THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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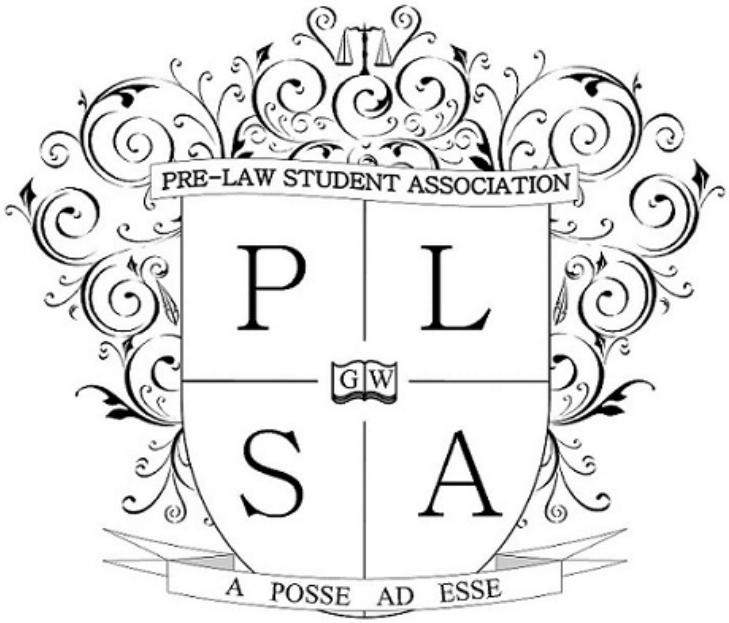

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THE GEORGE WASHINGTON PRE-LAW STUDENT ASSOCIATION

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Foreword

The Pre-Law Student Association is the prominent student organization for students at The George Washington University with an interest in the legal field. The organization aims to enhance the foundation of legal scholarship on campus by providing resources to develop students' interest in the law, and a means for our community to examine current legal issues. Furthermore, the organization facilitates the opportunity for students to simultaneously develop their legal writing skills while networking with legal professionals, through our professional editing process. Additionally, the organization develops students' skill set necessary for a future in law, including information regarding the law school admission process, LSAT test prep workshops, legal professional speaker events, and networking events.

The George Washington Undergraduate Law Review is a student- managed and published legal journal that analyzes current legal issues across a variety of specialties, including environmental, criminal, immigration, civil, and international law. The *Undergraduate Law Review* offers student the opportunity to explore legal research enrich their writing and critical thinking skills, and make a valuable contribution to legal discussion during their undergraduate studies.

The writings published in the *Undergraduate Law Review* conform to the 20th Edition of The Bluebook legal citation system, while adhering to the academic integrity of The George Washington University. The Pre-Law Student Association is proud of the work of these student authors and editors and their efforts in producing this journal.

Sincerely,

Gaurav Gawankar

Gaurav Gawankar
President

SA
GW Student Association

Introduction

Dear Reader,

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

After our most competitive application process to date, the 17 pieces in this publication represent the work of some of the best and brightest GW undergraduate students. These students chose, researched, and argued a legal issue of their own interest during the last year. They were assisted by our team of associate editors, also students, and our team of professional editors (legal professionals in the DC community and beyond) who graciously volunteered to offer their insight on the legal issues involved.

There are many words of gratitude I have for those involved in the publication process. First and foremost, I must thank the amazing ULR leadership team. The publication you are reading would not have been possible without the work of our three co-Editors-in-Chief Margaret Meiman, Alyssa Greenstein, and Emily Bauwens. Finally, I would like to sincerely thank PLSA President Gaurav Gawankar for all his help and guidance as I navigated the Directorship this year. Without his support, this publication would certainly not have been possible.

