGPRA) "provides for the ownership or control of Native American cultural items (human remains and objects) excavated or discovered on Federal or tribal lands."[51] This allows Native communities to gain ownership over certain items that are found.

II. The Issue of Cultural Appropriation through United States Law

A. The Challenge of Protecting Culture from Appropriation

The current United States IP System does not properly address the issue of cultural misappropriation. In the Law Journal of the International Trademark Association, Lauren M. Ingram writes that "there are no cultural appropriation or misappropriation laws in the United States, so the copyright system has been the primary source for solutions."[52] Ingram writes that the "most accepted legal definition of cultural appropriation is 'taking from a culture that is not one's own of intellectual property, cultural expressions or artifacts, history and ways of knowledge.'"[53] Many questions arise when dealing with cultural appropriation and the law, such as who claims ownership as the author and whom exactly the law should protect, whether it is a person, city, country, or an entire ethnic group. Also, for most source communities, copyright infringement and claims are not available options as cultural products do not meet the requirements for protection, including originality and fixation requirements. Ingram describes how "originality requires the work must be 'independently created by the author' and possess at least some minimal degree of creativity."'[54]

B. Issues and Shortcomings in Laws

The concept of fixation under copyright law limits the extent to which culture can be protected. For a work to be copyrightable, it has to be "fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated."[55] A work must be original, tangible, and have a creative

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[49] *Id.*
[50] *Id.*
[51] H.R. 5237, 101st Cong. (1989-1990).
[52] Lauren M. Ingram, *Cultural Misappropriation: What Should the United States Do?,* 111 TMR 857, 861 (2021).
[53] *Id.* at 863.
[54] *Id.* at 868.
[55] U.S. Const. art. I, § 8, cl. 8. 3.1

expression to be protected by copyright. This requirement for copyright protection is practical because the government cannot copyright an idea in a person's mind. Work needs to be communicated and expressed to prevent illegal copying. In copyright law, not every aspect of culture is protected, so it does not adequately combat cultural appropriation. In the International Journal of Law in Context, Mathias Siems writes that a requirement in copyright law is that it is "not simply an idea, but an expression of an idea."[56] Since cultural ideas often cannot be put into physical mediums, it makes it extremely difficult for cultural appropriation to be stopped. The fixation requirement also has an issue with modern creativity, and as Steven Hetcher says in the Fordham Law Review, it "provides little guidance for statutory interpretation."[57]

Another issue with cultural appropriation and the law pertains to the Fair Use Doctrine. In the California Law Review, Trevor Reed writes that the Fair Use Doctrine is "a gatekeeping mechanism of sorts for unauthorized appropriations of culture."[58] However, fair use only addresses the 'purpose' behind appropriation. To determine fair use, courts use a four-factor approach.[59] First, they look at the character and purpose of the appropriation, taking into consideration how copyright law is supposed to advance the arts and science.[60] Second, they assess the effect on the work's market and any economic disadvantages. Third, they decide how much of the work has been copied, both quality and quantity-wise. The fourth factor, called the 'forgotten factor,' "asks what is being appropriated—its creative or intellectual values—and whether allowing the appropriation would stifle future creativity."[61] This factor deciphers the nature of the copyrighted work and makes it easier to see the community's point of view on what exactly the work is. However, as Reed writes, the courts often forget "the amount and substance of the work used, and the effects of the appropriation on the market for the work, the vital inquiry about the 'nature' of the original work and the impact of unauthorized appropriation on its creative environment."[62] For this reason, it is often called the "forgotten factor." Since the very nature of the appropriation is

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[56] Mathias Siems, The law and ethics of 'cultural appropriation', 15 IJLC 408, 411 (2019).
[57] Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM. L. REV. 2221, 2221 (2014).
[58] Trevor G. Reed, Fair Use as Cultural Appropriation, 109 CALIF. L. REV. 101, 101 (2021).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

ignored, the forgotten nature of this factor is what makes it difficult to combat cultural appropriation.

While VARA provided certain rights protection, it is insufficient in supporting the moral rights mandate from the Berne Convention because of its narrow application. Since VARA requires the art to be a "painting, drawing, print, sculpture," it fails to protect numerous copyrighted works such as electronic publications, magazines, diagrams, maps, books, and posters.[63] There have been a significant number of court cases where VARA was not able to protect artists, and United States courts became closed off in allowing VARA to be applied. One such example is the 2006 case *Phillips v. Pembroke Real Estate.*[64] When certain stoneworks and sculptures of his work were removed from Eastport Park in Boston, David Phillips sued Pembroke Real Estate, saying that this violated his rights under VARA.[65] The court stated that Phillips' work was both "one integrated 'work of visual art'" and also "site-specific art," which is when "one of the component physical objects is the location of the art."[66] However, VARA's 'public-presentation exception' states that a modification that is "the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification."[67] So, the court held that Pembroke was allowed to remove Phillip's work.[68] In the Michigan Telecommunications and Technology Law Review, Samuel Jacobs writes that "VARA has most often been used by artists whose works were originally designed for installation in public locations."[69] This explains why VARA has not been successful in these cases. In 2011, *Kelley v. Chicago Park District* presented another case example where VARA was not able to protect the artist.[70] Jacobs writes that the "Seventh Circuit determined that a nationally recognized artist's 66,000 square foot wildflower display located in Chicago's Grant Park did not qualify for protection under VARA because the work did not meet the authorship and fixation requirements under the Copyright Act."[71] Furthermore, "the hurdle of establishing that a work is of 'recognized stature' to prevent destruction is also often a ground upon

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[63] Jacobs, *supra* note 40, at 175.
[64] *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Jacobs, *supra* note 40, at 175.
[70] *Id.* at 177.
[71] *Id.*

which courts rely to deny artists protection under VARA."[72] The words "recognized stature" in VARA are not properly defined.[73] Often, it is extremely difficult for plaintiffs to have evidence if the work was destroyed or removed before being reviewed by the court, and the statute is unable to be applied. Thus, since VARA is most often used by artists with public installations, it is frequently an unsuccessful defense in court.

In addition, cultural products do not qualify for trademark infringement claims, including collective or certification marks. "Trademark law protects commercial symbols but not words or symbols that are primarily cultural in nature."[74] Also, cultural products not used in commerce are often ignored in the United States IP system. There are, thus, many barriers to the protection of cultural products.

C. Navajo Nation v. Urban Outfitters, Inc

The 2016 case of *Navajo Nation v. Urban Outfitters, Inc* is a prime example of cultural appropriation and the limitations in protecting cultural heritage.[75] The Urban Outfitters product line utilized many Navajo Nation tribal prints and patterns, and in return, Navajo Nation sent cease and desist orders to the clothing company.[76] Navajo Nation, the plaintiff, started a case of trademark infringement against Urban Outfitters, the defendant. The issue of this case involves the following question: "Did the defendants prove that plaintiffs' mark was generic or that the plaintiffs abandoned their mark?"[77] The plaintiffs contended that the fair use argument is not applicable in this case since the 10th Circuit had not recognized that defense yet.[78] The case stated that the "plaintiffs' 'Navajo' marks are incontestable as well as inherently distinctive," and the "defendants cannot prove that their use of "Navajo" did not cause confusion."[79] The defendants stated that "the term 'Navajo' was now a generic name or designation for a fashion style or design" and that the 'Navajo' is a geographical term.[80] "Plaintiffs contend Defendants' 'unclean hands' defense should be dismissed since defendants cannot raise a genuine issue of material fact as to whether Plaintiffs' conduct with regard to their trademarks has ever been 'illegal or

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[72] *Id.* at 178.
[73] *Id.* at 178.
[74] Ingram, *supra* note 52, at 868.
[75] *Navajo Nation v. Urban Outfitters, Inc.*, 212 F. Supp. 3d 1098 (D.N.M. 2016).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*

unconscionable.'"[81] In conclusion, the court stated that "there was no admissible evidence in the record to support the defendants' affirmative defenses or counterclaims,"[82] implying that Urban Outfitters did culturally appropriate the Navajo designs. However, while this case did turn out in favor of the Indigenous group, many cases of cultural appropriation do not even reach a basic level in court and are often ignored. This is one of the only known court cases that deal with the issue of cultural appropriation.

III. Solutions

A. The World Intellectual Property Organization (WIPO)

To protect cultural products, the World Intellectual Property Organization (WIPO) is currently negotiating an "international legal instrument for the protection of TK and TCEs." TK, or Traditional Knowledge, is the "know-how skills, innovations, and practices developed by indigenous peoples and local communities."[83] TCEs, or Traditional Cultural Expressions, can "prevent insulting, derogatory, culturally, or spiritually offensive use" and protect from "misleading or false indications as to authenticity or origin."[84] These expressions allow for cultural products to be distinctive, cultural appropriation to be more defined, and more awareness of the protection of culture to be spread. The WIPO also pushes for domestic IP laws that protect cultural symbols and advocate efforts to make cultural works protectable across borders in the world. Furthermore, in the process of establishing ownership, the WIPO states that lawmakers may leave it up to communities to apply for separately and obtain rights in jointly held [cultural products]."[85] If applied to the United States, WIPO's international legal instrument and guidelines could be used in later cases to support cultural intellectual property protection.

B. Sui Generis

Sui generis is Latin for "of its own kind" and "denotes an independent legal classification."[86] Creating a *sui generis* system makes it easier for marginalized communities to exercise their rights over their cultures and for cultural products to be protected. A possible *sui generis* system for the United States may include: "definitive criteria, collective ownership,

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[81] *Id.*
[82] *Id.*
[83] Ingram, *supra* note 52, at 869
[84] *Id.*
[85] *Id.* at 874.
[86] Nichole McCarthy, *sui generis*, CORNELL LII (August 2021), https://www.law.cornell.edu/wex/sui_generis.

specific ownership rights, acquisition of ownership rights, administration and enforcement of rights, and possible termination of rights."[87]

First, criteria for a cultural product protection system should be made. One possible criterion that could be instilled is that cultural products should be "documented and fixated."[88] However, this fixation and documentation may not necessarily be at the same time the product was made or created since it may have originated before the fixation could happen. Additionally, in the *sui generis* system, ownership of the cultural product must be established. Instead of focusing on an individual person, the entire source community should be considered when deciding ownership. Since communities may expand across domestic, national, and international borders, it would mean "learning from and receiving information about customs in that community, about whether or not the cultural product comes from one person, and about who may represent the community or identify knowledge passed down to everyone in the community."[89] Furthermore, this *sui generis* system would work well with co-ownership rights of cultural products to prevent competition. The WIPO states that "competition between traditional communities for assigning or transferring knowledge susceptible of industrial application would lead to a reduction of prices and benefits to be paid for such knowledge, hence to the ultimate benefit of customers."[90]

To determine which exact rights need protection, "the rights of a *sui generis* system on intellectual property protection of cultural product should be a combination of features from copyright law and industrial property features."[91] This includes moral rights and licensing rights. Moral rights are essential for preserving the cultural heritage and identities of marginalized traditional communities. In our current copyright system, only visual arts are protected by moral rights.[92] In this *sui generis* system, all cultural products should have moral rights. Also, in IP law, licensing rights apply to cultural products in this *sui generis* system. Licensing rights state that "the owner or owners of the cultural product have 'the right to say 'no' to third parties and to say 'yes' to those who request permission to reproduce, fix, or use the protected subject matter."[93]

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[87] Ingram, *supra* note 52, at 873
[88] *Id.* at 873.
[89] *Id.* at 874.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* at 875.

To establish and acquire these moral and licensing rights for source communities, formal systems like the United States Patent and Trademark Office (USPTO) can be created to "allow the 'establishment of subsequent mechanisms of control over the legitimacy of claims.'"[94] Additionally, the Traditional Knowledge data filed can be used to establish the rights. A proper board or agency should be established to enforce and administer these rights. This board, like the Indian Arts and Crafts Board, can be responsible for filing and evaluating complaints. The board would also "evaluate the best remedy for an infringement of the rights or whether the remedy would require civil or criminal sanctions."[95] Lastly, these moral rights and licensing rights should not have a time limit or expiration period. There should be an indefinite period of protection due to the "intergenerational and incremental nature"[96] of cultural products.

C. Source Community Membership Standards

In order for this *sui generis* system to be created, source communities must establish membership standards. Cultural appropriation is often difficult to combat because of the absence of defined membership of source communities.[97] If a test of group belonging were to be included, cultural products could easily be determined whether or not they belong to that specific group or community. However, there is the issue of figuring out who would determine the test. This yet-to-be-defined group or third party has to involve fair views on minorities and equal representation. Additionally, a "legitimacy requirement to assess whether the use of the culture's product conforms with the rules they set out to govern"[98] can be put into place. This entails a requirement that would clearly show if the product is truly a part of the culture. On the other hand, some may say that these defined standards can 'freeze' a culture since it places too many restraints on what a cultural product means to a community. Additionally, the cultural product may lose its significance through monetization and too much legal definition. However, without these standards, it is difficult to provide a legal scholarship to fight cultural appropriation. Overall, a database for source communities that require protection must also be made, since the United States is multicultural and traditional communities should be described in detail.

D. Protecting Intangible Cultural Goods and Property

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[94] *Id.*
[95] *Id.*
[96] *Id.* at 876.
[97] *Id.* at 864.
[98] *Id.*

As a part of the solutions in the legal framework, IP protection should be expanded. First, cultural products should fall under 'Science and Useful Arts,' and whether commercially used or not, artistic or literary works, symbols, or words should have protections. Source communities should also be able to fall under 'Authors and Inventors' and receive a bundle of property rights just as individuals would. Some may argue that expanding IP law around culture would end up including all intangible cultural products. However, this is not necessary since this may limit healthy and advantageous cultural exchange. Instead, multiple levels of protection can be developed in IP law. Each cultural product can be classified according to its source community as a "private good or public good…and whether or not the source community has voluntarily commodified the product."[99] In her book "Who Owns Culture?: Appropriation and Authenticity in American Law," Susan Scafidi outlines this classification with the following guidelines: if a cultural product is non-commodified and private, it should have enhanced trade-secret style protection.[100] These products are "sacred, secret, or exclusive,"[101] and are often susceptible to cultural appropriation and need higher levels of security with limited access to the public. If the product is commodified and private or non-commodified and public, it should have patent-style protection. Lastly, if it is commodified and public, it should be protected with an "authenticity mark."[102] These products are open to the public and do not necessarily need high levels of protection from appropriation. 'Authenticity marks' would "preserve the relationship between community and product and create an affiliative ownership without halting the fertile exchange inherent in much cultural appropriation."[103]

E. Changes to the Copyright System

As previously stated, courts use a four-factor approach when deciding if the Fair Use Doctrine is applicable in a case. The fourth factor, the 'forgotten' factor, is regarding what exactly is being appropriated and how future creativity could be restricted. Since this factor is forgotten, cultural appropriation is harder to identify. Making the forgotten factor not forgotten would make it much easier to deal with cultural appropriation through the law. In the California Law Review, Trevor Reed states that amending the fourth factor involves

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[99] Scafidi, *supra* note 3, at 151.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 153.
[103] *Id.*

"reconceptualizing the factor's inquiry into the "nature" of a work as an ontological one, situating the work within its creative context and determining what impact, if any, unauthorized use of the work might have on this kind of creativity going forward."[104] Courts should inquire for further information on the "creative environment from which the work has been produced and the potential impact of unauthorized appropriation on that creative environment."[105]

Current copyright laws already have statements of acknowledgment and respect toward creators. However, this acknowledgment and protection should also be in line with traditional cultural expressions, even when there is no sole creator. Copyright law should cover and protect communities rather than individual creators in the case of cultural products. In this case, the community leaders can decide when to sue and when to grant the right to use IP. Furthermore, Megan Carpenter and Steven Hetcher discuss the issue of fixation on copyright in the Fordham Law Review.[106] They write that "dropping the transitory works exclusion for copyrightability would enable fixation to serve its essential purpose while not discriminating against important strains of contemporary creativity."[107]

Conclusion

Cultural appropriation is a widespread issue that is often not adequately treated through our current United States IP legal system. Protecting culture through the law is essential to community well-being. In our current legal system, IP rights only cover certain aspects of culture, and often the fixation requirement and Fair Use Doctrine limit the amount of protection cultural products can receive.

> If the law states that cultural products are valued creations of their source communities, should be treated with respect according to the norms of those source communities, and yet should in most cases be accessible in the public domain for civic reasons, then well-intentioned members of society are afforded guidelines for civil interaction.[108]

The law must provide more definitive frameworks and vocabulary to prevent further harmful and disrespectful instances of cultural appropriation. The IP system should be expanded so cultural products are included and properly classified. Minority communities' cultures should

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[104] Reed, *supra* note 58, at 109.
[105] *Id.*
[106] Carpenter & Hetcher, *supra* note 57, at 2221.
[107] *Id.*
[108] Scafidi, *supra* note 3, at 155.

be acknowledged in the copyright system. A *sui generis* system that involves moral and licensing rights for source communities and proper ownership would be a step in the right direction to further protect cultures and marginalized communities.

Fluid-Rape as a Form of Sexual Assault and the Implications of Conditional Consent in the United States

Rhea Waghray

Preface

Engaging in a sexual act requires an indispensable level of trust and vulnerability for all parties involved. When that trust is violated, the consequences are both physically and emotionally detrimental. This note is an effort to help repair the wounds of trauma that victims of fluid-rape (colloquially known as stealthing) experience by discussing an issue that is rarely brought up in conversations of sexual assault and legality. This note hopes to share a thoughtful perspective on how to seek justice for victims through the scope of the United States legal system in a way that is fair for all.

Introduction

Sexual assault is one of the most harmful and traumatic events an individual can experience. It represents one of the strongest violations of one's privacy, safety, and overall autonomy. In the United States, every two out of three cases of sexual assault go unreported every year.[1] The most publicized and widely acknowledged form of sexual assault is rape, with one out of six women experiencing rape or attempted rape in their lifetime.[2] Despite these horrifically high statistics, rape and sexual assault are extremely difficult to prosecute in the American justice system. In the United States, 975 out of every 1,000 offenders are not prosecuted.[3] The few who turn to the law for support expect that they will have "the

[1] U.S. DEP'T JUST., CRIMINAL VICTIMIZATION, 2019 (Sept. 2020).
[2] U.S DEP'T OF JUST., SEX OFFENSES AND OFFENDERS (Jan. 1997).
[3] U.S DEP'T OF JUST., *supra* note 1.

tools [and resources] to protect themselves" and seek proper justice in a legal setting.[4] But the truth of the matter is more bleak: some acts that violate an individual's sexual consent, male or female, are not even classified as sexual assault in the United States at all, despite the obvious presence of deception, manipulation, and coercion.