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

Sincerely,

Monica Iskander

Monica Iskander
Law Review Director

ARTICLES

The Need for Greater Congressional and Bureaucratic Oversight of the President's Unilateral Ability to Launch a Nuclear First-Strike

Ian Maurer

Introduction

The President of the United States has the sole authority to launch a nuclear weapon. Historical research suggests that no one actually granted the President this authority. Instead, during the dark days of World War II, President Truman simply took this power unto himself and his self-appointed authority was never seriously challenged.[1]

This article makes a case for transitioning from the current situation to an arrangement where the authority to launch a nuclear first-strike is shared between the President, Congress, and the bureaucracy.

Since the first moment that nuclear weapons became a part of the United States arsenal, the idea that the President has the sole authority to launch a weapon with such power has caused uneasiness in Congress and the Executive Branch bureaucratic agencies. The Constitution and federal law declare that war-making power is shared between Congress and the President[2]: the former has the authority to raise an army[3] and a navy[4] while the latter holds the title of Commander-in-Chief.[5] Thus, a sole grant of war-making power to the President, such as the authority to launch a nuclear weapon without consulting with Congress, violates this Constitutional scheme.

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[1] Rachel Martin & David Welna, *Why President Trump Has Exclusive Authority to Order a Nuclear Strike*, NATIONAL PUBLIC RADIO (October 2017).

[2] War Powers Resolution, Pub. L. No. 148, § 2, 87 Stat. 555 (1973).

[3] U.S. CONST. art. I, § 8, cl. 12.

[4] *Id.* at cl. 13.

[5] *Id.* at § art. II, § 2, cl. 1.

The longstanding concern surrounding the legality and morality of a President's unilateral ability to launch nuclear weapons has grown significantly during the administration of Donald J. Trump (2017-present).[6] Throughout his time in office, President Trump has advocated for the first-use of nuclear weapons, especially against adversaries that also have nuclear capabilities.[7] Additionally, Trump has called for a tenfold increase in the U.S. nuclear weapons stockpile.[8] During his campaign, Trump stated that "'proliferation is going to happen anyway…[and] if Japan had that nuclear threat, I'm not sure that would be a bad thing for us.' Nor would it be so bad, he's said, if South Korea and Saudi Arabia had nuclear weapons, too."[9] During a Senate Foreign Relations Committee meeting on November 15, 2017, Senator Bob Corker (R-Tennessee), chairman of the Committee, warned that Trump's statements "could put the country 'on the path to World War III,' [especially] in a system where the President has 'sole authority' to give launch orders there are 'no way to revoke.'"[10]

The worry regarding President Trump's ability to launch a nuclear weapon is based on more than politics; in fact, the Constitution, with its system of checks and balances and careful separation of powers, spells out a system for sharing decision-making authority that could easily be used when deciding to launch a nuclear first-strike. We come to the central question: Can the doctrines of checks and balances and separation of powers, inherent in the structure of the Constitution, be applied to foreign policy and national security and reshape the decision-making on the use of nuclear weapons as a first-strike capability?

This article answers that question with an emphatic "yes". The Constitution dictates that Congress's role in foreign policy is to appropriate funds,[11] to build and maintain the Armed Forces, and to conduct oversight on the military. But since World War II, it has become increasingly clear that the Executive Branch, more specifically the President, dictates the direction of U.S. foreign policy and national security.[12] The President has a large centralized bureaucracy at his disposal, allowing the President to obtain a great deal of

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[6] "[Trump] said he would be the 'last to use' nuclear weapons, yet implied first-use when he said North Korean threats 'will be met with a fire and fury like the world has never seen.'" John Wolfstahl, *How Will Trump Change Nuclear Weapons Policy?*, ARMS CONTROL ASSOCIATION (November 2017).

[7] *Id.*

[8] *Id.*

[9] Gene Gerzhoy & Nicholas Miller, *Donald Trump Thinks More Countries Should Have Nuclear Weapons. Here's what the Research Says,* WASHINGTON POST (April 6, 2016 at 4:00 PM).

[10] Karoun Demirijan, *Trump's Nuclear Authority Divides Senators Alarmed by his "Volatile" Behavior,* THE WASHINGTON POST (November 14, 2017).