A prime example of this is the act colloquially referred to as 'stealthing,' which is defined as non-consensual condom removal during sexual intercourse.[5] The term was first popularized among forums and blogs that hosted participants of the Men's Rights Movement and a group known as The Bareback Brotherhood.[6] "Bareback" refers to the movement that gained momentum in the early 1990s among gay men and is the act of having anal sexual intercourse without a condom.[7] Many barebackers who belonged to this movement had the goal of infecting other men with HIV.[8] Now the term is more commonly used in regards to heterosexual men and glamorization of unprotected sex with women in a non-consensual manner.[9] Members of The Bareback Brotherhood use online platforms to describe their own stealthing experiences and attempt to teach other men how to perform the act in an effective way in order to increase their own pleasure during sexual intercourse.[10]

Stealthing can be completed in a variety of ways. Such performances include deceitfully removing a condom during sexual intercourse, faking the process of wearing a condom before sexual intercourse, and poking holes in a condom before sexual intercourse for the purpose of wanting semen to enter a victim.[11] In a 2019 study describing the factors associated with nonconsensual condom removal, it was found that out of a sample of 626 male participants, almost 10 percent of men engaged in stealthing at least once from the age of fourteen years old.[12] These men reported high traits of "sexual aggression, adversarial

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[4] Mikaela Shapiro, *Yes, "Stealthing" is Sexual Assault... And We Need to Address It*, 37 TOURO L. REV. 1643 (2021).
[5] Rosie L. Latimer, et al, *Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia*, PLOSONE (Dec. 26, 2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779.
[6] Shapiro, *supra* note 4.
[7] Joseph Brennan, *Stealth Breeding: Bareback Without Consent*, 8 PSYCH. & SEXUALITY 318 (2017).
[8] Troy Suarez & Jeffery Miller, *Negotiating Risks in Context: A Perspective on Unprotected Anal Intercourse and Barebacking Among Men Who Have Sex with Men—Where Do We Go from Here?,* 30 ARCHIVES SEXUAL BEHAVIOR 287 (2001).
[9] Mikaela Shapiro, *Yes, "Stealthing" is Sexual Assault... And We Need to Address It*, 37 TOURO L. REV. 1643 (2021).
[10] Brennan, *supra* note 7.
[11] Konrad Czechowski et al., *"That's Not What Was Originally Agreed To": Perceptions, Outcomes, and Legal Contextualization ff Non-Consensual Condom Removal in a Canadian Sample*, PLOSONE (July 10, 2019), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0219297.
[12] Kelly Cue Davis, *"Stealthing": Factors Associated with Young Men's Nonconsensual Condom Removal,* 38 HEALTH PSYCH. 997 (2019).

heterosexual beliefs, and rape myth acceptance."[13] Partners of men who engage in stealthing are more likely to receive sexually transmitted diseases, making cases of sexually transmitted diseases via fluid-rape more common than cases of no physical harm resulting from stealthing at all.[14]

Forms of stealthing have also been referred to as "reproductive coercion," specifically by those in the medical community. However, this term has been criticized as it seemingly "removes culpability" from the perpetrator and is rarely mentioned in legal settings.[15] Critics also state that stealthing "cannot be exclusively understood from the reproductive coercion perspective" due to "several other motivations" that have been reported on stealthing behaviors.[16] From this point, this note refers to stealthing as fluid-rape. Though not all perpetrators have the intention of releasing their bodily fluids into their victims, this is a major consequence of non-consensual condom removal. The classification for this type of sexual assault should not be named by the perpetrators of such horrendous acts. Renaming stealthing as fluid-rape gives power and autonomy back to the victims, making it clear that those who 'stealth' should not be congratulated or perceived as cunning or skillful, but rather treated as deserving of punishment for their gross violations to an individual's body and consent.

A common statement among victims is "I don't know if this is rape, but...," reinforcing the notion that many women who experience this violation fail to realize that it is a violation at all.[17] Fluid-rape is a form of sexual assault that many say is "akin to rape."[18] Cases of fluid-rape are often consensual at first, but violations of initial consent are committed after sexual intercourse has already begun. In cases of fluid-rape, one party has consented to protected sex, but the encounter is then unknowingly converted into unprotected sex, which was never consented to in the initial sexual agreement.[19] Despite

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[13] *Id.*
[14] *Id.*
[15] Karen Trister Grace, and Christina Fleming, *A Systematic Review of Reproductive Coercion in International Settings*, 8 WORLD MED. & HEALTH POL'Y 382 (2016).
[16] Esperanza L. Gómez-Durán & Carles Martin-Fumadó, *Nonconsensual Condom-Use Deception: An Empirically Based Conceptualization of Stealthing*, TRAUMA, VIOLENCE, & ABUSE: ONLINEFIRST (Dec. 24, 2022), https://journals.sagepub.com/doi/full/10.1177/15248380221141731.
[17] Melissa Marie Blanco, *Sex Trend or Sexual Assault: The Dangers of Stealthing and the Concept of Conditional Consent*, 123 PENN. ST. L. REV. 217 (2018).
[18] Sumayya Ebrahim, *I'm Not Sure This is Rape, But: An Exposition of the Stealthing Trend*, 9 SAGE OPEN, Apr.–June 2019.
[19] *Id.*

having similar physical ramifications such as forced reproduction and the possibility of contracting sexually transmitted diseases, the comparison between fluid-rape and rape is one of significant controversy by lawmakers, scholars, and victims alike.[20] Unlike rape, fluid-rape is not classified as a criminal offense in any state besides California, which classified it as a civil offense in 2021.[21] This note argues that the United States has an obligation to victims and survivors of fluid-rape to criminalize fluid-rape under sexual assault laws as well as adopt a conditional consent doctrine in order to replace the ambiguous, incoherent, and unstandardized consent laws that are present in our current legal system.

Fluid-rape is an extremely harmful act with disastrous implications on a victim's psychological and physical state. Similar to rape, fluid-rape makes victims feel a gross violation of their bodily autonomy as victims do not have a final say of what is directly put inside of them, regardless of whether they are referring to genitalia or fluid. Many victims of rape and fluid-rape have similar mechanisms after the event, such as "self-blame and a loss of trust."[22] Long-lasting physical harm resulting from fluid-rape includes sexually transmitted diseases and unwanted pregnancy.[23] Both men and women can be victims of fluid-rape. While this note has a focus on female victims and male perpetrators, fluid-rape and all forms of sexual assault or rape can be done to anyone regardless of gender identity and sexual orientation.

I. Background on Fluid-Rape, Rape, and Consent Laws in the US

A. Rape and Sexual Assault Law in The United States

Instances of rape and sexual assault are difficult to prosecute in the United States because of the burden of proof that is required to convict someone for these crimes. Victims can often be confused with rape and sexual assault classification because of the varying legal definitions that occur in each jurisdiction and state. The federal definition of sexual assault refers to sexual violations that occur in the absence of consent, which can include rape.[24] Rape is defined as: "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of

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[20] Laura Tarzia, et al., *Exploring the Gray Areas Between "Stealthing" and Reproductive Coercion and Abuse*, 60 WOMEN & HEALTH 1174 (2020).
[21] Alexandra Brodsky, Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal, 32 COLUM. J. GENDER & L. 183 (2016).
[22] Shapiro, *supra* note 4.
[23] Brodsky, *supra* note 21.
[24] U.S. CODE § 920 Art. 120.

the victim."[25] Instances of rape have been historically limited to penal and vaginal penetration, with force being a key aspect in determining how much a victim resisted the action.[26] However, such terminology has recently been amended to now rely on the existence of consent, as seen with the Department of Justice, which removed "force" from the definition of rape in 2011.[27] Interestingly, in other crimes such as battery, resistance has always been irrelevant to the crime being committed.[28] However with cases of rape and sexual assault, a victim's "characterization," resistance, and "behavior" have played major roles in understanding if a victim had been raped or sexually assaulted.[29] Based on current federal definitions of sexual assault and rape, violations of such crimes only occur if threats of bodily harm or force are present.[30] Consent is only negated due to explicit resistance or incapacitation by drugs, sleep, or mental disability.[31] Within the scope of the United States' rape and sexual assault code, it can be seen how fluid-rape is not included as a form of sexual assault or rape due to the presence of initial consent to a sexual activity and a lack of force or threat displayed by the perpetrator.

In most cases of rape and sexual assault, there are "only two witnesses," with the defendant having three options: stating that they did not penetrate the victim, stating that the victim had been raped but not by them, or stating that the sexual acts done to the victim were consensual. In 1975, a series of rape laws titled "rape shield laws" were passed that "limit the defendant's ability to probe the sexual behavior, history, or reputation of the alleged victim."[32] Such laws were instrumental to the way consent is viewed today, as it became legally understood that consent could not be negated based on past sexual history of the victim, but rather the specific instance where the victim's consent was violated. Another legal shift occurred in the mid 1980's when martial rape laws had the ability to be prosecuted, an occurrence that was never available due to states' exemption laws. For

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[25] *Id.* § 920 Art. 120.
[26] *Id.* § 920 Art. 120.
[27] Carol E. Tracy et al., *Rape and Sexual Assault in the Legal System,* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES PANEL ON MEASURING RAPE AND SEXUAL ASSAULT IN THE BUREAU OF JUSTICE STATISTICS HOUSEHOLD SURVEYS COMMITTEE ON NATIONAL STATISTICS (Jun. 5, 2012)
[28] U.S. CODE § 920 Art. 120
[29] Carol E. Tracy et al., *Rape and Sexual Assault in the Legal System,* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES PANEL ON MEASURING RAPE AND SEXUAL ASSAULT IN THE BUREAU OF JUSTICE STATISTICS HOUSEHOLD SURVEYS COMMITTEE ON NATIONAL STATISTICS (Jun. 5, 2012)
[30] U.S. CODE § 920 Art. 120
[31] *Id.* § 920 Art. 120.
[32] FED R. EVID. 412.

example, New York penal code stated that "a husband could not be convicted of raping his wife" due to such martial exemption laws that existed in the 1980s.[33] In the case of *People v. Liberta*, the defendant's wife filed criminal charges against her husband for rape.[34] In an appeal, this exemption law was dropped as the New York court could not find a reason to continue having the distinction between marital rape and non-martial rape, stating in the court's opinion that rape occurs "when one party does not consent."[35] It can be seen how the broader application of consent laws can change the way legal institutions view rape and sexual assault as a whole.

B. Consent Laws in The United States

Expanding on consent laws in the United States, currently, federal law and some states practice versions of affirmative consent. Affirmative consent is defined as "the idea that a partner must freely, voluntarily, and intelligently agree to the nature of a sexual act."[36] Affirmative consent applies to the consent of a general sexual act and does not make any distinction between having sex without a birth control method or having sex with a person who has a sexually transmitted disease, but only if an explicit yes or no has been given.[37] Affirmative consent refers to the consent of a sexual act in its entirety and is therefore not nuanced enough to cover the perceived ambiguities that compose the act of fluid-rape, therefore providing "no [real] protection to victims of [fluid-rape]."[38] It is the definition of consent most used in cases of forcible rape or rape during diminished capacity.[39]

The Model Penal Code (MPC) is also used in many states as a guideline for sexual assault law, originally constructed by the American Law Association in 1962.[40] The MPC caused many states to implement legal reforms in their legislation and many current state codes are designed based on the MPC's attempted legal standardizations.[41] In 2016, the code regarding sexual consent was updated.[42] The MPC defines consent as "a person's willingness to engage in a specific act of sexual penetration or sexual contact."[43] It states that consent

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[33] N.Y Penal Law § 130.35
[34] People v. Liberta, 474 N.E.2d 152 (N.Y. 1984).
[35] *Id.*
[36] Blanco, *supra* note 17.
[37] *See* MODEL PENAL CODE § 213.0 (Am. Law Inst., Tentative Draft No. 4, 2016).
[38] Shapiro, *supra* note 4.
[39] *Id.*
[40] Lawrence K. Furbish, *Model Penal Code Sexual Assault Provision,* MODEL PENAL CODE SEXUAL ASSAULT PROVISION (1998), https://cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1535.htm.
[41] *Id.*
[42] *See* MODEL PENAL CODE § 213.0 (Am. Law Inst., Tentative Draft No. 4, 2016).
[43] *Id.* § 213.0(3)(a).

can be "inferred from behavior (both inaction and action), and that verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered in determining whether there was consent."[44] Most importantly, the MPC states that "consent may be revoked or withdrawn at any time, before or during, the act of sexual contact."[45] This statement, though more thorough than the notion of affirmative consent, is not a high enough standard to criminalize fluid-rape because it does not explicitly state that consent to protected intercourse does not imply consent to unprotected intercourse.[46] Even if this statement were to be included in the MPC's definition of consent, it can be deemed a non-inclusive condition for states that legislate consent laws similar to the MPC.[47] In other words, too much is left to the discretion of lawmakers, making the possible criminalization of fluid-rape more convoluted due to anticipated incoherencies and the lack of standardization that currently exists in state consent laws.

For states that include aspects of the MPC in their sexual consent laws, the path to criminalizing fluid-rape under sexual assault laws seems attainable due its broadness and thoroughness in comparison to other consent laws in the United States. But what about states that do not use the MPC consent standards or the affirmative consent definition in their legislation?

In states, like Alabama, where consent is strictly defined by what is not considered consent, criminalizing fluid-rape is much more difficult. Alabama law states that a lack of consent is limited to forcible compulsion or being incapable of consent.[48] This consent law states that the definition of consent does *not* require affirmative consent, only stating that "the relationship between the victim and the actor impacts the victim's ability to consent."[49] It states that with a child, sexual relations are automatically considered rape, due to position of authority.[50] In cases of incest, rape is overridden by the fact that sexual relations were formed between a family member.[51] The lack of material present in Alabama's law regarding consent (as it limited to only forcible compulsion, age, and incest) is a prime example of the

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[44] *Id.* § 213.0(3)I.
[45] *Id.* § 213.0(3)(d).
[46] *See Id.*
[47] Blanco, *supra* note 17.
[48] ALA. CODE § 13A-6-60 (2019); *id.* § 15-20A-4 (2019) (consent definition).
[49] ALA. CODE § 13A-6-60 (2019); *id.* § 15-20A-4 (2019) (consent definition).
[50] ALA. CODE § 13A-6-61(2019) (defining rape in the first degree).
[51] *Id.*

lack of standardized consent laws and definitions that do not account for any sort of physical ambiguity and "moral" obscurity that is prevalent in many sexual assault cases, especially that of fluid-rape.[52]

C. Fluid-Rape and Rape

Fluid-rape is non-consensual sex. However, many victims and scholars are unsure if this categorizes fluid-rape as a form of rape or sexual assault in the first degree. Sexual assault is used as a "broader term" that can encompass rape as well as other types of sexual misconduct such as unwanted sexual touching.[53] First degree rape is defined in most states as having an element of "forcible compulsion" towards the victim.[54] When it comes to criminalization, some victims do not know where to draw the line, stating that their consent at the beginning of the sexual act does not make their experience "forced," though they did not consent at all to the sexual act that was done to them.[55] In a study conducted by the International Journal of Environmental Research and Public Health, a victim discussed the need for justice that comes with such a violation stating that "if something were to happen like a pregnancy or sexually transmitted disease there [should] be repercussions… someone [must] answer to that."[56]

Despite such complexities, one thing can be said definitively: fluid-rape is a form of sexual deception. This fact makes other commentators certain that fluid-rape is a form of deceit and is undeniably a form of sexual assault, as it "manipulates the victim into acting against their will by restricting their right to [choose] viable options available to them,"[57] specifically restricting options that prioritize the safety of the victim. Notably, sexual deception is an important part of sexual assault law that has recently been amended in states, such as California, which now includes instances of rape and sex crimes "where the victim submits under the belief that perpetrator is someone known to the victim other than the perpetrator."[58] Despite this amendment, the improved definition of sexual deception was

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[52] Brodsky, *supra* note 21.
[53] Laura Rymel, *What is the Difference Between Rape and Sexual Assault*, SCH. VIOLENCE RES. CTR. UNIV. ARK. SYS. (2004).
[54] Wash. Leg. 2012 c 29 § 10.
[55] Blanco, *supra* note 17.
[56] Marwa Ahmad et al., *"You Do It Without Their Knowledge": Assessing Knowledge and Perception of* Stealthing *among College Students*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 3527 (2020).
[57] Amanda Clough, *Conditional Consent and Purposeful Deception*, 82 J. CRIM. L. 178 (2018).
[58] S.B 59, 2013 Leg., 282 Sess. (Cal. 2013).

still not broad enough to include instances of fluid-rape, as sexual deception relies heavily on the deception of a specific person rather than that of a specific sexual act.

However, in September of 2021, California unanimously passed an amendment to its civil code, making it the first state to have a civil law regarding nonconsensual condom removal as a violation of consent. This violation is under the category of sexual battery, a form of sexual assault in which someone "acts with the intent to cause a harmful or offensive contact, as defined, with an intimate part of another that directly or indirectly results in a sexually offensive contact with that person."[59] If found guilty for fluid-rape in a civil court, one can be " liable for money damages, including general damages, special damages, and punitive damages."[60] Non-consensual condom removal (fluid-rape) was originally attempted to pass in a criminal bill by California Senator Cristina Garcia, but it failed back in 2017 due to concern "for what [criminal] penalties would be set."[61] This long awaited legislative action categorized fluid-rape as a form of sexual assault and brings hope that this ruling will produce a similar effect for the other forty-nine states in years to come.

Despite fluid-rape being a form of non-consensual sex, it should not be classified as a form of first-degree rape as fluid-rape relies on a of lack consent that does not include force, making fluid-rape seemingly impossible to prosecute under a rape charge in the United States.

II. Issues with Current Law to Prevent Fluid-Rape

A. Conditional Consent

Conditional consent is a concept that has not been widely introduced in the United States due to the broadness of its definition. Because consent laws differ from state to state, most do not have enough nuance to account for instances such as fluid-rape. Conditional consent is defined as initial consent to sexual activity that can be revoked once an initial condition has been violated.[62] In regard to fluid-rape, consent is given when individuals decide to engage in sexual intercourse and consent can be revoked once a condom was

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[59] CAL. CIV. CODE § 1708.5(a) (West 2021).
[60] *Id.* § 1708.5(b).
[61] Isabella Grullón Paz, *California Makes "Stealthing," or Removing Condom without Consent, Illegal*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/10/08/us/stealthing-illegal-california.html.
[62] *Rape and Sexual Offences – Chapter 6: Consent*, CROWN PROSECTUION SERVS. (May 21, 2021), https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent.

removed during that act. Consent is negated entirely when initial conditions are violated, without further action by the victim.[63]

However, a fully explicit condition, or how to make a condition fully explicit to a sexual partner, is not defined in this law. In Alexandra Brodsky's article *Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal*, she asks victims about their experiences with fluid-rape.[64] One discussed her traumatic experience, noting that before she had sex with her former partner, she made it clear that having unprotected sex was "something [she was not okay with]" as she was not on a form of birth control.[65] Despite making her sexual boundaries clear, her partner removed the condom during their sexual interaction anyway. In this case, the victim made her conditions fully explicit and her partner was fully aware that his actions were a violation of consent, even replying after a confrontation with the words "don't worry about it, trust me," acknowledging his violation, but not expressing remorse about breaking their agreement.[66] Cases like these are examples of clear violations where there was a conversation before the sexual act that both parties had acknowledged and agreed upon. Conditions are considered less explicit when there is no specific conversation that outlines a party's conditions, such as having sexual intercourse with a condom throughout a sexual act. Yet, it can be implied that a condition is fully explicit when there is any sort of request made, with statements such as 'can you wear a condom?' which suggests that a condom is required for the full duration of the sexual act.

Difficulties also arise when examining the broadness of the definition of conditional consent, as stated earlier. Consider Karamvir Chadha's philosophical publication on conditional consent which outlines how the broadness of conditional consent could become an overreach of criminal law.[67] She asks the reader to consider this hypothetical scenario in which conditional consent seems plausible:

> Agnes tokens consent to Barry having sexual relations with her on the condition that Agnes reaches sexual completion before Barry does. Barry has sexual intercourse with Agnes and reaches sexual completion before her.[68]

This is where the broad definition of conditional consent poses a problem in its value and implementation. When reading this hypothetical theory at first glance, it seems obvious that

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[63] Brodsky, *supra* note 21.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Karamvir Chadha, *Conditional Consent*, 40 LAW & PHIL. 335 (2021).
[68] *Id.*

such an event should not be criminalized. But even so, Barry and Agnes' sexual encounter falls within the definition of conditional consent. Chadha's reflections are valid: not only do such problems fall within the scope of conditional consent but they should be taken into serious account when discussing its reformation and implementation into United States law.

In the hypothetical case of Barry v. Agnes, the violation of conditional consent is not criminalizable due to the fact that Barry did not engage in a harsh and deceptive violation of Agnes' rights, despite Barry's premature sexual completion being an unwanted occurrence for Agnes. Even if this situation did cause Agnes significant distress, the definition of conditional consent must heavily consider the severity of physical and psychological ramifications that occur due to sexual violations. This is not to say that emotional distress is not a significant factor in cases that violate conditional consent, as lifelong emotional distress resulting from any act of sexual coercion is an extremely large part of why the criminalization of fluid-rape should exist and is a major component of this note.[69] However, Agnes does not have a legal right to orgasm. Though her condition was violated and might have experienced distress because of Barry's actions, it does not warrant criminalization. This is an example of the problems that conditional consent poses if defined too broadly, leaving room for the possibility of overcriminalization and the misrepresentation of a sexual harm or violation.

III. Solutions to Criminalizing Fluid-Rape

A. Classifying Fluid-Rape as Sexual Assault

Fluid-rape would best be criminalized under a third-degree sexual assault charge in the United States. In many states, a third-degree sexual assault charge focuses on unwanted sexual contact rather than a sexual act.[70] In the District of Columbia's (D.C.) criminal code, third-degree sexual assault is classified as a "Class D felony and produces a sentence length of less than ten years," depending on the specific nature of the crime.[71] Further, sexual contact is defined as "touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the

[69] Ebrahim, *supra* note 18.
[70] *Id.*
[71] D.C. CODE § 22–3004 (2023) (defining Third Degree Sexual Abuse).

sexual desire of any person."[72] Because the act of fluid-rape relies on unwanted sexual contact with perpetrator's genitalia or genital fluid, this classification would be appropriate to the nature of the crime because it does not rely on the existence of force placed upon the victim, which is required for sexual assault in the first degree.

A third-degree sexual assault charge also focuses on non-consensual contact that occurs when a condom is not used. Fluid-rape is often done with the intention of heightening a perpetrator's sexual "gratification" and can be counted as a form of reproductive abuse as perpetrators force victims to be at risk for pregnancy.[73] This changes the way one would generally think about sexual contact and allows for the complexity and severity of fluid-rape to have a place within the criminal justice system. It would also consider the requests of many victims who agree that a first-degree rape or sexual assault charge is not proportionate to the crime.

Classifying fluid-rape as a form of rape in the sphere of United States criminal law would also hinder its ability to be prosecuted due to the narrow definition of rape and the lack of clear, universal, consent laws in the United States, which are often defined by the use of force or threat. Additionally, male public perception towards rape could influence how fluid-rape is viewed in the criminal justice system. A 2021 study sought to investigate the effects of fluid-rape justifications on rape perception in men, finding that when male participants were given a scenario in which a man is described as removing his condom non-consensually during a sexual act, rape perception was lower when the justification for the condom removal was a "natural instinct" in a man.[74] This study suggests that when condom removal was characterized as instinctual, men were less likely to perceive fluid-rape as a sexual violation at all.[75] Such findings provide insight on the difficulties that may arise with equating fluid-rape to rape, which could have a negative impact on ability to convict perpetrators in cases due to historical and current perceptions of rape in the United States.

Though some propose to criminalize fluid-rape as a sexual misdemeanor, a sexual misdemeanor is one of the lowest charges one can receive for a sexual violation and is not proportional to the severity of fluid-rape.[76] A sexual misdemeanor likely results in a fine that

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[72] *Id.* § 22–3002 (defining First Degree Sexual Abuse).
[73] *Id.* § 22–3001 (General Provisions).
[74] Kimmy Khanh Nguyen, Cody Weeks, & Douglas Stenstrom, *Investigating the Effects of Stealthing Justifications on Rape Perceptions,* 27 VIOLENCE AGAINST WOMEN 790 (2021).
[75] *Id.*
[76] D.C. CODE § 22–3006 (defining Sexual Misdemeanor).

does not exceed 1,000 dollars and imprisonment that must last less than 180 days.[77] Classifying fluid-rape as a sexual misdemeanor solely based on what the United States' current legal institutions deem as severe or not severe without acknowledging the trauma that victims experience would be irresponsible. This note relies on the assumption that legal institutions have the power to change. To classify fluid-rape under a sexual misdemeanor, what some lawyers call a 'catch-all charge' (a term that is typically used to describe any offensive behavior that does not reflect a serious criminal offense), defeats the purpose for offering ideas that strive to change the way our society currently views sexual assault and consent.

B. Adopting the Conditional Consent Doctrine in Criminal Law

The adoption of a conditional consent doctrine in the law of sexual assault would help the ability to successfully prosecute all sexual assault claims, especially fluid-rape. It could also serve as an expressive function, a function of law that is used to validate social norms beyond the fear of punishment. In this case, a conditional consent doctrine in the United States would show support for gender equality and the right to bodily autonomy. If a conditional consent doctrine is adopted in the United States, a clear statement regarding the definition of an explicit condition, such as the degree to which parties conversed about the condition in question, should be considered.

In the case of *Assange v. The Swedish Prosecution Authority*[78], the United Kingdom was one of the first to convict a man for fluid-rape during sexual intercourse with the use of conditional consent. A British man and a Swedish woman met in Sweden and had sexual relations.[79] The women consented to sex on the condition that a condom was used due to fears of pregnancy and sexually transmitted diseases.[80] When she discovered that the condom had been removed at some point during their encounter, she pressed charges.[81] Before this case, a conditional consent doctrine was not used in United Kingdom law, but was able to be implemented due to the definition of consent in the United Kingdom Sexual Offences Act of 2003,[82] which defines sexual consent as an "agreement by choice" with a person

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[77] *Id.*
[78] Assange v. The Swedish Prosecution Authority [2012] UKSC 22, [2012] 2 AC 471.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Sexual Offences Act, (2003) § 74 (U.K.).

having "the freedom and capacity to make that choice."[83] The court decided that the defendant's actions were a violation of consent, as the injured party only consented to sexual intercourse with a condom, stating that the "sexual act was designed to violate the injured party's sexual integrity."[84] In order for the defendant to be extradited to Sweden where the crime took place, the United Kingdom Supreme Court deemed his actions as criminal, allowing conditional consent to become a valid precedent.[85] The court's decision also demonstrates that in order for someone to violate conditional consent, it must be clear that the defendant is fully aware that they were in violation of a sexual agreement,[86] which can be difficult to prove without substantial evidence since the nature of sexual consent often occurs in circumstances that are solely verbal and occur in the moment.

In a different case involving fluid-rape and the Swedish government, the perpetrator and victim met on Tinder and engaged in sexual activity.[87] The victim explicitly conveyed that a condom was a non-negotiable condition when engaging in the sexual act.[88] The perpetrator removed the condom deceitfully without the victim's knowledge despite agreeing to wear a condom beforehand.[89] The Swedish government originally proceeded with a rape charge, sentencing the defendant to twelve months in prison.[90] However, this charge was later removed and changed to defilement, a charge that is defined as committing dishonorable physical actions.[91] The imprisonment length remained at twelve months.[92] These cases are possible predictors of the way fluid-rape cases could be prosecuted in other countries across the world, including the United States. Even in countries like Sweden that have expansive and clear sexual consent laws that rely on the conditional consent doctrine, fluid-rape was still not deemed severe enough to constitute a rape charge. If fluid-rape is

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83 Assange v. The Swedish Prosecution Authority [2012] UKSC 22, [2012] 2 AC 471.
84 *Id.*
85 *Id.*
86 *Id.*
87 Reuters Staff*, Swiss Court Upholds Sentence in "Stealthing" Condom Case* (May 9, 2017, 11:17 AM), https://www.reuters.com/article/us-swiss-stealthing/swiss-court-upholds-sentence-in-stealthing-condom-case-idUSKBN1851UN.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*

classified as rape in the United States, prosecution rates are likely to be low, even when the absence of consent has been proved.[93]

Canada has also used a form of conditional consent in laws relating to HIV disclosure. In 1998, the Canadian Supreme Court ruled in *R v. Cuerrier* that failing to disclose one's HIV positive status before engaging in unprotected sexual relations with another individual(s) would be regarded as a criminal offense.[94] In the case, a male defendant had unprotected sexual relations with two women while he was knowingly HIV positive and was charged with aggravated assault.[95] However, he was later charged with HIV non-disclosure.[96] The court stated that in order for sexual consent to have validity, sexual partners must disclose their HIV status.[97] With this statement, the court acknowledges that a sexual relationship between a victim and a perpetrator might not have occurred if the victim was informed that they could possibly contract HIV from the interaction, therefore making their sexual agreement conditional.[98] Though the defendant was aware of his HIV positive status in *R v. Cuerrier*, the court ruled that intent is irrelevant regarding criminalization.[99] Even if the defendant was unaware of their HIV positive status, criminal charges could still be placed.[100]

The criminalization of HIV nondisclosure in Canadian law is important to the understanding of how conditional consent could be implemented in the United States as well as what this means for the criminalization of fluid-rape. Both violations involve the presence of sexual deception and the inability to make an informed decision. Though this note argues that fluid-rape should be criminalized regardless of the physical harm it produces, concentrating on the physical consequences of fluid-rape could produce beneficial results, especially considering that ten states in the United States already have laws regarding the criminalization of HIV non-disclosure.[101]

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[93] Vanessa Romo, *Swedish Law Declares Sex Without Consent is Rape*, NAT'L PUB. RADIO (May 25, 2018, 6:07 PM), https://www.npr.org/sections/thetwo-way/2018/05/25/614438565/swedish-law-declares-sex-without-consent-is-rape.
[94] R. v. Cuerrier, [1998] 2 SCR 371 (Can.).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] R. v. Cuerrier, [1998] 2 SCR 371 (Can.).
[100] *Id.*
[101] *HIV and STD Criminalization Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/policies/law/states/exposure.html#:~:text=HIV%20and%20STD%20Criminalizati

This transition proved to be true in Canada, as the strengthened definition of consent due to the enactment of HIV non-disclosure laws eventually led to the criminalization of fluid-rape in Canada in July 2022.[102] In the case of *R v. Kirkpatrick*, the male defendant violated the victim's consent after having unprotected sexual intercourse without the victim's knowledge, despite the victim's prior insistence on using a condom before their sexual relationship began.[103] The victim realized that the defendant had violated their sexual agreement when the defendant ejaculated inside of her and found that there was no sign of a condom in use.[104] Following this case, a precedent of a two-step consent law was created in order to decide if a victim's claims of assault are valid.[105] Step one requires proof that a party consented to the "sexual act in question" and step two requires consideration if there are circumstances "including fraud, that vitiate [the party's] apparent consent."[106] As mentioned in previous sections, though a country might have expansive consent laws, acquiring a conviction for fluid-rape is difficult due to the presence of initial consent. In the ruling of *R v. Kirkpatrick*, the court stated that there was consent from the victim to engage in sexual intercourse with the defendant as well as the fact that fraud was not present.[107] However, the case was appealed as prosecutors reestablished the definition of consent, stating that "the sexual act in question" required a condom to be used, therefore, when a condom was not used, the condition in which the victim agreed to was violated and non-consensual.[108] In a final opinion, the Canadian Supreme Court announced that "sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom."[109]

This ruling has set an extremely important precedent in Canada and should be used as an example to other countries around the world, particularly in the United States. The firm stance taken by the court shows a holistic understanding of the seriousness of fluid-rape and the horrific consequences that victims can face as a result. The progression of Canada's consent laws over the past two decades are an example of how broader consent

on%20Laws%202022&text=Several%20states%20criminalize%20one%20or,disclosure%20to%20needle%2Dsharing%20partners. (last updated Oct. 24, 2022).
[102] R. v. Kirkpatrick, Judgement, 2022 SCC 13 (Jun 29).
[103] *Id.*
[104] *Id.*
[105] R. v. Hutchinson, Judgement, 2014 SCC 19 (Mar 07)
[106] *Id.*
[107] R v. Kirkpatrick, Judgement, 2022, SCC (Jun 29).
[108] *Id.*
[109] *Id.*

laws that include a form of conditional consent can greatly impact the characterization of sexual assault. It also recognizes the rights that victims have to their safety and well-being. The criminalization of fluid-rape under sexual assault provides a tangible way for victims to hold perpetrators accountable and seek justice through the state.

C. Fluid-Rape: Civil Law and Criminal Law

Though this note argues for fluid-rape to be prosecuted as a criminal offense, fluid-rape should also be prosecuted under civil law, as it is currently in the state of California. The goal of civil litigation is to "compensate the plaintiff for any injuries and to put the plaintiff back in the position that person held before the injury occurred," as opposed to criminal prosecution, which requires a "violation of state or federal law" and decides punitive measures.[110] As described earlier, an explicit condition being present is difficult to argue in a criminal court. The lack of physical ramifications that could result from a fluid-rape can also influence the likelihood of a victim receiving justice in criminal proceedings. Because of this, there must be options for victims that do not want to press criminal charges on a perpetrator due to the unreliability of a criminal conviction. Alexandra Brodsky, a civil rights attorney, has popularized the notion that fluid-rape is a violation of consent with her article that labels fluid-rape as a rape-adjacent action. Though this note argues with the presumption that fluid-rape is an inherent violation of consent, Brodsky sparks a key point of interest when discussing the criminal consequences of fluid-rape. Even in cases with substantial evidentiary support and obvious harm, there is a distinct "limitation on the liberatory potential of criminal law," especially towards providing an adequate amount of justice and closure to victims.[111]

Brodsky is right to voice such fears about criminal law. Even if conditional consent is adopted in the United States, there are cases in which conditional consent will be hard to prove in a criminal court, as this note has discussed. If woman A agrees to sexual intercourse with man B and a condom is used and then is taken off without woman A's knowledge, woman A would be required to prove that she only consented to sexual intercourse with a condom. It will be difficult to prove that woman A only consented to sexual intercourse if a condom was used, and not to sexual intercourse in any other condition. It is also important to note that birth control methods have the capacity to fail. Condoms can come off

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[110] *The Difference Between Civil and Criminal Law*, *in* CRIMINAL LAW 6 (Minnesota Libraries Publishing ed.) (2012).
[111] Brodsky, *supra* note 21.

unintentionally and unknowingly to both parties involved in a sexual act (without malicious intent). Even with the presence of malicious intent, uncertainty is still present. The defendant (man B) could claim that there was never a specific conversation conducted by woman A that required man B to use a condom for the entirety of their sexual act (an explicit condition), especially if they have had consensual unprotected sex before this instance. Though this note argues that initial request for a condom implies its usage throughout the entirety of a sexual act regardless of past sexual interactions, complex instances like these, depending on the specificity of a conditional consent doctrine that is adopted, will have to be left up to the discretion of a judge and adequate justice for victims is unfortunately not certain.

Going forward with a criminal case is not just an evidentiary battle. This experience can also be very traumatic for individuals who report their sexual assault to law enforcement. Criminal sexual assault cases are often not taken seriously, with victims having a tendency to "be blamed for the sexual assault" rather than receiving helpful advice on how to proceed forward with legal criminal action.[112] Such occurrences of ineffectiveness that are present within the American criminal justice system further propel victims to seek support and justice through other ways, such as civil litigation. Since conviction rates for sexual assault and rape are already low, victims might feel unsatisfied with the minimal or lack of conviction that a perpetrator receives.[113] This is when a civil suit can be most beneficial for a victim, as they can receive justice through monetary support for the possible physical and psychological damages they have faced since the incident. The definition of conditional consent should retain its broadness for civil cases due to the greater focus on victim compensation as civil law has a greater capacity to administer reparations for psychological violations, such as in instances of the hypothetical case of Barry v. Agnes.[114] The broader definition of conditional consent for civil cases would not result in over-criminalization for rape and sexual assault cases.

Fluid-rape is an action that should be criminalized within the American legal system. It is an undeniable violation to an individual's autonomy and consent that can result in distressing emotional and physical consequences. However, victims should be able to choose

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[112] Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U.L. REV. 479 (1977).
[113] U.S Dep't of Just., National Crime Victimization Survey, (2015-2019)
[114] Chadha, *supra* note 67.

how they want to receive justice. This is especially true as there are instances where legal efforts will be more productively used in the scope of civil law as opposed to criminal law, as civil cases have to prove the preponderance of evidence, or that it is 51 percent likely that the defendant committed fluid-rape.[115] This is different than criminal law, which requires one to prove that fluid-rape was committed beyond a reasonable doubt.[116] Civil law can help victims with claims when there are no physical ramifications, but can also be used when such physical complications have occurred such as sexually transmitted diseases and unwanted pregnancy. These decisions are ultimately up to the victim to decide which path is best for them and their unique situation, taking into account their own trauma and ideas of justice.