[11] U.S. CONST. art. I, § 9, cl. 7.

[12] William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters,* 515, BOSTON UNIVERSITY LAW REVIEW, 505, 522 (2008).

information quickly,[13] and given there are no legislative obstacles to the Chief Executive's actions, the President can act quickly and secretly.[14] But while there may be some foreign policy and national security situations where speed and secrecy are beneficial, launching an immensely destructive nuclear weapon is not one of them. Accordingly, it is necessary to (a) reduce the unilateral authority that the President of the United States has over the U.S. nuclear weapons arsenal and (b) implement and enforce provisions that will prevent the President from launching a nuclear first-strike against an adversary without Congressional and/or bureaucratic approval.

I. Introduction: Nuclear Weapons, Separation of Powers, and the Role of the Executive and Legislative Branches in Foreign Policy and National Security

It is important to understand the current composition of the United States nuclear arsenal before analyzing the power and control a President should have with respect to launching a nuclear first-strike unilaterally. At the conclusion of the Cold War in 1990, the U.S. nuclear arsenal consisted of more than 12,000 deployable nuclear warheads.[15] Under various bilateral agreements with the Russian Federation, such as the Strategic Arms Reduction Treaty (START) and the 2002 Strategic Offensive Reduction Treaty, also known as the Moscow Treaty, the U.S. nuclear arsenal has gradually but significantly declined. Under the New START Treaty negotiated in April 2010, President Obama and Russian President Dmitry Medvedev pledged to reduce the nuclear cache of their respective countries to no more than 1,550 warheads.[16] According to the Arms Control Association's Director for Nonproliferation Policy Kelsey Davenport and Director for Disarmament and Threat Reduction Policy Kingston Reif, "the world's nuclear-armed states possess a combined total of nearly 14,000 nuclear warheads; more than 90 percent belong to Russia [6,490 warheads] and the United States [6,185 warheads]. Approximately 9,500 warheads are in military service, with the rest waiting dismantlement."[17] Of the United States' 6,185 warheads, roughly 1,300 are deployed on intercontinental ballistic missiles (ICBMs), submarine-

[13] *Id.* at 515.

[14] *Id.* at 517.

[15] Amy F. Woolf, *U.S. Strategic Nuclear Forces: Background, Developments, and Issues*, CONGRESSIONAL RESEARCH SERVICE (September 3, 2019), at 1.

[16] *Id.*

[17] Kelsey Davenport & Kingston Reif, *Nuclear Weapons: Who Has What at a Glance,* ARMS CONTROL ASSOCIATION (July 2019).

launched ballistic missiles (SLBMs), and strategic bombers. Another 3,800 are stockpiled and 2,385 are retired.[18]

Nuclear weapons are critical military assets to the United States because of their destructive capabilities and ability to deter other nations from attacking the U.S. for fear of nuclear retaliation. Despite—or, perhaps, because of—their power, nuclear weapons have only been utilized against an adversary twice. In both instances, the United States used these weapons against Japan to expedite the conclusion of World War II with limited American casualties[19] and gain concessions over the Union of Soviet Socialist Republics (USSR) in Asia and Eastern Europe at the conclusion of the War.[20] The first atomic bomb was dropped on the city of Hiroshima, Japan, (the eighth largest city in the country with 250,000 inhabitants) on August 6, 1945.[21] The atomic bomb, with force equivalent to that of 20,000 tons of TNT, led to the deaths of 130,000, a similar number wounded, and the destruction of 81 percent of the city's buildings.[22] Three days later, on August 9, a second nuclear bomb was released onto another Japanese city, Nagasaki, killing 73,884.[23] It is beyond debate at this point that nuclear weapons carry unparalleled destructive capability. For this reason, the decision to launch a nuclear first-strike must be based on careful and comprehensive decision-making.