Conclusion

The combination of conditional consent and the criminalization of fluid-rape creates an important sense of security for victims of deceptive forms of sexual assault. Though the progress made in California is a positive step in the right direction for victims of fluid-rape cases, fluid-rape should be tried under both criminal and civil sexual assault laws. Victims should be able to make an independent and informed decision about the legal options that are available to them, options that currently does not exist in the United States due to the absence of criminal laws regarding fluid-rape. Criminalization for fluid-rape would best be classified under a third-degree sexual assault charge. Because fluid-rape is a form of sexual deception, punitive options for perpetrators should be established. Even if a victim decides not to move forward with criminal proceedings, civil options should be available to them. The adoption of a conditional consent doctrine modeled after laws in countries such as the United Kingdom and Canada will help bring justice for survivors and change the unstandardized consent laws that are currently in place in the United States. Though fluid-rape adds to the difficulties already present when prosecuting any sexual assault crime, evidentiary challenges should not be a discouragement in the fight for its criminalization. Victims deserve to receive justice for the violations that have been done to them. The serious consequences that can result from fluid-rape, such as forced pregnancy and contraction of

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[115] Stacy Barrett, *Stealthing Laws: Removing a Condom without Consent*, ALLLAW, https://www.alllaw.com/articles/nolo/personal-injury/california-stealthing-laws.html. (last accessed March 3, 2023).
[116] *Id.*

sexually transmitted diseases, demonstrate clear harms that require proper legal avenues for victims.

An Originalist Explanation of Race-Consciousness

Reeya Patel

Introduction

During its October 2022 term, the Supreme Court heard oral arguments in three cases challenging the current standard of race in the law. *Merrill v. Milligan* challenges the Voting Rights Act (VRA) on the grounds that race-conscious redistricting is unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[1] *Students for Fair Admissions v. President and Fellows of Harvard College*[2] and *Students for Fair Admissions v. University of North Carolina*[3] both challenge affirmative action admissions policies on the grounds that race-consciousness is also unconstitutional in that context.[4] It became clear that the Roberts Court aimed to tackle the question of race-consciousness and the contours of its relationship with the Fourteenth Amendment. This note grapples with the same question the Court faces and highlights why the approach some anticipate the Court may take to the Fourteenth Amendment is incorrect. In doing so, this note will introduce a new framework for understanding the role race plays in the Fourteenth Amendment by using two terms – positive discrimination and negative discrimination – and will demonstrate how race-consciousness is a fundamental aspect of the Fourteenth Amendment. The cases before the Court are current examples of positive and negative discrimination at work and will be used to juxtapose the two frameworks.

Positive discrimination is legislation or policy that supports a specific group of people who have historically faced a system of oppression and exclusion to right a previous wrong in a particular context.[5] It is a law or practice designed to ensure the equal protection

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[1] Transcript of Oral Argument at 00:00:51, *Merrill v. Milligan*, No. 21-1086, (U.S. argued Oct. 4, 2022). https://www.oyez.org/cases/2022/21-1086.
[2] 980 F.3d 157 (1st. Cir. 2020).
[3] *Students for Fair Admissions v. University of North Carolina*, No. 21-707, (U.S. argued Oct. 31, 2022).
[4] *See* DAVID KAPLAN & MICHEL MARTIN, *A Look at 2 Supreme Court Cases Challenging Affirmative Action in Higher Education*, NPR, https://www.npr.org/2022/10/30/1132724610/a-look-at-2-supreme-court-cases-challenging-affirmative-action-in-higher-educati (last visited Jan. 6, 2023).
[5] OXFORD ENGLISH DICTIONARY, entry "positive discrimination" (2022).

of all people. It aligns most closely with race-consciousness, a term frequently used in political spheres that has become controversial in regard to affirmative action.[6] Closely related to positive discrimination, race-consciousness is the awareness of membership in an ethnic or minority group, which includes an awareness of that group's history of exclusion or oppression.[7] In contrast, "race-blind" refers to policies in which no consideration of race occurs in legislation or policy.[8] Finally, "negative discrimination" describes a policy that denies the rights and privileges enjoyed by others to a specific group of people.[9]

This note focuses on race and the African American minority group even though affirmative action and the VRA more broadly encompass all groups of people. Although affirmative action protects all minorities, its primary origins lie in protections for African Americans with *Regents of the University of California v. Bakke* as a race-based case.[10] The VRA has mostly dealt with racial issues, so, because African Americans are the common thread between affirmative action and the VRA, this note targets race only. Secondly, the Fourteenth Amendment and the Equal Protection Clause will be the centerpieces of this note even though the VRA does consider other constitutional questions such as the separation of powers and the Fifteenth Amendment.[11]

Part I consists of an overview of the legal foundations of the Fourteenth Amendment and how the current Supreme Court interprets it. Part I also explains affirmative action and the important legal precedent that shaped it. It will examine the history and precedent surrounding both affirmative action and the VRA, and explore the history and significance behind the Fourteenth Amendment. Part II analyzes how the Court's expected interpretation of the Fourteenth Amendment mischaracterizes the original meaning and intent of the Fourteenth Amendment, which codified race-consciousness and was also designed to allow for race-consciousness with vital caveats. Lastly, Part III introduces a new theory to understand the Fourteenth Amendment's stance on positive discrimination (and consequently, race-consciousness) and introduces a workable legal test to use in judicial decision-making that complies with the words, principles, and original intent of the

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[6] *Id.*
[7] *See* STEVEN J. GOLD & PAULA MILLER, *Race and Ethnic Consciousness*, BLACKWELL ENCYCLOPEDIA SOCIO. 1 (G. Ritzer eds. 2015).
[8] *See* MONNICA T. WILLIAMS, *Colorblind Ideology is a Form of Racism*, PSYCH. TODAY, https://www.psychologytoday.com/us/blog/culturally-speaking/201112/colorblind-ideology-is-form-racism (last visited Jan. 6, 2023).
[9] OXFORD ENGLISH DICTIONARY, entry "negative discrimination" (2022), https://www.oed.com/.
[10] 438 U.S. 265 (1978).
[11] *See e.g., Katzenbach v. South Carolina*, 383 U.S. 301 (1966); *Shelby County v. Holder*, 570 U.S. 529 (2013).

Fourteenth Amendment. The note concludes that race-consciousness is deeply embedded in the Fourteenth Amendment; as a result, a race-conscious policy is constitutional so long as it does not create any negative harm to other groups not targeted in the policy, otherwise known as positive discrimination. This is the model for the VRA. On the other hand, a race-conscious approach that does create perverse effects for others, or otherwise known as negative discrimination, is unconstitutional.

I. The Fourteenth Amendment, Affirmative Action, & the Voting Rights Amendment

A. The Fourteenth Amendment

The Fourteenth Amendment of the U.S. Constitution states that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[12]

The Fourteenth Amendment ensured that former slaves were citizens of the nation with rights and privileges after a long period where African Americans were not granted citizenship and were subordinate to others.[13] The amendment stems from a long history of legal oppression of African Americans from the founding of the United States Constitution.[14] Slavery was embedded in the Constitution through the 3/5ths Clause, stating that slaves and their descendants counted as 3/5ths of a person in the context of congressional apportionment.[15] This Clause was created to ensure slaves, when counted in the Census to allocate representation for the larger southern states, would not establish southern dominance over the northern states.[16] The debate over slavery continued until the Civil War when the southern states attempted to secede, as they felt that states had the right to regulate whether or not they practiced slavery, not the federal government.[17] This country's origins until the Civil War established that African Americans were not citizens, nor would they ever become citizens of the United States. Enslaved African Americans

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[12] U.S. CONST. amend. XIV, §1.
[13] RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 1, 10 (2021).
[14] DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 1, 10-25 (2009).
[15] U.S. CONST. art.1, §2, cl.3.
[16] WALDSTREICHER, *supra* note 14, at 1.
[17] ERIC FONER, GIVE ME LIBERTY! AN AMERICAN HISTORY 510 (5th ed. 2016).

had no access to the rights and privileges of the rest of United States citizens, particularly white men.[18]

The practice of slavery created a constitutional system of oppression and racist ideology that took almost two hundred years to address.[19] It is critical to understand the legacy of slavery and the scope of the Fourteenth Amendment to fathom how slaves and their descendants were treated up until today to fully comprehend the scope of the Fourteenth Amendment. Congressman Henry Stanton writes in his denunciation of slavery:

> His labor is coerced by laws of Congress; no bargain is made, no wage is given…His domestic and social rights are as entirely disregarded in the eye of the law. . . There is not a shadow of legal protection for the family state among the slaves of the district. . . neither is there any real protection for the lives and limbs of the slaves. . . no slave can be a party before a judicial tribunal. . . He is not known to the law as a person: much less, a person having civil rights. The master may murder by system, with complete legal impunity.[20]

Stanton's description of an African American's life demonstrated the need for a constitutional amendment to address structural inequalities. This structure of inequality and imprisonment, as illustrated by Stanton, could not be fixed easily. Slavery was deeply embedded in the legal system of this country, including the Constitution.[21] This dynamic was on full display in *Dred Scott v. Sandford,* in which the Court denied African Americans, free or enslaved, the right to due process of law because, according to the Court, they could never be citizens of the country.[22] In the Court's majority opinion, Chief Justice Taney writes:

> [African Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[23]

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[18] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 60 (1857), *superseded by constitutional amendment,* U.S. CONST. amend. XIV.
[19] WALDSREITCHER, *supra* note 14, at 1.
[20] BARNETT & BERNICK, *supra* note 13, at 323.
[21] WALDSTREICHER, *supra* note 14 at 1.
[22] 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment,* U.S. CONST. amend. XIV.
[23] *Id* at 60.

Dred Scott is an essential case in understanding the original meaning and purpose of the Fourteenth Amendment.[24] It illustrates the extent to which African Americans were second-class citizens and demonstrates the gap in the United States Constitution that the Fourteenth Amendment was meant to correct. As Chief Justice Taney wrote, African Americans were excluded from almost every aspect of society in the elimination of social and political relations, had no rights to any societal institutions, and were purely a vessel of commerce. Chief Justice Taney asserts that a state of inferiority for slaves and their descendants was baked into the country for all of its existence; they never could, or would, be free.[25] Every political, social, and economic institution was stacked against freedom and equality.

During the Civil War, Congress, with the urging of President Abraham Lincoln, passed the 13th Amendment, officially banning the practice of slavery.[26] After the Union triumphed in the war, the Radical Republicans, a group of abolitionist lawmakers who fought to end slavery for decades, took control of Congress, hoping to establish equality across all races.[27] It is here, within a context of historical oppression, brutality, systemic inferiority of citizenship, and war that the nation passed the Fourteenth Amendment, which established the fundamental right to equality between the races, as well as the right to equal citizenship under the law.

The Fourteenth Amendment contains three important clauses: (1) the Citizenship Clause, (2) the Due Process Clause, and (3) the Equal Protection Clause.[28] The Citizenship Clause declared that all people born within the United States were citizens of the nation,[29] allowing former slaves to be full citizens with the rights that are guaranteed with citizenship.[30] The Due Process Clause ensures that every person in the nation has the right to due process of life, liberty, and property.[31] The Equal Protection Clause states that "no state shall. . .deny to any person within its jurisdiction the equal protection of the laws."[32] It

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[24] *Id.*
[25] U.S. CONST. art. 1, §2, cl. 3.
[26] FONER, *supra* note 17, at 515.
[27] *Id.* at 566.
[28] U.S. CONST. amend. XIV, § 1.
[29] *Id.*
[30] BARNETT & BERNICK, *supra* note 13, at 109.
[31] *Id.*
[32] BARNETT & BERNICK, *supra* note 13, at 109.; U.S. CONST. amend. XIV, §1.

establishes that each person, "born or naturalized in the United States," is to be treated equally under the law.[33]

B. How the Current Supreme Court Understands the Fourteenth Amendment

a. The Theory of Originalism as the Majoritarian Judicial Philosophy

The current Supreme Court can be understood as a majority of originalists. Originalism, a judicial philosophy as old as the Court itself, states that the United States Constitution should be interpreted based on the original meaning of the text as was originally understood at the time of its ratification.[34] There are three principles of originalist philosophy that guide a Justice's thinking. The first is the Fixation Thesis, which states that the linguistic meaning of the constitutional text is fixed at the time it was ratified and that its meaning does not change.[35] The second is the Public Meaning Thesis, which states that the public's understanding of the constitutional text is also fixed at the time it was ratified.[36] Lastly, the Textual-Constraint Thesis states that the fixed linguistic and original public meaning is binding law and should be treated as such.[37] The current Court will likely approach the Fourteenth Amendment using the above framework.[38] Because race is not mentioned in the Fourteenth Amendment, an originalist Supreme Court is likely to interpret the Fourteenth Amendment as race-blind.

C. Affirmative Action

In the context of university admissions, affirmative action is a policy that allows admissions officers to consider race as one of many criteria for admitting students.[39] It was intended to redress some of the educational inequality that existed after a legacy of slavery and Jim Crow segregation laws to give both white and African American students a fairer chance at being admitted to competitive schools.[40] Affirmative action was deemed

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[33] U.S. CONST. amend. XIV, §1; BARNETT & BERNICK, *supra* note 13, at 261.
[34] LAWRENCE B. SOLUM & ROBERT W. BENNET, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 8 (2011).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *See* ROBERT BARNES, *et. al, Supreme Court seems open to ending affirmative action in college admissions*, THE WASHINGTON POST, https://www.washingtonpost.com/politics/2022/10/31/supreme-court-race-college-admissions-harvard-unc/, (last visited Apr. 16, 2023).
[39] *See Students for Fair Admissions v. President and Fellows of Harvard College* 980 F.3d 157 (1st. Cir. 2020); *Students for Fair Admissions v. University of North Carolina; Regents of the University of California v. Bakke* 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003); *Fisher v. University of Texas* 579 U.S. 365 (2016).
[40] *See Students for Fair Admissions v. President and Fellows of Harvard College* 980 F.3d 157 (1st. Cir. 2020); *Students for Fair Admissions v. University of North Carolina; Regents of the University of California v. Bakke* 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003); *Fisher v. University of Texas* 579 U.S. 365 (2016).

constitutional in 1978.[41] In *Regents of the University of California v. Bakke (1978),*[42] the University of California ("UC") established an admissions rule that reserved exactly 16 out of 100 seats for African American students, allocating the rest for white students.[43] Allan Bakke was a white student who claimed that he was unfairly denied admission to UC's medical school because racial quotas were a direct violation of the Civil Rights Act and blatantly discriminated against white students by giving preferential treatment to African American students for those 16 spots.[44] The Court held that the racial quotas, in which seats are reserved for specific races, were unconstitutional since they allowed the university to reject students simply on the basis of their race, failing to afford the two races equal protection of the laws.[45] However, the Court also held that using race as one of many criteria in admissions was constitutionally sound because the state had a compelling government interest in eliminating the detrimental effects of historical discrimination.[46] Justice Powell, writing for the Court, summarized this distinction:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[47]

In other words, the Court ruled that affirmative action is permissible as long as it does not make race the determinant factor. Yet, the *Bakke* opinion does imply that in the case of two applicants with the same academic merits, one will get denied and the other accepted because they have different races.[48] Many constitutional theorists, including Justice White who concurred and dissented to *Bakke*, regarded the consideration of race in this manner as a violation of the Fourteenth Amendment.[49]

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[41] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[42] 438 U.S. 265 (1978).
[43] *Id.* at 438.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Regents of the University of California v. Bakke*, 438 U.S. 265, 381 (1978) (White, B., dissenting).

Thus, though *Bakke* became precedent, the decision was immediately controversial and problematic.[50] The use of race in the college admissions process was up for debate once again in 2003. *Grutter v. Bollinger*[51] reaffirmed the *Bakke* decision that the Equal Protection Clause allows the consideration of race as a criterion for admission because the educational benefits of diversity are a sufficient state interest to outweigh concerns about the use of race and pass the strict scrutiny test.[52] It established that strict scrutiny must be applied to each affirmative action case.[53] In the Court's majority opinion, Justice O'Connor writes that "the Law School's race-conscious admissions program does not unduly harm nonminority applicants."[54] Yet, Justice O'Connor also warned in her majority opinion that affirmative action was a dangerous precedent given its debated compatibility with the Equal Protection Clause.[55]

Still a highly controversial constitutional issue,[56] affirmative action was re-examined by the Supreme Court in 2016 in *Fisher v. University of Texas.*[57] Texas law required the University of Texas to admit all high school students who ranked in the top 10 percent of their classes in an attempt to attract more in-state students.[58] The University of Texas complied with this law, but due to a skewed balance in the racial and ethnic makeup of this group, the university began applying affirmative action policy to the remaining 90 percent of high school seniors.[59] Fisher, a white student who was denied admission, sued, arguing that she was being denied equal protection of the law due to the university preferentially treating students of color.[60] The Court upheld affirmative action but narrowed the scope of the policy by placing affirmative action on a stricter standard of judicial scrutiny to examine whether the policy is sufficiently tailored to serve the interest of diversity.[61]

At this point, there is a clear, established precedent that states that affirmative action is constitutional, since diversity on college campuses is a compelling state interest, though

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50 CLAIRE ANDRE, et al., *Affirmative Action: Twenty-five Years of Controversy*, 5 ISSUES IN ETHICS, (Summer 1992).
51 539 U.S. 306 (2003).
52 438 U.S. at 309.
53 *Id.*
54 *Id.*
55 *Id.*
56 ANDRE, et al., *supra* note 50.
57 579 U.S. 365 (2016).
58 Fisher v. University of Texas, 579 U.S. 365 (2016).
59 *Id.*
60 *Id.*
61 *Id.*

many justices currently hint that this is no longer the case.[62] The Supreme Court has accepted that universities can consider race among other factors in their admissions process. However, the affirmative action cases currently before the Court create an opportunity for an originalist majority to object to affirmative action on the grounds that the Fourteenth Amendment makes no mention of race anywhere in the text, and therefore race cannot be a factor at all in the admissions process.[63]

D. The Voting Rights Act of 1965 and its Challenges in Court

In the aftermath of the Civil War and the Fourteenth Amendment, most leaders and politicians, including President Lincoln, were still reluctant to give African Americans the right to vote, including President Lincoln.[64] Following the passage of the Fourteenth Amendment, southern states were still denying African Americans the right to vote by using violence and fear tactics to prevent African Americans from voting at polls.[65] In response, the Radical Republicans passed the Fifteenth Amendment, which states that: "The right of citizens of the United States to 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. The Congress shall have the power to enforce this note by appropriate legislation."[66]

Eventually, the Radical Republicans became so unpopular that many were voted out of office.[67] With the Radical Republicans' departure came the rise of the Southern Democrats who fiercely opposed racial equality by immediately passing the Jim Crow Laws.[68] These laws created an apartheid system that separated African Americans and whites from each other, providing African Americans with no equal protection or due process of the law.[69] In other words, the promises of the Fifteenth Amendment went unfulfilled. Among the Jim Crow Laws were numerous barriers to the vote, such as poll taxes, literacy tests, and militia policing

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[62] *See Students for Fair Admissions v. President and Fellows of Harvard College* 980 F.3d 157 (1st. Cir. 2020); *Students for Fair Admissions v. University of North Carolina (2023).*

[63] Speculative. *See* DAVID KAPLAN & MICHEL MARTIN, *A Look at 2 Supreme Court Cases Challenging Affirmative Action in Higher Education*, NPR, https://www.npr.org/2022/10/30/1132724610/a-look-at-2-supreme-court-cases-challenging-affirmative-action-in-higher-educati (last visited Jan. 6, 2023).https://www.npr.org/2022/10/30/1132724610/a-look-at-2-supreme-court-cases-challenging-affirmative-action-in-higher-educati (last visited Jan. 6, 2023).

[64] CHANDLER DAVIDSON, *"The Voting Rights Act: A Brief History" appears in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 1, 7-34 (Bernard Grofman & Chandler Davidson eds., 1992).

[65] FONER, *supra* note 17, at 579.

[66] *Id.* at 570; U.S. CONST. amend XV, §§ 1-2.

[67] FONER, *supra* note 17, at 579-83.

[68] *Id.*

[69] *Id.* at 651-654.

outside voting booths to prevent African Americans from voting.[70] This lasted for almost a century before Congress passed the Voting Rights Act (VRA) in 1965, which eliminated barriers to voting and created safeguards to prevent any future violations.

The VRA sought to remove the barriers that prevented African Americans from voting based on decades of data on voter participation and registration data.[71] Section Two implements a ban on race-based voting qualifications.[72] Section Four guarantees the right to vote regardless of proficiency in English, establishes a formula to determine which areas of the country were most discriminatory, and applies stricter rules to prevent discrimination in those jurisdictions.[73] Section Five, more commonly known as the preclearance section, required jurisdictions with a history of voter discrimination to gain the approval of the Department of Justice before enacting a new election law.[74]

Nevertheless, the VRA was immediately met with legal challenges. *South Carolina v. Katzenbach* challenged the VRA because it violated the state's right to regulate elections as they saw fit due to the separation of powers between the federal government and the states.[75] The Court upheld the VRA finding that the Fifteenth Amendment granted the explicit power to Congress to enforce the amendment as they saw fit.[76] Congress enacted the VRA as a reasonable enforcement power based on data demonstrating that African American people were being denied the vote on the basis of race.[77] As written by Chief Justice Warren, "the Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."[78]

Today, *Merrill v. Milligan*[79] seeks to challenge parts of the VRA on the grounds that it violates the Fourteenth Amendment. In this case, the Alabama legislature redrew the district map such that one of the districts has a majority African American population while the remaining districts have a much smaller African American population.[80] Challengers to this map argue that the legislature purposely gerrymandered the districts to dilute the voting

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[70] *Id.*
[71] *See South Carolina v. Katzenbach*, 383 US 301 (1966).
[72] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 1-19.
[73] *Id.* §4.
[74] *Id.* §5.
[75] 383 U.S. 301 (1966) at 308.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] No. 21-1086 (U.S. argued Oct. 4, 2022).
[80] *Merrill v. Milligan*, No. 21-1086, (U.S. argued Oct. 4, 2022).

power of African Americans.[81] This would violate Section Two of the VRA, which prohibits racial discrimination in election policies.[82] During their oral argument, attorneys representing the state argued that the Fourteenth Amendment does not consider race at all; therefore, the district map as the legislature has drawn it should be allowed to stand.[83] In addition, Alabama alleges that Section Two of the Voting Rights Act is unconstitutional on these grounds. From oral argument on this case, the Supreme Court appears likely to agree, illustrating how the Court is moving toward a race-blind constitutional philosophy to the detriment of the true meaning of the Fourteenth Amendment as applied to race-based cases.[84]

II. The Court's Misunderstanding of the 14th Amendment as Applied to Race

A. The Original Meaning and Intent of the Fourteenth Amendment

a. The History of the Fourteenth Amendment and the Drafting Process

Following the conclusion of the Civil War, the legal right to equality for African Americans was not guaranteed; rather, any rights African Americans had gained in the post-war period were instead being rapidly stripped from them. After Abraham Lincoln's assassination, Andrew Johnson was elected President.[85] Johnson, a Tennessee politician, was sympathetic to the interests of Southerners.[86] He admitted the Southern states back into the Union under the control of a military governor.[87] Johnson's Reconstruction plan only allowed white people to vote on state legislatures and newly re-written state constitutions.[88] Former slaves, though freed people, were excluded from the democratic process.[89] Resentful that the federal government was exerting its will over the former Confederate states, and to the outrage of the Radical Republicans who still had a majority in Congress, the Southern states enacted the Black Codes.[90] The Black Codes were a punitive legal system that relegated

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[81] Brief for Petitioner, Merrill vs. Milligan, No. 21-1086, (U.S. argued Oct. 4, 2022).
[82] *Id.*
[83] Oral Argument at 00:00:51, Merrill vs. Milligan, No. 21-1086, (U.S. argued Oct. 4, 2022). https://www.oyez.org/cases/2022/21-1086.
[84] *See* AMY HOWE, *Conservative justices seem poised to uphold Alabama's redistricting plan in Voting Rights Act challenge,* SCOTUS BLOG, https://www.scotusblog.com/2022/10/conservative-justices-seem-poised-to-uphold-alabamas-redistricting-plan-in-voting-rights-act-challenge/ (last visited Apr. 16, 2023); *See* also Oral Argument, Merrill vs. Milligan, No. 21-1086, (U.S. argued Oct. 4, 2022). https://www.oyez.org/cases/2022/21-1086.
[85] FONER, *supra* note 17, at 564.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] GARY STEWART, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Institutions*, 107 YALE L.J. 2249, 2259 (May 1998).

former slaves to second-class citizens.[91] The laws repressively regulated the behavior of former slaves and created a system that forced them to be dependent on white planters.[92] Under these codes, freed African Americans could not work, travel freely, vote, serve on juries, and legally marry, among other restrictive rules.[93] Though slavery had ended, African Americans were being forced into another system that was, in principle, similar to slavery.[94]

It became clear to the Radical Republicans that the legal right to equality needed to be ensured by the federal government. Therefore, in response, Congress passed the Civil Rights Act of 1866 to ensure federal equality for freed African Americans.[95] The Act declared that all people born in the United States were citizens and granted equal protection of the law.[96] President Johnson, opposed to racial equality, vetoed the bill.[97] However, the Radical Republicans had enough support in Congress to override Johnson's veto.[98] Though the Civil Rights Act of 1866 was passed, it did not have a strong foundation of support due to Johnson's veto.[99] Both during the process of passing the bill and immediately after, some legislators believed that the rights and freedoms of African Americans needed stronger protections than a mere, revocable Congressional act.[100] Talk of another constitutional amendment following the Thirteenth Amendment became a reality, and Congress began drafting the amendment.[101]

Fierce debate surrounded the drafting process. The amendment included a more punitive process of readmitting the Southern states into the Union, repudiation of Confederate war debt, civil rights for African American men, and a new plan to reapportion Congress based on its new population.[102] Through constant debate, the amendment was shortened to include only civil rights, equality, and citizenship for African Americans—vague enough to be applied to all citizens of the country.[103] What is clear from the ratification debates is that the ratifiers of the amendment intended to ensure equality between white and

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[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] FONER, *supra* note 17, at 561.
[95] Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27.
[96] *Id.*
[97] FONER, *supra* note 17, at 567.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] FONER, *supra* note 17, at 568.
[103] *Id.*

African American people and the rights that citizenship naturally guarantees.[104] Throughout the legislative debate on the Fourteenth Amendment in Congress, race was the commanding factor. Senator Jacob Howard wrote:

> This [Fourteenth Amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of person to a code not applicable to another....It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man....Ought not the time to be now passed when one measure of justice is to be meted out to the members of another caste, both castes being like citizens of the United States....[105]

Senator Howard mentions both the "white man" and the "black man" twice each in this short defense of the Fourteenth Amendment.[106] Howard was clearly addressing the racial inequalities between African Americans and white people in defending the amendment as a mechanism to prevent those inequalities. These direct references to racial relations suggest that the Fourteenth Amendment, at the time of ratification, was intended to be race-conscious from the beginning. A possible counterargument is that Howard's statement could be the genesis of race-blind approaches, but the context for Howard's speech is just as important. He speaks about the African American man being treated equally to the white man because, at that point in history, the white population had far more legal rights than the African American population.[107] Taking a race-blind approach from this point is not feasible because Howard referred to the Fourteenth Amendment as a mechanism to equalize the law and raise African Americans up to the platform white people were already on.

Senator Howard was not the only politician to speak about African Americans when drafting the amendment. Congressman Bingham, in his address to rally support for ratification, referred to the New Orleans massacre against African Americans and spoke about the cruel treatment of African Americans in the South.[108] From this, it can be reasonably concluded that the Fourteenth Amendment was never meant to be a race-blind philosophy but rather a race-conscious amendment. The Fourteenth Amendment was designed to address disparities between the white and African American populations.

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[104] THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 147 (Alfred Avins comp., 1967), hereinafter THE RECONSTRUCTION AMENDMENTS' DEBATES.
[105] BARNETT & BERNICK, *supra* note 13, at 330.
[106] *Id.*
[107] *Id.*
[108] *Id.*

Of course, the word "race" does not appear in the text of the Fourteenth Amendment, nor does it mention African Americans or slaves. This is the rebuttal offered by advocates of the race-blind judicial philosophy.[109] The Constitution is necessarily vague, and the Fourteenth Amendment is no exception.[110] However, originalist philosophy requires that decision-makers examine not just the final text but its original meaning and purpose.[111] Neglecting to mention the specific racial group the drafters were addressing was not by accident.[112] Like the main body of the Constitution before it, the drafters of the Fourteenth Amendment kept the wording vague to ensure that the Fourteenth Amendment ensures equality and citizenship to all people. As Congressman Clark addressed his colleagues in his defense of the Fourteenth Amendment:

> The black man has just as much right to his vote as the white man has to his; and it is no more a gift or boon in the one case than in the other; and the white man has no more authority to confer or withhold it than the black man; and the black man of this city has just as good a right to vote that the white man shall not exercise the elective franchise here as the white man has that the black man shall not. Neither has the right to control or restrict the other.[113]

Clark speaks about the Fourteenth Amendment broadly, demonstrating that it was an amendment designed to enshrine *all* in its wording.[114] By addressing both the rights of the African American man and the white man, it is clear that leaving any mention of race out of the Fourteenth Amendment was so that no one would be excluded from the amendment's guarantees by singling out the protection of a certain race.[115] This does not mean that the history of the Fourteenth Amendment and its drafters' intentions can be disregarded because the framers of the amendment pertained to all Americans. It cannot be dismissed that the context of African American discrimination dominated the debates on the Fourteenth Amendment.[116] The tenets of originalism require that decision-makers examine the original meaning and intention, and the original public meaning of the amendment was race-conscious from its inception. This originalist approach allows for a modern application of centuries-old text while maintaining fidelity to the text and original meaning of the

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[109] WILLIAMS, *supra* note 8.
[110] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
[111] SOLUM & BENNETT, *supra* note 34, at 8.
[112] THE RECONSTRUCTION AMENDMENTS' DEBATES *supra* note 104, at 147.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

Constitution.[117] Following this approach signals the need to consider African American discrimination and race-consciousness when analyzing the Fourteenth Amendment in regards to race-based cases.

b. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment is implicated in each of the affirmative action cases and *Merrill v. Milligan*.[118] According to the Fourteenth Amendment, "[no] State [shall] deny to any person within its jurisdiction the equal protection of the laws."[119] Its wording is what underlines the constitutionality of affirmative action and the VRA - that each person is equally treated under the law.[120] The principle of the Equal Protection Clause originates in the Civil Rights Act of 1866, which signals its incredible importance to the Fourteenth Amendment.[121] The drafters of the amendment desired to eliminate discrimination on the basis of three classes of people: race, class, and caste.[122] Race, class, and caste became the three categories that summarize every form of arbitrary legislation that punishes one group of people over another.[123] The Equal Protection Clause, along with the Due Process Clause,[124] abolishes legislation that made "arbitrary and unreasonable distinctions between citizens and persons"(race),[125] created "special or partial legislation that picked out a group for special benefits or special burdens" (class),[126] or enacted laws that "made a disfavored caste of subordinated a group through law" (caste).[127] Each person, no matter the race, class, or caste that one belongs to, is equally treated before the law. This is the main principle of the Fourteenth Amendment – fundamental equality under the law.

The same principles, intentions, and meanings of the Fourteenth Amendment also apply to the Equal Protection Clause on the basis that the clause is part of the amendment.

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117 BARNETT & BERNICK, *supra* note 13, at 10.
118 *See Students for Fair Admissions v. President and Fellows of Harvard College* 980 F.3d 157 (1st. Cir. 2020); *Students for Fair Admissions v. University of North Carolina XXXX; Regents of the University of California v. Bakke* 438 U.S. 265 (1978); *Grutter v. Bollinger* 539 U.S. 306 (2003); *Fisher v. University of Texas* 579 U.S. 365 (2016). *See* also *Merrill v. Milligan* No. 21-1086 (U.S. argued Oct. 4, 2022).
119 U.S. CONST. amend. XIV, §1.
120 BARNETT & BERNICK, *supra* note 13, at 323.
121 Civil Rights Act of 1866, Pub. L. No. 101-567, 14 Stat. 27.
122 JACK M. BALKAN, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 314 (2007).
123 *Id.*
124 *Id.*; Balkan uses this quote from Senator Jacob Howard's introduction of the Fourteenth Amendment to the Senate about the design of the Fourteenth Amendment.
125 BALKAN, *supra* note 122, at 315.
126 *Id.*
127 *Id.*

While the Equal Protection Clause applies to all, the intentions behind the clause speak to an awareness of the gap in racial equality following the history of exploitation and violence. Congressman Thaddeus Stevens, the most vocal supporter of racial equality, promised the Fourteenth Amendment to all and specifically addressed racial relations in a race-conscious manner:

> Whatever law punishes a white man for a crime shall punish a black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.[128]

Stevens brought attention to the lack of equality of the law between African Americans and white people plaguing the nation, signaling that the Equal Protection Clause should be understood in a race-conscious manner. While speaking to the general principle of the Fourteenth Amendment, Stevens also highlights the institutions that do not afford African Americans the same rights and privileges as white people; the Fourteenth Amendment rectifies this. Stevens spoke about the judicial institution, but it also applies, more generally, to most public institutions in America that denied African Americans the same privileges that white people regularly enjoyed. The Equal Protection Clause is race-conscious while also preserving the general inclusivity of the statement.

B. A Constitutional Reevaluation of Affirmative Action and the Voting Rights Act

a. Affirmative Action and the Voting Rights Act – Race-Blind or Race-Conscious?

Based on the history and drafting process of the Fourteenth Amendment, it is designed to be race-conscious, which then offers a new lens through which to revisit both affirmative action and the VRA. Having examined the history of the VRA and the origins of affirmative action, it is also clear that both policies were designed to be race-conscious. It is more direct in the policy of affirmative action, and while more subtle in the VRA, it is nonetheless, still present. Regarding affirmative action, the Supreme Court has fluctuated on whether or not affirmative action should be considered synthetically with the race-conscious or race-blind Fourteenth Amendment. In *Regents of the University of California v. Bakke*,[129] the majority opinion decides that race can be one of many criteria in deciding admission to a university.[130] This could be considered a more race-conscious approach to the Fourteenth

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[128] BARNETT & BERNICK, *supra* note 13, at 330.

[129] 438 U.S. 265 (1978).

[130] *Id.* at 438.

Amendment. However, there are also traces of a more race-blind philosophy that appear in the majority opinion. Justice Powell wrote:

> Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra,* the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.[131]

The phrase "without reference to color, ethnic origin, or condition of prior servitude" almost entirely removes race from the Fourteenth Amendment.[132] Though the members of this Court are gone, it is clear that they seemed, at least cognizant of, if not also fully aware of the distinctions between race-blind and race-conscious judicial philosophy on the Fourteenth Amendment.

Nonetheless, universities adopted the policy because admissions officers had noticed a large discrepancy in the number of white students and African American students.[133] As explained in Part I, affirmative action policies began reserving seats for African American students in *Bakke* but eventually changed methods to take race into account.[134] Although affirmative action policies have expanded to all minorities, they began with reserving seats for African Americans, specifically. Therefore, from its onset, affirmative action has been race-conscious to remedy the previous wrongs of slavery and Jim Crow segregation in the collegiate educational policy realm.

The VRA, on the other hand, has much more vague language in its wording that encompasses all people in ensuring their right to vote is protected.[135] The VRA was born out of the violence in Selma, where African Americans' voting drives and protests for voting rights turned bloody and brutal, gaining national attention.[136] The White House immediately started writing the VRA to redress the failures of the Fifteenth Amendment alone in abridging any denial of the right to vote on the basis of race.[137] In writing the law, the government specifically used data on the discrepancies in African American voter registration and white voter registration, as well as other metrics on barriers to African

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131 *Id.*
132 *Id.*
133 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
134 *Id.*
135 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.
136 DAVIDSON, *supra* note 64, at 14, 15.
137 *Id.* at 16, 17.

Americans voting.[138] Like affirmative action, from its inception, the VRA was designed to be race-conscious. Yet, here too in *Merrill v. Milligan,*[139] the Supreme Court is strongly speculated to agree with Alabama, illustrating how the Supreme Court is moving toward a race-blind constitutional philosophy to the detriment of the true understanding of the Fourteenth Amendment and how it applies to race-based cases.[140]

An important caveat pertaining to the VRA, is that the Fifteenth Amendment, on which the constitutional reasoning for the VRA's constitutionality resides, *does* explicitly mention race. The amendment writes, "the right of citizens of the United States to 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. The Congress shall have the power to enforce this article by appropriate legislation."[141] A brief discussion on the Fifteenth Amendment illustrates the argument that race must be read into the Fourteenth Amendment even further. The Fifteenth Amendment was a reactionary amendment to a problem the Radical Republicans had noticed: African American voters were *still* being denied access to the polls even after the Fourteenth Amendment clearly established that they had a right to vote.[142] Thus, the Fifteenth Amendment takes what the Fourteenth Amendment already does a step further by explicitly putting race into the amendment's language. This does not bar the Fourteenth Amendment from race-consciousness. If read as a reactionary amendment to explicitly address a problem the Fourteenth Amendment already attempted to solve, as was the Fifteenth's intention, then an understanding of the two amendments together show that the Fourteenth Amendment was clearly designed to be race-conscious as well. Unfortunately, the current case being considered by the Court does not involve a Fifteenth Amendment constitutional question; instead, only the Equal Protection Clause is being argued in *Merrill v. Milligan*. As a result, there is a possibility the Court may misinterpret the Fourteenth Amendment by not considering its race-conscious intentions.