A. Separation of Powers as Outlined in the Constitution

Separation of powers is a doctrine that requires each branch of government to exercise only the powers given to that branch in the Constitution and not to exercise powers given to another branch. These principles were conceptualized in 1748 when Montesquieu published his *Spirit of Laws*, explaining that separation of powers is "the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances."[24] The framers of the Constitution considered the system of checks and balances and the separation of powers between the three branches of government to be critical to the smooth functioning of the United States democratic system.

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[18] *Id.*

[19] Paterson et al., American Foreign Relations: Volume 2: Since 1985 239 (Cengage Learning, 8th ed. 1985).

[20] *Id.* at 243.

[21] *Id.* at 239.

[22] *Id.* at 239.

[23] *Id.* at 240.

[24] Separation of Powers—An Overview, NATIONAL CONFERENCES OF STATE LEGISLATURES (May 1, 2019).

[24] U.S. CONST. art. I.

These divisions are enshrined in the Constitution's first three Articles: I for the Legislative Branch[25], II for the Executive Branch[26], and III for the Judicial Branch.[27] The responsibilities delegated to each branch of government are designed to prevent the tyranny of one branch of government over the others.[28] Not surprisingly, given advances in technology and war fighting resources, such as nuclear weapons, the responsibilities of the three branches of government have changed over time.

Although the Constitution explicitly outlines the roles of the three branches in the domestic sphere, it is not nearly as explicit when dealing with U.S. foreign policy and national security.[29] In fact, the Constitution's handling of powers related to foreign policy can be aptly characterized by the phrase:

> "Friction by Design," [meaning that] there is not the intrinsic division of labor between the two political branches that there is with domestic affairs, …And because the judiciary, the third branch, has been generally reluctant to provide much clarity on these questions, constitutional scuffles over foreign policy are likely to endure."[30]

The broad outline of Congressional authority over foreign policy is listed in several clauses in Article I, Section 8: Congress "shall have Power To…provide for the common Defense and general Welfare of the United States[31], declare war[32], raise and support Armies[33], provide and maintain a Navy[34], [and] to make Rules for the Government and Regulation of the land and naval Forces."[35] Additionally, Congress has the power to appropriate the money that plays a critical role in the financing and maintenance of the military.[36] The same general guidance appears in Article II of the Constitution, which stipulates that the President shall

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[25] *Id.* at art. I.
[26] *Id.* at art. II.
[27] *Id.* at art. III.
[28] Separation of Powers—An Overview, *supra* note 24.
[29] Constitutional scholar Edward S. Corwin writes, "the Constitution, considered only for its affirmative grants of power capable of affecting the issue, is an invitation to struggle for the privilege for directing American foreign policy." Jonathon Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELATIONS (March 2, 2017).
[30] *Id.*
[31] U.S. CONST. art. I, § 8, cl. 1.
[32] *Id.* at cl. 11.
[33] *Id.* at cl. 12.
[34] *Id.* at cl. 13.
[35] *Id.* at cl. 14.
[36] *Id.* at art. I, § 9, cl. 7.

be the Commander-in-Chief of the Army and Navy[37] and lists the powers of the President that implicitly touch on foreign policy, including the ability to appoint and receive ambassadors, recognize foreign governments, and conduct diplomacy.[38]

Thus, from the very beginning of our Constitutional democracy, the conduct of foreign policy and national security (particularly war-making powers) has been shared by Congress and the President. In *The Foreign Policy Role of the President: Origins and Limitations*, Jody S. Fink writes that "a consensus has not been reached on the effect and meaning of the opening clause of Article II. Nonetheless, it is generally agreed that the express provisions of the article give the President broad power in the areas of negotiation and military control–areas that are vital to policymaking in the foreign relations sphere."[39]

The Judicial Branch does not have its own independent power over foreign policy. However, the Supreme Court has issued many decisions that have upheld or struck down actions taken by the Congress or the President in the name of national security and these decisions have had the effect of expanding (or, sometimes, contracting) the authority of the President and Congress over foreign affairs.

For example, the Supreme Court issued a major decision dealing with foreign affairs that, even though written in 1936, still is relevant today. During the Chaco War, a conflict between Paraguay and Bolivia from 1932-1935,[40] the Curtiss-Wright Export Corporation, a U.S. weapons manufacturer, supported Bolivia by supplying it with fighter planes and bombers, an activity prohibited by a Joint Resolution of Congress and a proclamation from President Franklin D. Roosevelt reaffirming the language of the resolution.[41] Roosevelt was also authorized by the Congressional resolution to shut down Curtiss-Wright's activities if doing so would bring an end to the war. When indicted by the federal government for violating both the Resolution and the proclamation, Curtiss-Wright attacked the underlying validity of the proclamation, arguing "that the Congress had violated the non-delegation doctrine,"[42] thereby unconstitutionally affording legislative power to the Executive Branch.[43]

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[37] *Id.* at art. II, § 2, cl. 1.
[38] Masters, *supra* note 29.
[39] Jody S. Fink, *The Foreign Policy Role of the President,* 776, HOFSTRA LAW REVIEW, 773, 804 (1983).
[40] The Editors of the Encyclopedia Britannica, *Chaco War*, ENCYCLOPEDIA BRITANNICA.
[41] 299 U.S. 304 (1936).
[42] *United States v. Curtiss-Wright Export Corporation,* OYEZ.
[43] *Id.*

In *United States v. Curtiss-Wright Export Corporation* (1936),[44] the Supreme Court, in a 7-1 decision,[45] decided in favor of the United States, finding that neither the Congressional resolution nor the Presidential proclamation were flawed. The Court also emphasized the power of the President in foreign affairs, writing that "The President alone has the power to speak or listen as a representative of the nation…as [former Supreme Court Chief Justice Marshall said in 1800], 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations…"[46] In other words, "The President has broad power in foreign affairs and possesses plenary powers beyond those listed in Article II…[the Court reasoned that] the federal government could not exceed its enumerated powers regarding internal issues but had a much broader scope of discretion in foreign affairs."[47]

Although the Executive Branch was granted greater influence over foreign policy in *United States v. Curtiss-Wright Export Corporation*, the Supreme Court held that the powers of the President were not limitless in the 1952 Supreme Court case *Youngstown Sheet & Tube Company v. Sawyer.*[48] During the Korean War, President Harry Truman directed the Secretary of Commerce, Charles Sawyer, to seize steel mills "to avert expected effects of a strike by the United Steelworkers of America."[49] The Court, in considering whether Truman's seizure of the steel mills was within the powers granted to him by the Constitution, held 6-3 in favor of Youngstown Sheet & Tube Company[50], stating "we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities."[51]

B. Power Relationships Between the Executive and Legislative Branches in Practice

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[44] 299 U.S. 304 (1936).
[45] *United States v. Curtiss-Wright Export Corporation, supra* note 42.
[46] 299 U.S. 304 (1936).
[47] *United States v. Curtiss-Wright Export Corporation, supra* note 42.
[48] *Youngstown Sheet & Tube Company v. Sawyer,* OYEZ.
[49] *Id.*
[50] *Id.*
[51] 343 U.S. 579 (1952).

In his work *Congress and Foreign Policy: Why the Hill Matters*, James M. Lindsay argues that the influence that Congress has over foreign policy is mostly indirect.[52] This influence mainly comes in the form of "anticipated reactions"[53] in which the Executive and Legislative Branches each predict the conduct of the other and act accordingly, altering the decision-making processes of the Executive (for example, implementing reporting requirements for the bureaucracy),[54] and/or grandstanding, which involves capturing the attention of the nation around a certain issue in an attempt to force the President to change a position.[55]