Thus, the Fourteenth Amendment, affirmative action, and the VRA were all designed to be race-conscious. Are the policies of affirmative action and the VRA therefore constitutional on the grounds that they each share the same intentions alone? Originalism dictates that the law must be interpreted on the basis of original meaning (which includes

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[138] *See South Carolina v. Katzenbach*, 383 U.S. 301, 301 (1966).
[139] No. 21-1086 (U.S. 2022).
[140] HOWE, *supra* note 84.
[141] FONER, *supra* note 17, at 570; U.S. CONST. amend XV, §§1-2.
[142] FONER, *supra* note 17, at 570.

designs and intentions) as well as fidelity to the text itself. The next section explores these two facets and how they work together.

b. The Two Principle Cases through the Lens of the Fourteenth Amendment

According to some critics, the affirmative action case law demonstrates a misapplication of the Equal Protection Clause and the basic principles of the Fourteenth Amendment, which suggests that the Court's interpretation of the text in its opinions may be flawed.[143] Affirmative action works against the amendment because it creates varying standards of admissions for different groups of people that, ultimately, create levels of harm for some students. For example, in *Students for Fair Admissions v. President and Fellows of Harvard College*, petitioners for the students alleged hard evidence that Asian-American students were treated unfairly on the basis that there were too many Asian Americans being admitted.[144] Implicit in this statement is that Asian Americans were not the kind of "diversity" or minority students the school wanted too many of. This affected their chances of admission as Harvard used an affirmative action policy.[145] Due to the school giving low personality scores to Asian Americans, they faced harder chances of admission.[146] Besides the personality score, they achieved extremely similar academic criteria as a typical student admitted to Harvard would achieve.[147]

If there is direct harm against others in the form of preferential treatment with this kind of affirmative action policy, then the policy is constitutionally impermissible with the Fourteenth Amendment.[148] The fact that the Supreme Court has long since upheld affirmative action as constitutional speaks to a wider misunderstanding of how to interpret the amendment. Even though the current Supreme Court is likely to overturn affirmative action, it is not a sign of clarity on the amendment's meaning.[149] Instead, the likely reasoning for overturning affirmative action, or using a race-blind philosophy, is still inappropriate to the true meaning of the Fourteenth Amendment and how it should be applied.

Affirmative action violates all three principles of the Fourteenth Amendment. It is a policy, or as Balkan would have called it, "legislation," that creates an unreasonable

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143 BARNETT & BERNICK, *supra* note 13, at 323.
144 980 F.3d 157 (1st. Cir. 2020).
145 *Id.*
146 *Id.*
147 *Id.*
148 BALKAN, *supra* note 122, at 314.
149 *See* note 38; *See* also note 83.

distinction between people, singles out a particular group for a better reward than other groups of people, and unintentionally and indirectly creates a subordinate class of people by virtue of not being in the singled out group.[150] Without affirmative action as an active player in the decision room, college admissions officers use academic statistics, extracurricular activities, leadership skills, personal essays, test scores, and others to determine whether a student is admitted. Affirmative action adds race to this list of considerations.[151] When admissions officers consider race, they appraise the historical and socio-economic factors of racism that generally contribute to lower academic statistics in students of color as opposed to white students.[152] Therefore, college admissions officers can sometimes alter the standards of admittance for favored groups and allow them admission regardless of not meeting the general standard of admittance.*[153]*

Admissions officers create distinctions between races and treat some racial groups differently than others; in doing so, it violates the Fourteenth Amendment's principle of outlawing caste legislation.[154] Admissions officers single out, in general, people of color (in the Harvard case, the group in question is Asian-Americans, but includes African Americans as well) as differential groups of people, altering, sometimes raising or lowering the standards of admission so that a certain percentage of diversity can be reached.[155] This is a form of special legislation that "picks out a group for special benefits or special burdens" and "made a disfavored caste of subordinated a group through law."[156] In doing so, admissions officers unintentionally and indirectly create a subordinated group of white students who face higher standards of admission and therefore, have harder chances of getting in.[157] Because of these distinctions, the differences in the treatment of race in college admissions violate the principles of the Equal Protection Clause and the design of the Fourteenth Amendment. All arguments combined, affirmative action violates the principles of the Fourteenth Amendment by altering the standards of admittance and giving preferential treatment to one racial group over another.

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150 BALKAN, *supra* note 122, at 314.
151 COLE CLAYBOURN, *How Colleges Choose Which Students to Admit*, U.S. NEWS & WORLD REP. (Aug. 16, 2022), https://www.usnews.com/education/best-colleges/articles/how-colleges-choose-which-students-to-admit.
152 GOLD & MILLER, *supra* note 7.
153 *Id.*
154 BALKAN, *supra* note 122, at 314.
155 GOLD & MILLER, *supra* note 7.
156 *Id.*
157 *Id.*

In contrast, the VRA does not violate the original meaning or design of the Fourteenth Amendment, nor is the text itself negatively discriminatory. There is no relegation of second-class citizenship to any group of people. Instead, striking down the legislature's map as unconstitutional allows Alabama's African American voters to be treated equally under election law and to the same standards as the white voter.[158] It lifts up African American voters to be on par with the power of the white voter. In this case, there is no second-class citizenship, only a guarantee of the Equal Protection Clause to both African American and white voters. [159]

In conclusion, a deeper analysis of the Fourteenth Amendment proves that the amendment was designed to be race-conscious but still establishes the important principle of no second-class citizenship, caste, or class legislation that harms classes of people. With this originalist understanding of the Fourteenth Amendment, both affirmative action and the speculated decision on Section Two of the Voting Rights Act are misinterpreted. It is clear that there needs to be a new evaluation of reading race-conscious principles into constitutional decision-making as the current standard for evaluating race, strict scrutiny, fails to distinguish race-consciousness from race-blindness in the Fourteenth Amendment.

III. Positive Discrimination versus Negative Discrimination

Both affirmative action and the VRA are construed as policies of positive discrimination.[160] Yet, the former is dangerous and the latter constitutionally sound, which poses a problematic confusion in constitutional philosophy. To close this discrepancy, the test this note proposes is as follows: Positive discrimination is legislation that discriminates on the basis of race if it solely ensures that people are being treated equally under the Equal Protection Clause.[161] In doing so, it cannot, under any circumstances, negatively affect other groups of people because they do not belong in that protected group.[162] A harmful effect on groups of people not specifically targeted by the policy would violate the principle of the Fourteenth Amendment — to not create distinctions between people on the basis of race,

[158] Brief for Petitioner, *Merrill v. Milligan*, No. 21-1086 (U.S. argued Oct. 4, 2022).
[159] BALKAN, *supra* note 123, at 314, 315.
[160] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.
[161] JOHN HART ELY, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 724 (1974).
[162] *Id.*

caste, or class.[163] Harm to others, even if unintended, hinders the purpose of the Fourteenth Amendment, which seeks to ensure equality between all peoples.[164]

The VRA is a policy bill based on positive discrimination that targets specific areas in election policy where African Americans were treated unfairly or denied the rights guaranteed by the Fourteenth and Fifteenth Amendments.[165] The act serves as a federal mechanism to ensure that the African Americans' right to vote is held equally along with the white person's right to vote by outlawing discriminatory actions and preventing them from happening in the future.[166] In regard to *Merrill v. Milligan,*[167] the federal government, through the VRA, forces state governments to consider race when examining election laws. Examining the district map through such a lens allows the Courts to discern if there are discriminatory practices taking place in a state that has had a long history of denying African Americans the right to vote.[168] Yet, this race-conscious perspective on Alabama's district map does not dampen or eliminate anybody else's right to vote in elections, nor does it unfairly treat anyone else's vote. Instead, each vote is counted and apportioned equally as the Equal Protection Clauses guarantees. Therefore, the VRA is a form of positive discrimination but does not create adverse effects on the rights of people outside the protected class, and it should remain that way.[169]

Affirmative action is tricker as it was intended upon its inception to be a form of positive discrimination to shrink the racial discrepancies of the higher education system, which would theoretically validate the policy as constitutionally sound. However, in its practice, affirmative action acts as negative discrimination and thus violates the principles of the Fourteenth Amendment. Affirmative action creates an adverse effect on unintended groups of people by harming their own chances of receiving admission into universities. By altering the standards of admission for different groups of people, some face a harder chance of gaining acceptance into universities on the sole basis of their race, making it unfair and a direct violation of the principles of the Equal Protection Clause.[170] Affirmative action demonstrates how positive discrimination should not function. In perverting the tenets of

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[163] BALKAN, *supra* note 122, at 314 - 317.
[164] *Id.*
[165] DAVIDSON, *supra* note 64, at 7, 8.
[166] *Id.*
[167] No. 21-1086 (U.S. argued Oct. 4, 2022).
[168] FONER, *supra* note 17, at 982.
[169] ELY, *supra* note 161, at 731-740.
[170] U.S. CONST. amend. XIV, §1.

positive discrimination by causing undue harm to other groups of people not specifically targeted by the policy, affirmative action strays away from its intended form of positive discrimination and becomes negative discrimination instead. Perhaps in the future some new framework for closing the racial inequities in the higher education system could be reargued for its constitutionality under the Equal Protection Clause so long as it passes this new legal test, but until then, affirmative action in its practice must be examined as it is, not how it should be.

Conclusion

As the Supreme Court makes its decisions on both affirmative action and the VRA, it faces major challenges to long-standing policies under the Fourteenth Amendment. The Court will decide both cases under the Equal Protection Clause, and it is widely speculated that it will strike down both affirmative action and race-conscious redistricting as unconstitutional. The Court seems likely to employ a race-blind approach to the Fourteenth Amendment, but this would be a grave mistake.[171] The Fourteenth Amendment had two purposes. One was to write a broad guarantee of rights for all people in the nation; the second purpose was to guard African Americans against the oppressive systems of racism and exclusion. Numerous specific mentions of African Americans throughout the drafting of the Amendment reveal that while the amendment is inclusive, racial equality was the dominating focus. Thus, for cases that involve race, the Fourteenth Amendment was meant to be constructed in a race-conscious manner.

Affirmative action and the VRA are two strong examples to better illustrate how to interpret the Fourteenth Amendment in cases that involve race. Affirmative action is an example of negative discrimination because it requires altering the standards of admissions for different groups of people, making it harder for some groups of people to get into university. It treats people differentially on the basis of race and violates the basic principle of the Fourteenth Amendment of no divisions between people on the basis of race. On the other hand, the VRA is constitutional and is a policy of positive discrimination. The Act ensures that the African American vote is held equal to the white vote while posing no adverse effects on any other person's fair vote. Thus, since race-consciousness is rooted in

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171 *See* THEODORE R. JOHNSON, *How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress*, ATLANTIC, https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/ (last visited Apr. 13, 2023).

the history of the Fourteenth Amendment, positive discrimination is constitutional so long as it does not create harm to other groups not targeted by the policy.

To conclude with a statement from a drafter of the Fourteenth Amendment:

> It is its crowning glory that no citizen, or person living under it is so high or so powerful that he can refuse or deny its obligation; and none so low that its protection cannot reach him. Its great strength is in the universality of its principles, and its chief danger in attempts to narrow, contract, crib, and confine their application.[172]

The Fourteenth Amendment's great strength lies in its inclusivity of all people and its emphatic declaration of civil rights for all. Yet, the history of this country cannot be so easily discarded; rather, this nation's history signals that the Fourteenth Amendment should be interpreted differently than how the current Supreme Court is likely to do so.

[172] THE RECONSTRUCTION AMENDMENTS' DEBATES *supra* note 104, at 147.

A Legal Reform of the American Monetary System: Reimagining Banking and the Federal Reserve

Arthi Thiruppathi

Introduction

The "perfect storm of shocks" of 2008, as Federal Reserve Governor Frederic Mishkin put it, described a negligence-induced crisis that was revealed when the housing bubble burst.[1] While the effects of the crisis were largely felt starting in 2007, economists argue that the foundation for the failure of financial markets was laid nearly a decade prior with the repeal of the Glass-Steagall Act.[2] The subsequent moral hazard epidemic plagued investors who were given little reason to be cautious.[3] This epidemic, combined with decreased household spending and a buildup of household debt earlier in the decade, caused a widespread credit crunch, culminating in the Dow Jones Industrial Average plummeting.[4] In order to offset the effects of decreased investor confidence in bank solvency and the reduced availability of credit, central banks across the world orchestrated one of the biggest bailouts of financial institutions in history.[5] The unprecedented scale of the bailout forced the Federal Reserve and the Treasury to distribute the supply of over $400 billion to the economy through the Congress-authorized Troubled Assets Relief Program (TARP).[6] The bailout raised questions about both efficiency and ethicality when responding to financial

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[1] Matthew O'Brien, How the Fed Let the World Blow Up, THE ATLANTIC (Feb. 26, 2014), https://www.theatlantic.com/business/archive/2014/02/how-the-fed-let-the-world-blow-up-in-2008/284054/.

[2] Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008 - 2009 American Capital Markets Crisis*, 73 Alb. L. Rev. 371 (2010).

[3] *Id.*

[4] Ben Bernanke, Financial Panic and Credit Disruptions in the 2007-09 Crisis, BROOKINGS (Sept. 13, 2018), https://www.brookings.edu/blog/ben-bernanke/2018/09/13/financial-panic-and-credit-disruptions-in-the-2007-09-crisis/.

[5] Kevin Warsh, The Panic of 2008, FEDERAL RESERVE (Apr. 6, 2009) https://www.federalreserve.gov/newsevents/speech/warsh20090406a.htm.

[6] Troubled Assets Relief Program (TARP), U.S. DEPARTMENT OF THE TREASURY https://home.treasury.gov/data/troubled-assets-relief-program (last visited Jan. 6, 2023).

crises and laid the groundwork for passing landmark regulatory frameworks, including the Dodd Frank Wall Street Reform and Consumer Protection Act.[7] Legal scholarship attempts to address these questions through analyzing the legality of the bailout itself and the precedent that the 2008 government intervention sets for future troubled markets.

The Federal Reserve System has no supervisory authority or institution to whom it needs to defer more difficult decisions to; while Federal Reserve governors frequently consult with the executive branch and Congressional officials, its decisions are made independently.[8] The lack of a regulatory authority can lead to overcautious nearsightedness, as was the case in the debate on inflation immediately prior to the crisis.[9] Specifically, disagreement between long and short term goals, as well as the relative importance of each in the debate on inflation led to the stalling of slashing interest rates until it was too late.[10] While it may have been nonbank financial institutions that provided the basis for the crisis, the internal disagreement on how to deal with rising inflation and lack of credit greatly exacerbated the crisis' effects. Because the Federal Reserve lacked the foresight to predict the necessary tools to prevent the financial crisis, MIT Sloan Professor Deborah Lucas argues that the $10 billion bailout provided to the bank was morally hazardous.[11] Moreover, the enormous power of the Federal Reserve to instantaneously create liquidity raises the question of whether the same agency creating the liquidity should be charged with distributing it as well.[12] The concerns surrounding this question are amplified when considering that the Federal Reserve is an inherently undemocratic institution and holds the potential to infringe upon the American ideal of limited government.[13] Despite former chairman Ben Bernanke's emphasis on the way that the "power of the Federal Reserve is derived from and depends upon the support of elected officials," Bernanke himself was at

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[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. §203 (2010).
[8] About the Federal Reserve System, Aug. 24, 2022, https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.
[9] Matthew O'Brien, How the Fed Let the World Blow Up, THE ATLANTIC (Feb. 26, 2014), https://www.theatlantic.com/business/archive/2014/02/how-the-fed-let-the-world-blow-up-in-2008/284054/.
[10] Matthew O'Brien, How the Fed Let the World Blow Up, THE ATLANTIC (Feb. 26, 2014), https://www.theatlantic.com/business/archive/2014/02/how-the-fed-let-the-world-blow-up-in-2008/284054/.
[11] Deborah Lucas, *Measuring the Cost of Bailouts*, 11 ANNUAL REVIEW OF FINANCIAL ECONOMICS 85, 85-108 (2019).
[12] *Id.*
[13] Tom Palmer, Limited Government and the Rule of Law, CATO (2017), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/limited-government-rule-law.

odds with - and often disregarded the advice of - those occupying the White House.[14] Checks and balances are only constitutionally bound for institutions falling within the judicial, executive, and legislative bodies; increasing the independent authority of the Federal Reserve runs the risk of violating foundational tenets of the constitution. However, during the financial crisis, the Federal Reserve was able to circumvent partisan politics that slowed down the enactment of fiscal policies by the executive and the legislative bodies, an issue that was heightened by the presidential transition in 2009.[15]

The bailout has also been a cause for scrutiny among legal scholars who have identified discrepancies in the manner in which the Federal Reserve chose to address different private nonbank financial institutions. While the origins of the crisis, as aforementioned, have been attributed to a myriad of sources, the failure of Lehman Brothers, a systemically important financial institution (SIFI), was a significant one.[16] Bernanke holds that the controversial decision to withhold funding from Lehman, inevitably contributing to its failure, was one of legal necessity: the limitations posed by Section 13(3) of the Federal Reserve Act prohibited him from injecting liquidity into the institution.[17] However, when examining the bailouts that Bernanke *did* authorize, questions on the violation of law during the American International Group and Bear Stearns intervention arose.[18] It further draws attention to the extension of legal power requested by the Federal Reserve and denied by Congress prior to the Lehman failure, provoking questions on the issues of inefficiency caused by the restraints of the law.[19] This note will examine the legal consequences of expanding the Federal Reserve's authority and mandate while reconciling the effectiveness of remaining a powerful, independent authority. It will briefly examine prior arguments on the legality of the bailout and then analyze the legal structures that constrained the effectiveness of the Federal Reserve. Further, the note will discuss the structure and role of

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[14] Sarah Binder, The Federal Reserve as a "Political" Institution, AMERICAN ACADEMY OF ARTS AND SCIENCES (2016) https://www.amacad.org/news/federal-reserve-political-institution.
[15] Frederic S. Mishkin, *The Financial Crisis and the Federal Reserve,* 24 NBER MACROECONOMICS ANNUAL 495, 495-508 (2009).
[16] David Skeel, History Credits Lehman Brothers' Collapse for the 2008 Crisis. Here's Why That Narrative Is Wrong, BROOKINGS (Sept. 20, 2018) https://www.brookings.edu/research/history-credits-lehman-brothers-collapse-for-the-2008-financial-crisis-heres-why-that-narrative-is-wrong/.
[17] Eric Posner, *What Legal Authority Does the Federal Reserve Need During a Financial Crisis?* 101 MINNESOTA LAW REVIEW 1529 (2017).
[18] *Id.*
[19] *Id.*

the American central bank for the coming decades, in the context of evolving markets and regulatory changes.