Even though Congress has indirect influence over the foreign policy decision-making process, in addition to its appropriation and oversight powers derived from the Constitution, it is clear that the President and the Executive Branch are the key actors with respect to foreign policy and national security. Lindsay attributes the "lack of legislative success on foreign policy [to] the inherent advantages of the Presidency: 'decision, activity, secrecy, and dispatch.'" [56] Unlike Congress, which primarily gathers information from testimony by key officials or subpoena, the President presides over a vast array of bureaucratic agencies, such as the Departments of State and Defense, that are responsible for conducting foreign policy and implementing national security measures. This has become increasingly important post-World War II, as the National Security Act of 1947 established the National Security Council (NSC),[57] the Central Intelligence Agency (CIA),[58] and the Department of Defense (DoD)[59] (and within it the Departments of the Army, Navy, and Air Force as well as the Joint Chiefs of Staff).[60]

Likewise, in the aftermath of the attacks on September 11th, 2001, Congress established the Department of Homeland Security (DHS), an Executive Branch agency headed by an official designated by the President.[61] The expansion of the foreign affairs and national security bureaucracy under the direction of the President (with additional guidance from civilian and/or military officials appointed to head these organizations) highlights the

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[52] James M. Lindsay, *Congress and Foreign Policy: Why the Hill Matters,* 609, POLITICAL SCIENCE QUARTERLY, 607, 628, (1992-1993).

[53] *Id.* at 613.

[54] *Id.* at 619.

[55] *Id.* at 622.

[56] *Id.* at 609.

[57] National Security Act of 1947, Pub. L. No. 253, §101, 61 Stat. 495, (1947).

[58] *Id.* at §102.

[59] *Id.* at §201.

[60] *Id.* at §211.

[61] Homeland Security Act of 2002, Pub. L. No. 296, § 2, 116 Stat. 2135 (2002).

fact that the Executive Branch has more influence in these policy realms than the Legislative Branch. Furthermore, the National Security Act and the Homeland Security Act underscore the President's role as Commander-in-Chief of the Armed Forces and enhance the President's ability to quickly and flexibly conduct foreign policy and national security by placing relevant information under the Executive's jurisdiction.[62] Lindsay believes that "these inherent advantages are greatest in national security affairs, and especially in crisis situations," such as one in which nuclear weapons would be utilized."[63]

Although Article I of the Constitution gives Congress the power to declare war[64], it is important to realize that Congress has not actually declared war since World War II: all major U.S. wars abroad, such as the Korean War, Vietnam War, the Gulf Wars in 1991 and 1993, and the U.S. invasion of Iraq and Afghanistan in the 2000s, were all launched and conducted under Executive Action issued by the President.[65] As a result, ample precedent exists for the President to bypass Congress when it comes to foreign policy, reducing the ability of Congress to act even when Congress is Constitutionally authorized to do so.

Congress's ability to act on foreign policy and national security matters is further limited by institutional divisions, such as increased polarization and the Constitutional provision that legislation must be approved by both the House and Senate even when the majorities of those groups may be held by different political parties. Likewise, Congressional action often occurs in public settings, such as committee hearings and televised votes. In contrast, the President, acting under executive privilege and other doctrines, has more opportunity for private, off-the-record decision-making and action.[66] Given that foreign policy and national security decisions are often based on highly confidential information, it is no surprise that these actions are often kept secret.

Despite the President's vast authority, Presidential and Executive Branch actions in foreign policy and national security have not gone unchallenged. In 1973, after Nixon expanded bombings in the Vietnam War without Congressional approval, the House of Representatives and Senate passed the Joint Resolution Concerning the War Powers of

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[62] Marshall, *supra* note 12, at 515.
[63] Lindsay, *supra* note 52, at 611.
[64] U.S. CONST. art. I, § 8, cl. 11.
[65] Alan Greenblatt, *Why the War Powers Act Doesn't Work,* NATIONAL PUBLIC RADIO (June 16, 2011, 1:01 PM).
[66] Marshall, *supra* note 12, at 515.

Congress and the President, also known as the War Power Resolution.[67] The purpose of the Resolution was to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into Hostilities."[68] By reaffirming Article I, Section 8 and the powers allocated to Congress with respect to war efforts, the War Powers Resolution intended to curtail unilateral action by the President, stating that the President is only authorized to involve U.S. troops when there is a "declaration of war, specific statutory authorization, or a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces."[69] In a nod to Congress's influence over foreign policy decision-making, Sections 3[70] and 4[71] of the War Powers Resolution respectively implemented consultation and reporting requirements when the Executive Branch decides that the deployment of U.S. troops is necessary.

Despite a history of shared authority in national security and foreign policy matters, at the present time the President of the United States is the only government official who has the authority to launch a nuclear weapon whenever the Chief Executive feels that such a move is called for.[72] While this "concentrates launch authority at the highest level"[73] and establishes civilian control of the nuclear arsenal, this policy has more consequences than benefits. For example, "the protocol concentrates authority and emphasizes speed to such a degree that it may allow a president to railroad the nuclear commanders into initiating a first-strike without apparent cause and quickly executing an order that may be horrifyingly misguided, illegal, or both. A…commander-in-chief could start a nuclear conflagration that no one could forestall, veto, or stop."[74] Furthermore, the President is not legally obligated to consult his military advisors or Congress before ordering a nuclear strike, a terrifying concentration of power in the hands of a single individual and a vivid demonstration of the erosion of checks and balances.

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[67] Nixon and the War Powers Resolution, BILL OF RIGHTS INSTITUTE.
[67] U.S. CONST. art. I.
[68] War Powers Resolution, *supra* note 2, at § 2.
[69] *Id.* at §2.
[70] *Id.* at §3.
[71] *Id.* at §4.
[72] Bruce Blair, *Strengthening Checks on Presidential Nuclear Launch Authority,* ARMS CONTROL ASSOCIATION (January/February 2018).
[73] *Id.*
[74] *Id.*

II. The Development of the Nuclear Taboo

The non-use of nuclear weapons (also known as the Nuclear Taboo) since Hiroshima and Nagasaki can largely be attributed to international law, the set of "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."[75] Sources of international law, according to Article 38 of the Charter of the International Court of Justice (ICJ), include international conventions, customary international law, legal principles that are widely accepted by civilized nations, and judicial decisions.[76] Conventions, which include treaties and contracts, establish obligations only for the states that agree to them,[77] and international principles dictate that only states, international organizations, and "other traditionally recognized entities" can be bound by them.[78]

Customary international law is not codified in treaties but is instead based on a set of norms, or "standards of right or wrong, a prescription or proscription for behavior 'for a given identity.'"[79] It has two critical elements. The first is state practice: how a critical number of states do or do not act in a given situation; importantly, "a practice can be general even if it is not universally accepted; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity."[80] Likewise, in *Colombia v. Peru*, also known as the *Asylum Case*, the International Court of Justice [ICJ] ruled that custom is dependent on "a constant and uniform usage,"[81] and that "'it is not possible to discern in all this any constant uniform usage, accepted as law.'"[82] The second element is *opinio juris,* which means states do or do not behave in that manner because they believe they are under a legal obligation.[83]

International law, including custom, is voluntary, as affirmed by the Permanent Court of International Justice (the precursor to the ICJ) in the *Lotus Case* when it explained

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[75] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (Malanczuk, 7th ed. 1997).

[76] *Id.* at 36.

[77] *Id.* at 37.

[78] *Id.* at 38.

[79] Nina Tannenwald, *Stigmatizing the Bomb: Origins of the Nuclear Taboo*, 8 INTERNATIONAL SECURITY,5, 49 (2005).

[80] Malanczuk, *supra* note 75, at 42.

[81] Asylum Case (Colom./Peru), Judgement, 1950 I.C.J., 14 (Nov. 20).