I. The Federal Reserve System: Principles and Theory

A. History of the American Monetary System

The term "monetary policy" refers to the actions undertaken by a central bank to influence the availability and cost of money and credit to help promote national economic goals.[20] In the United States, this power was vested in the Federal Reserve in 1913 through the Federal Reserve Act. This allows the Federal Reserve to use open market operations, the discount rate, and reserve requirements to influence monetary policy goals as set by Congress.[21] The broad, original goal of the Federal Reserve was the "preservation of financial stability."[22] Although Congress hoped for timely interventions by the Federal Reserve to prevent financial panic, it did not fully accept the idea of the Federal Reserve serving as lender of last resort, despite the same recommendations by economists, including Walter Bagehot, the creator of the premise of lending freely and early to solvent firms against good collateral.[23] Article 1, Section 8 of the U.S. Constitution grants the right to "coin money and regulate the value thereof" to Congress, implying that Congress's apprehensions about providing the Federal Reserve with the ability to freely lend at high interest rates to banks through the discount window could become - and did become - a central restriction of the earlier, pre-Great Depression Federal Reserve.[24]

After the Federal Reserve failed to prevent or minimize the widespread effects of the Great Depression, the Glass-Steagall Act was passed to solidify banking restrictions.[25] The Act prohibited the integration of commercial and investment banks under Section 16 and imposed restraints on the general securities activities of commercial banks.[26] It also reorganized the structure of the central bank and introduced federal deposit insurance for

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[20] About the FOMC, FEDERAL RESERVE (last visited Jan. 6, 2023) https://www.federalreserve.gov/monetarypolicy/fomc.htm.
[21] *Id.*
[22] Ben Bernanke, *A Century of US Central Banking: Goals, Frameworks, Accountability,* 27 JOURNAL OF ECONOMIC PERSPECTIVES 3, 3-16, 2017
[23] Walter Bagehot, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET 93 (1873)
[24] U.S. CONST. art. I, § 8.
[25] Roberta S. Karmel, *Glass-Steagall: Some Critical Reflections*, 97 BANKING L.J. 631, 631-641 (1980).
[26] *Id.* at 640

all Federal Reserve member banks.[27] Additionally, the Act mandated tighter regulation of national banks by the Federal Reserve board.[28] The regulation was passed after concern from Congress that commercial banking operations were incurring losses from the volatile equity market.[29] Legal scholars further argue that Glass-Steagall was an imperative provision to prevent concerns on the violations of antitrust law, with the decentralization of wealth - and thus, power - from only a few financial institutions.[30] When considering public needs, the expansion of commercial banks into the securities market can only lead to volatility with money belonging to aforementioned public depositors.[31] However, the fact that the "mechanism by which the Glass-Steagall enforces a separation [of commercial and investment banking] was not in the best working order," as recognized by many banking law journals, has been leveraged by commercial banks to expand.[32] This weak separation regulation has resulted in a two-fold effect: Congress has liberalized parts of or the entirety of selected sections of the Act and banks have taken advantage of innovations in the securities market to evade regulation.[33]

The Federal Reserve Board of Governors also participated in this deregulation after fears that funds in non-financial institutions were drying up without access to bank holding companies participating in underwriting commercial paper and securitized debt.[34] This is most prominently seen in *Securities Industry Association v. Board of Governors of the Federal Reserve System* (1984), where the Federal Reserve won an appeal at the Supreme Court that the Bankers Trust's trading of commercial paper did not comprise a violation of the Glass-Steagall Act.[35] The most worrisome aspect of this case was the Federal Reserve's insistence that the "Board's specialized experience gives it an advantage judges cannot possibly have in ascertaining the meaning Congress had in mind in prescribing the standards by which [the Board] should administer it."[36] This opinion provides the basis for a self-policing mechanism

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[27] George G. Kaufman & Larry R. Mote, *Glass-Steagall: Repeal by Regulatory and Judicial Reinterpretation*, 107 BANKING L.J. 388, 388-401 (1990).
[28] Banking Act of 1933, 12 U.S.C § 227 (1933).
[29] Milton Friedman & Anna J. Schwartz, A MONETARY HISTORY OF THE UNITED STATES 1867-1960 34 (1st ed. 1971).
[30] *See* Karmel, *supra* note 25 at 641
[31] *Id.*
[32] *Id.*
[33] George G. Kaufman & Larry R. Mote, *Glass-Steagall: Repeal by Regulatory and Judicial Reinterpretation*, 107 BANKING L.J. 388, 388-401 (1990).
[34] *Id.*
[35] *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System* 807 F.2d 1052 (D.C. Cir. 1986)
[36] *Id.*

for an institution that is already powerful. Justice Steward concurred with this opinion, agreeing that courts should, for the most part, defer to agencies charged with the enforcement of regulatory statutes.[37] This precedent was re-emphasized in *Chevron U.S.A, Inc. v. NRDC* (1984) and is an approach that is partially championed by many legal scholars who believe in judicial restraint, or in other words, the deference of the judiciary to the legislative for the "preservation of public peace and good order."[38] However, a ruling in favor of the Federal Reserve in this case was *not* preserving the public order and further runs the risk of a future uncurtailed expansion of the Federal Reserve's power, holding the potential to supersede judicial authority.[39] After this landmark case, many legal scholars adopted the view that reforms of some sort to the Glass-Steagall were necessary, especially with respect to the FDIC.[40]

In 1999, the Glass-Steagall Act was finally repealed through passing the Gramm-Leach-Bliley Act (GLBA) in the wake of waning authority and relevance in an economy pushing the bounds of regulation.[41] The GLBA brought sweeping deregulation and loosened the tight scrutiny that institutions were under between the Great Depression and the turn of the century, ushering in an era of proliferation of megabanks.[42] This took place by allowing the merging of commercial and investment banking instruments, obscuring the difference between Main Street and Wall Street from a regulatory lens.[43] One notable critic of the GLBA was Senator Dorgan, who describes the effort as "some legislative version of Back to the Future" and points out that 15.6% - or $250 billion - of all mergers in the United States in 1998 were those of banks.[44] Dorgan proceeds to note the increasing relevance of the phrase "too big to fail" in the coming business cycles and its catastrophic effects on the public, while quoting the president of the Richmond Fed:

> The point I want to make in the context of bank mergers is that the failure of a large, merged banking organization could be very costly to resolve. Additionally, the existence of such organizations could exacerbate the so-called too-big-to-fail problem and the risks it

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[37] *Id.*
[38] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARVARD LAW REVIEW 129, 129-156 (1893)
[39] *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984)
[40] Kelly A. Zazella, *Beyond "The Wall": The American Financial System and Glass-Steagall Reform* 62 ST. JOHN'S LAW REVIEW 67, 67-98 (1987).
[41] Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008 - 2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371 (2010).
[42] *Id.* at 78.
[43] *Id.*
[44] *Id.*

> prevents. Consequently, I believe the current merger wave has intensified the need for a fresh review of the safety net, specifically the breadth of the deposit insurance coverage - with an eye towards reform.[45]

This exemplifies that the Federal Reserve was well aware of the consequences of promulgating the ideas behind the GLBA nearly a decade prior to the start of the 2008 financial crisis. The GLBA also makes no mention of a solution to deal with the inherent risk carried by holding $33 trillion worth of derivatives by commercial banks.[46] Furthermore, as Senator Dorgan mentions, Federal Reserve chair Alan Greenspan orchestrated a massive bailout of a hedge fund composed of Nobel laureates, Long-Term Capital Management, in 1998. During this bailout, the Board realized that "if [corresponding banks] didn't save the fund, there will be catastrophic results to the economy" and the Federal Reserve Board would bear the burden of the failure.[47] Despite foreshadowing events preceding the GLBA, the Act was overwhelmingly supported in Congress and set the stage for the spectacle of the "perfect storm of shocks" in 2008.[48]

B. Beyond Original Originalism: What Should The Federal Reserve Be?

Originalism, a popular method of interpreting legal texts, emphasizes the importance of giving legal texts the original public meaning that it would have had at the time that it became law and can create interesting arguments about the present structure and operation of the Federal Reserve.[49] The case of *McCulloch v. Maryland* (1819) defined the scope of the powers of Congress and its explicit right to charter a bank.[50] After an appeal to the Supreme Court by the State of Maryland, who argued that the "Constitution is silent on the subject of banks" and therefore, any creation of banks by the federal government would be rendered unconstitutional, the Court ruled in favor of McCulloch.[51] Had the Supreme Court followed an originalist interpretation as Maryland argued, the precedent would have been set, thus disabling the formation of the Federal Reserve nearly a century later.[52] Instead, Chief Justice Marshall supported his conclusion by citing the creation of the First Bank of the United States in 1791 by Alexander Hamilton as authority for the constitutionality of a

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[45] 145 CONG. REC. S14696 (1999).
[46] *See* Grant, *supra* note 41.
[47] 145 CONG. REC. S14696 (1999).
[48] *Id.*
[49] Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST LAW REVIEW 909, 909-1036 (1998).
[50] *McCulloch v. Maryland*, 17 U.S. 316 (1819).
[51] *Id.*
[52] *Id.*

federal power creating a bank.[53] Article 1, Section 8 of the Constitution grants Congress the power to "regulate the value [of money]" and further reduces the legal mandate of the central bank.[54] Therefore, an originalist would argue that Congress itself - or at least an agency under the supervision of and regulated by Congress - should take on the role that the Federal Reserve presently has.[55]

This argument, however, is not economically sound.[56] Countries that have integrated their central banks with either the executive or legislative branches often have magnified business cycles with high inflation that are typically in line with election cycles.[57] Christopher Crowe of the International Monetary Fund and Ellen Meade of American University argue that a time-inconsistency problem arises: a central bank that is connected to or under the mandate of elected officials, whether in the legislative or the executive branch, would find itself under political pressure to reduce unemployment and boost the economy, especially before election season.[58] However, the economy cannot exceed its long run natural rate of unemployment and these short-term monetary policies that try to artificially alter this rate will only result in high inflation and disturbed business cycles.[59] This is the central economic argument for central banking independence.

Applying an earlier definition of originalism, intentionalism, is therefore likely to be more useful to understand the Federal Reserve and how it can be reformed without altering the legal structures that created it. This form of originalism uses functional and motivational intent to understand the objectives of a law's creators.[60] This allows for a reasonable deduction that the intent of the framers of the Constitution did not prohibit the creation of a second authority by Congress that could *also* have the power to regulate the value of money, although they did explicitly grant Congress said power.[61] Another relevant argument on a similar basis concerns a violation of separation of powers during the process of injecting liquidity into the economy. If the Constitution granted Congress - and perhaps, by extension,

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[53] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 214 (Rachel E. Barkow et al. eds., 6th ed. 2019).
[54] U.S. CONST. art. I §8
[55] *Id.*
[56] Bernd Hayo, *Inflation culture, central bank independence and price stability*, 14 EUROPEAN JOURNAL OF POLITICAL ECONOMY 241, 241-263 (1998).
[57] *Id.*
[58] Christopher Crowe & Ellen Meade, *The Evolution of Central Bank Governance Around the World,* 21 Journal of Economic Perspectives 69, 69-90 (2007).
[59] *Id.* at 83
[60] Beal, *Cardinal Rules of Legal Interpretation*
[61] Brian Flanagan, *A Fullerian Challenge to Legal Intentionalism*, 24 RATIO JURIS 330, 330-334 (2011).

institutions created by this legislative authority (the Federal Reserve) - the power to regulate the value of money, would the delegation of this aforementioned power to a branch of the executive (the Treasury) constitute an adequate violation of the separation of power, and specifically the nondelegation doctrine, to be illegal?[62] This is the precise dilemma presented by the passing of the Troubled Assets Relief Program (TARP) in 2008, where the Secretary of the Treasury was authorized to "purchase [...] troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary."[63] Originalists often argue that the enumerated powers of Congress to collect taxes or regulate commerce do not include the power to authorize the spending of more than $457 billion to the executive branch.[64] However, *J. W. Hampton, Jr. & Co. v. United States* (1928) set a precedent for Congress to delegate authority to the executive, in which an exception to the nondelegation doctrine was allowed so long as Congress provided an "intelligible principle" upon which the executive branch would be guided.[65]

While *J. W. Hampton, Jr. & Co. v. United States* (1928) may provide an acceptable explanation for TARP, it is worth noting that Congress did not provide an "intelligible principle" in this case and authorized the Treasury to spend as they saw fit.[66] Furthermore, a later case brought to the Supreme Court, *A.L.A Schechter Poultry Corp. v. United States* (1935) reversed the judgment of the appellate court of authorizing a delegation of legislative power to the executive.[67] Specifically, the ruling found that certain provisions of the National Industrial Recovery Act that attempted to regulate intrastate transactions "affected interstate commerce indirectly" and thus constituted an unconstitutional delegation of legislative power.[68] It can certainly be argued that the purchase of troubled assets, as authorized by TARP, would have only affected interstate commerce indirectly. Although it increased liquidity - and thus, the availability of money to purchase goods - the purchase was not an immediate effort to regulate the exchange of goods and services between two entities, which is the enumerated power granted to Congress.

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[62] Gary Lawson, *Burying the Constitution under a TARP*, 33 HARV. J. L. & PUB. POL'Y 55, 55-77 (2010).
[63] *Id.*
[64] *Id.*
[65] *J.W. Hampton v. United States,* 276 U.S. 394 (1928).
[66] *About TARP*, U.S. DEPARTMENT OF THE TREASURY, https://home.treasury.gov/data/troubled-assets-relief-program/about-tarp (last visited Jan. 6, 2023)
[67] *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[68] *Id.*

II. Practical Concerns of Central Banking

A. Lender of Last Resort: Creator Of or Protector From Crises?

Perhaps the most common function of central banks around the world is to serve as a lender of last resort. A lender of last resort is imperative to an economy to prevent bank runs and originates in Sir Francis Baring's *Observations on the Establishment of the Bank of England*, who characterized the idea as "the dernier resort" from which all banks could obtain liquidity in times of crisis.[69] An important distinction here is between illiquid banks and insolvent banks: the former implies that the bank does not have the resources - cash - to pay current obligations, while the latter refers to a state wherein a bank owes more than it owns.[70] The role of the lender of last resort is to provide cash to banks that fall in the former category, in order to keep them afloat during temporary periods when the public wishes to withdraw their deposits.[71] However, it has been widely noted that it is difficult to distinguish between illiquid and insolvent banks and with the passing of time, banks that are illiquid can become insolvent.[72] Therefore, some critics emphasize the importance of timely intervention with liquidity to correctly identified institutions, an issue that is dealt with in greater depth in the following section.[73]

The Federal Reserve, in the United States, is the appropriate agent to be the lender of last resort. Baring correctly reasons that the most important requisite for a lender of last resort is the monopolistic control over an inexhaustible source of outside money.[74] Given this condition, Baring's requisite refutes earlier criticisms about the agency tasked with creating liquidity being able to distribute it as well stand weak against economic logic. Therefore, rather than changing the role of the Federal Reserve as a lender of last resort, it may be more prudent to reform the legal parameters to which it must abide by. Before setting these parameters, it is equally important to acknowledge the effect the existence of an unlimited and free lender has on the market and borrowing activities. The issue of moral hazard arises, as having a lender of last resort may incentivize institutions to take on more risk than their balance sheets can handle. Like all government safety nets, critics of the lender

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[69] Sir Francis Baring's Observations on the Establishment of the Bank of England
[70] Matthew C. Klein, *Illiquid, Insolvent, What's the Difference?*, FINANCIAL TIMES (Sept. 30, 2014), https://www.ft.com/content/07b6a662-bf29-3d4f-b9d5-ab7a6385bdb8
[71] *Id.*
[72] BANK OF INTERNATIONAL SETTLEMENTS, *Rethinking the Lender of Last Resort* 79 (2014).
[73] *Id.*
[74] Thomas M. Humphrey, *Lender of Last Resort: The Concept in History*, 4 ECONOMIC REVIEW 8, 8-16 (1989)

of last resort argue that it could result in carelessness by the banks.[75] Other criticisms include the potential for reduced monitoring by central banks, thus putting taxpayer dollars at greater risk although this holds less merit as legal ramifications will remain for financial institutions who do not meet capital requirements.[76] Yet, as will be discussed further in this note, maintaining the Federal Reserve as the lender of last resort and revising the role's legal parameters neutralize some of the aforementioned criticisms.

George Selgin of the Cato Institute presents an entirely different criticism of the perceived necessity of the lender of last resort. The underlying assumption of the current banking system backed by a central bank that has an infinite reserve supply of fiat money is that it is "inherently fragile and crisis prone."[77] Selgin argues that the entire principle of fragility within the system is artificially created through legal restrictions that are ultimately aimed at generating revenue for the government.[78] The latter half of his argument is factually accurate: the government earned a net profit of $68 billion from interest payments on liquidity injections provided to financial institutions after the 2008 crisis, which begs the question of what incentives the government may have to reform such a lucrative system.[79] However, assuming the undesirability of such profits, a greater analysis of the conditions that banking regulations in the United States unintentionally contribute to is needed.[80] Selgin presents three conditions that create fissures in the American banking system: increased risk exposure of individual banks, thereby enhancing their likelihood of insolvency; an environment that promotes contagion, wherein a single failure leads to system-wide bank runs; and obstructed private market mechanisms to avert crisis.[81] In addition, Selgin identifies specific mechanisms as contributory and include anti-branching laws, deposit insurance, and the existence of the lender of last resort.[82] This argument is not without merit, because the "side effects" of anti-branching laws include a reduction of mergers and

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[75] Mikko Niskanen, *Lender of Last Resort and Moral Hazard Problems*, (BANK OF FINLAND WORKING PAPER No. 17, 2002).
[76] *Id.*
[77] George A. Selgin, *Legal Restrictions, Financial Weakening, and the Lender of Last Resort,* 9 CATO J. 429, 429-469 (1989).
[78] *Id.*
[79] Wayne Duggan, *Financial Crisis Bailouts Have Earned Taxpayer Billions*, U.S. NEWS (Jan. 19, 2017) https://money.usnews.com/investing/articles/2017-01-19/financial-crisis-bailouts-have-earned-taxpayers-billions.
[80] George A. Selgin, *Legal Restrictions, Financial Weakening, and the Lender of Last Resort,* 9 CATO J. 429, 429-469 (1989).
[81] *Id.*
[82] *Id.*

acquisitions of banks, obstructing a simple private market mechanism to deal with troubled institutions; deposit insurance induces moral hazard through borrowing, thus increasing risk exposure of individual banks; and the lender of last resort further subsidizes this risk-heavy borrowing. However, these laws and entities were created in order to prevent violations of antitrust law and eliminating them entirely - and perhaps eliminating these side effects - will lead to larger, longer-term problems. Addressing Selgin's concerns will require the reform of the regulations he cites, as will be explored in Part 3 of this note.

Another issue Selgin left unresolved is the consequence of a SIFI failing: if there is no central bank and a bank that was previously designated as 'too big to fail' becomes illiquid, what prevents the collapse of the entire financial system? If the Federal Reserve is dismantled, the government's response is limited when the economy is on the brink of a significant recession and will have to respond with only traditional monetary and fiscal policy tools, which will take far longer to come into effect.[83] If existing legislation alleviates the inherent threat posed by these large institutions, through the prosecution of SIFIs under antitrust violations of the Sherman Act, Selgin's recommendations may become more relevant.[84] Because these large institutions enjoy an unfair advantage, in terms of new clientele who will prefer them simply because they are 'too big to fail' and their deposits will not be at risk, there is an unlawful restraint of trade in this industry.[85] Once these firms are reduced to a sufficiently small size, wherein their natural failure upon insolvency will not have a domino effect on the rest of the financial services industry, the Federal Reserve will also be able to adopt a more minimal role in private markets.[86]

B. Managing Modern Credit Risk: Evaluating the Volcker Rule

The Volcker Rule, adopted by the Federal Reserve, prohibits banking entities from "engaging in proprietary trading or investing in or sponsoring hedge funds or private equity funds" and is a provision of the Dodd-Frank Act.[87] This provision is reminiscent of the Glass-Steagall Act of 1933, which prohibits commercial banks from underwriting, holding, or dealing in corporate securities, either directly or through securities affiliates.[88] This draws

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[83] Johnathan R. Macey and James P. Holdcroft, *Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L. J. 1368, 1368-1418 (2011).
[84] *Id.*
[85] Sherman Antitrust Act 15 U.S.C. §1.
[86] Johnathan R. Macey and James P. Holdcroft, *Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L. J. 1368, 1368-1418 (2011).
[87] 124 STAT. 1376 Dodd-Frank Wall Street Reform and Consumer Protection Act
[88] 12 U.S.C. § 227 Glass-Steagall Act.

the question of efficiency in repealing necessary regulatory statutes during times of financial expansion only to reinstate their main provisions after the occurrence of a crisis.[89] The ability of Glass-Steagall to prevent systemic bank failures was well-known: in an experiment conducted by the American Economic Review that compared the default rate of bonds originating from investment banks and from commercial banks, the former was much higher.[90] This fact necessitates a legal enforcement of the separation of the two entities. While there is a demonstrated need for the legal separation of commercial and investment banking, lawmakers can just as easily repeal certain provisions or the entirety of it in the future, as they have with the Glass-Steagall Act of 1933. For example, in 2018, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) as part of a wider effort by former President Donald Trump to increase deregulation of markets.[91] This act raised the asset-size based threshold to require the application of stronger rules and standards from $50 billion to $250 billion, thus modifying the original requirements of the Volcker Rule as was defined in Section 619 of the Dodd-Frank Act.[92] Thus, the aforementioned discussion prerequisites an examination of the Volcker Rule's relevance in today's interconnected market.

Yet, Charles Whitehead, a professor of business law at Cornell University, argues that the Volcker Rule, a repackaged form of similar Glass-Steagall provisions, is not tailored to address diversification of credit market risk beyond the narrowly defined "banking sector."[93] With the evolution of capital market instruments, including the emergence of tools such as credit default swaps, banks can outsource credit risks to hedge funds, thereby circumventing the moral hazard problem.[94] Thus, this allows traditional banks to extend more credit, increasing their likelihood of becoming a systemically important financial institution (SIFI).[95] Because these banks grow their clientele naturally – as opposed to through a merger – it will become more difficult to prosecute large financial institutions under antitrust law violations and the unresolved issue of bailout from Selgin resurfaces once again. Whitehead further notes that the Volcker Rule may have the unintended consequence

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[89] Randall S. Kroszner & Raghuram G. Rajan, *Is the Glass-Steagall Act Justified? A Study of the U.S. Experience with Universal Banking Before 1933,* 84 American Economic Rev. 810, 810-832 (1994).
[90] *Id.*
[91] S.2155 Economic Growth, Regulatory Relief, and Consumer Protection Act, 115th Cong.
[92] *Id.*
[93] Charles K. Whitehead, The Volcker Rule and Evolving Financial Markets, 1 HARV. Bus. L. REV. 39 (2011).
[94] *Id.*
[95] *Id.*

of causing hedge funds to increase risk-taking in order to manage their *own* credit exposure.[96] This can result in greater precarity and increased damage to the financial system in the event of a crisis because hedge funds are typically not regulated by the same standards as banks are. The sentiment is echoed by Anjan Thakor of the Washington University in St. Louis, who argues that reduced liquidity and increased perceived regulatory uncertainty will cause higher costs of capital for businesses, leading to a greater focus on riskier investments. These predictions came true in 2017, as observed by the House Subcommittee on Capital Markets, Securities, and Investments, where the subcommittee noted that corporate bond market stress is attributable to the Volcker Rule, and specifically, the conflicting restrictions it caused alongside Basel III and SIFI implementation rules.[97]

Furthermore, the Volcker Rule's restrictions are to be understood as structural law.[98] This legally requires the regulatory body to perform a cost-benefit-analysis of the Rule prior to its individual application.[99] However, the idea of "costs and benefits" is loosely defined and each agency charged with varying facets of the Rule's enforcement takes on a different approach. The Securities and Exchange Commission (SEC) defines benefits as "efficiency," as the costs are easier to quantify through reduction of liquidity where banks were major participants in trading activities and a variety of compliance costs.[100] Despite the input of multiple agencies, the Federal Reserve was formally charged with the responsibility to enforce Section 619.[101] Scholars have questioned the reliability of this analysis, given the existence of the revolving door problem.[102] The revolving door problem is informally defined as the issue of high turnover rates – due to large incentives for Federal Reserve employees to gain employment in the private sector after their term at the central bank – causing Federal Reserve employees to be partial to their future private sector employer. This can cloud judgment on the cost-benefit analysis, making the Federal Reserve an unreliable agency to enforce the Rule. The agency is also already burdened with the sole responsibility of creating monetary policy, further disincentivizing their candidacy for this job.

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96 Charles K. Whitehead, *The Volcker Rule and Evolving Financial Markets*, 1 HARV. Bus. L. REV. 39 (2011)
97 *Examining the Impact of the Volcker Rule on the Markets, Businesses, Investors, and Job Creators: Hearing Before the Subcommittee of Capital Markets, Securities, and Investments of the Comm. on Financial Services,* 115th Cong. 12 (2017).
98 John C. Coates, *The Volcker Rule as Structural Law: Implications for Cost-Benefit Analysis and Administrative Law* (EUROPEAN CORPORATE GOVERNANCE INSTITUTE LAW WORKING PAPER NO. 299, 2015).
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*

A revision of the Volcker Rule must include provisions to curtail outsourcing of credit risk to a set percentage of assets, similar to capital-asset adequacy ratios required by law. Furthermore, increased scrutiny of the relationship between banks and firms hedging risks accepted by banks to regulate the latter industry can create greater accountability. Given that investment banks cannot operate within the same framework as commercial banks, hedge funds must also be barred from involvement with commercial banks, due to their shared lack of regulation. This can be explained through the following scenario. If a large hedge fund files for bankruptcy, all banks that have outsourced their risky assets now hold the risk themselves, which is likely to cause bank failures.[103] This is especially likely when the public is made aware of the hedge fund's bankruptcy and causes bank runs.[104] Thus, it may be in the government's interest to bail out the hedge fund to prevent the domino-like failure of banks. As discussed earlier, this increases government involvement in the market and does not solve the original problem the legislation intended to address.

III. Legislating Banking Reform

"What banking most needs is to become boring." -Joe Nocera[105]

A critical evaluation of the problems presented in this note reveals that the foremost issue in reforming the Federal Reserve lies in its role as lender of last resort. This section will discuss the ways in which the American central bank can retain its role with the same responsibilities as it currently has, while limiting the risks it faces and reconciling legal barriers to free lending.

A. Bagehot's Last Resort: Lending Lessons from the Bank of England

Charged with the responsibility to "preserve financial stability" by Congress during the founding of the Federal Reserve, an effective way to carry out this duty is by making emergency loans to sound but temporarily illiquid banks at higher than typical market rates on good collateral.[106] This principle is often referred to as Bagehot's Dictum, after the English journalist Walter Bagehot and author of *Lombard Street: A Description of the Money*

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[103] William Fung & David A. Hsieh, *Hedge Fund Benchmarks: A Risk Based Approach,* 60 FIN. ANALYSIS J. 65, 65-80 (2004) (arbitrage pricing theory with dynamic risk-factor coefficients)
[104] *Id.*
[105] Joe Nocera, Make Banking Boring, THE NEW YORK TIMES (May 14, 2012) https://www.nytimes.com/2012/05/15/opinion/nocera-make-banking-boring.htm.l
[106] Ben Bernanke, *A Century of US Central Banking: Goals, Frameworks, Accountability,* 27 JOURNAL OF ECONOMIC PERSPECTIVES 3, 3-16 (2013).

Market.[107] While considered a foundation of macroeconomic policymaking, Bagehot's Dictum is not codified as a legal principle for monetary authorities to abide by.[108] This section will discuss the economic necessity of Bagehot's dictum while presenting the ways in which this principle can be used to bridge the gaps between Congress' fear of the taxpayer's risk and the Fed; between the American tenet of limited government and the necessity of a powerful - and independent - central bank; and between principles required by legal precedents and monetary practicality.

The precedent set by *J.W. Hampton v. United States* allowed for an exception to the non-delegation doctrine when Congress provided the executive branch with an "intelligible principle," but as was discussed earlier, the exception to the non-delegation doctrine was not provided under Congress' authorization of purchasing assets to the Treasury under the TARP.[109] While the question of legality for the TARP as a whole is beyond the scope of this note, it could be argued that the disbursement of $100 million from the program to the Federal Reserve for the Term Asset-Backed Securities Loan Facility (TALF) should have been given an "intelligible principle" by Congress.[110] The disbursement was used to provide liquidity to banks through loans, in the hopes that they would lend to the market.[111] These market loans took the form of asset-backed loans, including auto loans, credit card loans, student loans, and equipment loans, which also served as collateral for the Federal Reserve.[112] While all loans were collateralized, the government faced the risk of default if the *bank*'s borrowers defaulted on their loans.[113] Furthermore, the Federal Reserve feared that increased scrutiny of the loans would result in fewer institutions applying for the loan, thus having a smaller effect on the market's liquidity, causing the Federal Reserve to relax certain guidelines on future performance of the collateral.[114] However, this is not in the interest of

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[107] Walter Bagehot, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET 93 (1873).
[108] Kathryn Judge, *A Different Take on the AIG Case: The Dangers of Invoking 19th Century Principles to solve 21st Century Problems*, COLUMBIA LAW SCHOOL'S BLUE-SKY BLOG (Jun. 23, 2015), https://clsbluesky.law.columbia.edu/2015/06/23/another-take-on-aig-the-dangers-of-invoking-19th-century-principles-to-solve-21st-century-problems/.

[109] Gary Lawson, *Burying the Constitution under a TARP*, 33 HARV. J. L. & PUB. POL'Y 55, 55-77 (2010).
[110] Ralf R. Meisenzahl & Karen M. Pence, *Crisis Liquidity Facilities with Nonbank Counterparties: Lessons from the Term Asset-Backed Securities Loan Facility*, (FINANCE AND ECONOMICS DISCUSSION SERIES: BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, NO. 21, 2022).
[111] Policy Tools, FEDERAL RESERVE https://www.federalreserve.gov/monetarypolicy/talf.htm (last visited Jan. 6, 2023).
[112] *Id.*.
[113] *See* Meisenzahl & Pence, *supra* note 110.
[114] *Id.*

Congress, which is responsible for minimizing the risk to taxpayers. In order to reconcile the diverging objectives of both agencies, Congress is legally empowered to set its own criteria or principles for the Federal Reserve to abide by.[115] One of these criteria could have been to follow Bagehot's dictum, requiring stringent analysis of the quality of collateral provided by each bank and nonbank financial institution. Another criterion could be the requirement of congressional approval for each loan that exceeds a preset amount.[116]

The second issue that Bagehot's Dictum can address is maintaining an effective, yet limited, Federal Reserve. Liquidity should be provided to 'sound but temporarily illiquid *banks*.'[117] Creating a legal distinction between commercial banks and nonbank financial institutions helps curtail the power of the Federal Reserve by limiting the number and type of - and thereby reducing the amount of money and risk - firms that they lend to. By strengthening provisions in the Dodd-Frank Act, freer lending can be adopted at lower risk to the government.[118] This will also make the task of analyzing the durability of collateral under stressed times easier for the government; balance sheets of commercial banks typically hold less volatile assets than financial institutions because of existing regulations that require a set capital-asset ratio.[119] With a safer balance sheet, the likelihood of a financial crisis is lower and should a panic arise, the Federal Reserve is less likely to be in the dilemma of being forced to choose the systemically important financial institutions (SIFIs) to provide massive loans to. Bagehot's emphasis on solvent institutions is also important; during the first Bush administration, the Federal Reserve adopted a liberalized plan to lend to insolvent institutions, albeit with some collateral.[120] While only a few loans were made, this concept sets a dangerous precedent that could exacerbate the effects of financial crises and transfer risk from insolvent institutions to the government.[121] Finally, adopting the Basel committee's recommendations of a Liquidity Coverage Ratio (LCR) can reduce the need for the Federal Reserve to provide liquidity and limit its role in the free market.[122] In addition to this,

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[115] *J.W. Hampton v. United States*, 276 U.S. 394 (1928)
[116] Martin Feldman, *What Powers for the Federal Reserve?*, 48 JOURNAL OF ECONOMIC LITERATURE 134, 134-145 (2010).
[117] Peter Conti Brown, *The Mythology of Walter Bagehot: Part I of II*, Yale J. Reg. (2014).
[118] *Id.*
[119] Stress Test, FEDERAL RESERVE, https://www.federalreserve.gov/monetarypolicy/talf.htm (last visited Jan. 6, 2023).
[120] George A. Selgin, *Legal Restrictions, Financial Weakening, and the Lender of Last Resort,* 9 CATO J. 429, 429-469 (1989).
[121] *Id.*
[122] BANK OF INTERNATIONAL SETTLEMENTS, BASEL COMMITTEE ON BANKING SUPERVISION, BASEL III: THE LIQUIDITY COVERAGE RATIO AND LIQUIDITY RISK MONITORING TOOLS (2013).

promulgating a new law requiring liquidity insurance, along with established reserve liquidity requirement laws, is likely to reduce reliance on the lender of last resort, as well.[123] This concept is also likely to reduce moral hazard and promote less risky banking; institutions that take on a great deal of risk on their balance sheets or have been bailed out before will face higher insurance premiums.[124] Prior to times of crisis, the Federal Reserve will also be able to securitize insurance payments and sell this back to the market, further reducing risk to the government.[125] These securities can serve as additional collateral for other banks that may need future liquidity injections from the Federal Reserve.

There are, however, critical drawbacks to Bagehot's dictum. The most important consideration is the difficulty of striking a balance between lending at a 'penalty rate' – so as to minimize moral hazard – but simultaneously ensure that the rate is low enough to incentivize banks to borrow in the first place.[126] Another issue with this guideline is that Bagehot's dictum had accentuated the financial cycle and did not reduce the amplitude of each business cycle.[127] Regional officials of the Federal Reserve have noted that Bagehot's dictum is especially unreliable when banks fear the stigma associated with drawing discount window credit, which was true in the aftermath of the 2008 crisis.[128] Such concerns are highly relevant to today's markets and were not incorporated in this 19th century guideline.

Conclusion

The Federal Reserve is a necessary institution to complement existing systems for financial regulation and is far from obsolete in today's securities markets. This view is supported by evidence collected by the International Monetary Fund (IMF) that the probability of a systemic banking crisis is higher when the government's capacity to support banks is more constrained.[129] While this research was done in the context of economies whose governments do not have the financial or structural capacity to support banks, it can

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123 BANK OF INTERNATIONAL SETTLEMENTS, RETHINKING THE LENDER OF LAST RESORT 79 (2014).
124 *Id.*
125 Richard Gorvett, *Insurance Securitization: The Development of a New Asset Class* 136-172 (CASUALTY ACTUARIAL SOCIETY, Dissertation Paper Program, 1999).
126 Laurent Le Maux, *Bagehot for Central Bankers* (Institute for New Economic Thinking, Working Paper No. 147, 2021).
127 *Id.*
128 *Id.*
129 Luc Laeven, *Systemic Banking Crises Revisited* (INTERNATIONAL MONETARY FUND, Working Paper No. 206, 2018).

be applied to a central bank that cannot intervene due to legal restrictions, as well. Therefore, rather than adopting a laissez-faire approach to financial cycles, this note advocates for a reduced role of central banking that is constrained by clearly defined legal parameters to prevent arbitrary actions in times of crisis. For maximized macroeconomic stability, these parameters should follow Bagehot's dictum. This can be further strengthened by a full separation between commercial and investment banking, reducing the risk that deposits are exposed to. Additional provisions may be put in effect to ensure that the involvement of a government body in private markets remains constitutional. These can include expanded liquidity insurance, a mandatory liquidity-coverage ratio, and imposing a legal requirement for liquidity reserves on nonbank financial institutions, as well. Further questions that require legal responses include the relationship between the Federal Reserve and agents of the executive branch, specifically the Treasury, in times of crisis. Can the responsibilities that one is charged with be transferred to the other? What distinctions between fiscal and monetary policy need to be made in a time of blurred mandate? How might Congressionally appropriated funds be transferred between institutions?

It is imperative to address these considerations in a time of fluctuating markets and volatility that is increasingly dependent on political cycles. The rise of household debt is likely to increase the likelihood of future financial crises; in a regression analysis run by the IMF, it was found that changes in levels of household debt (including student loans, mortgages, auto loan payments, etc.) are strongly correlated with a high probability of the occurrence of a banking crisis. These issues must be considered when legislating new parameters for the role of the Federal Reserve.