[82] *Id.*

[83] Malanczuk, *supra* note 75, at 44.

that "the rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."[84] According to Peter Malanczuk, the prevailing view is, with different reasoning, that new states cannot in principle escape existing customary obligations. One cannot select rights granted by a legal system ' 'à la carte' and at the same time reject the duties one dislikes."[85] In their paper *International Norm Dynamics and Political Change*, Martha Finnemore and Kathryn Sikkink argue that norms follow a unique life cycle: they emerge, then cascade to a tipping point at which a critical number of relevant states adopt the norm, and are finally internalized at which point norms "achieve a 'taken-for-granted' quality that makes conformance with the norm almost automatic."[86]

The Nuclear Taboo, the "normative inhibition against the first use of nuclear weapons," is a staple of international law. [87] According to Nina Tannenwald, the Director of the International Relations Program and Joukowsky Family Research Assistant Professor at the Watson Institute for International Studies at Brown University, the Nuclear Taboo is unlike normal taboos or norms because "it is not legalized (many taboos in modern society are), and it does entirely prohibit the acquisition of taboo objects or over preparations for their use…the nuclear taboo, however, has an intersubjective or a phenomenal aspect: it is a taboo because people believe it to be," evidence of one critical element of customary international law: state practice. [88]

Interestingly, in a July 1996 Advisory Opinion, the International Court of Justice (ICJ) found that:

> The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the State would be at stake.[89]

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[84] The Case of the S.S. "Lotus," Collection of Judgements, 1927 P.C.I.J., (Sept. 7).

[85] Malanczuk, *supra* note 74, at 47.

[86] Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 904, INTERNATIONAL ORGANIZATION, 887, 917 (2005).

[87] Nina Tannenwald, *How Strong is the Nuclear Taboo Today?*, 89, THE WASHINGTON QUARTERLY, 89, 109, (2018).

[88] Tannenwald, *supra* note 79, at 8-9.

[89] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J., 2E (July 8).

With this Opinion, it is important to note that, while the ICJ could not come to a consensus about the legality of retaliatory nuclear strikes, it is clear that nuclear first-use is considered by the international community to be a violation of multiple facets of international law.

Despite the fact that nuclear powers, including the United States, are modernizing and upgrading their nuclear arsenals,[90] the Nuclear Taboo has gained prominence in U.S. nuclear decision-making. Tannenwald explains that, although nuclear weapons are one of the more effective weapons in the U.S. arsenal due to their destructive capabilities and low cost, the Taboo has "been developed to the point that uses of nuclear weapons that were once considered plausible by at least some U.S. decision-makers…have been severely destigmatized and are practically unthinkable policy options."[91]

Three instances in U.S. foreign policy since 1945 highlight the applicability of the norm life cycle theory proposed by the Finnemore and Sikkink to the Nuclear Taboo outlined by Tannenwald. First, when the U.S. dropped the nuclear bombs on Hiroshima and Nagasaki in August 1945, there was no norm against the first-use of nuclear weapons and the atomic bomb was simply seen as a "more or less seamless continuation of the strategic bombing" campaigns that the U.S. used on the Japanese throughout the World War II.[92] Second, during the Korean War, as both Presidents Truman and Eisenhower considered the use of nuclear weapons, norms regarding the use of these weapons began to emerge:

> Eisenhower and Secretary of State [John Foster] Dulles explicitly associated negative domestic and world public opinion on nuclear weapons with an emerging taboo, which they viewed as an unwelcome constraint on their freedom to use nuclear weapons…their perception of an emerging taboo appears to have played a role in inhibiting a casual resort to use of nuclear weapons during Cold War crises in Asia. In turn, the nonuse of nuclear weapons during these crises—despites the United States' increasing reliance on them in its security policies—established an important behavioral precedent for nonuse.[93]

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[90] Nina Tannenwald, *The Vanishing Nuclear Taboo? How Disarmament Fell Apart,* FOREIGN AFFAIRS (November/December 2018).

[91] Tannenwald, *supra* note 79, at 5.

[92] *Id.* at 14.

[93] *Id.* at 23.

Third, the Vietnam War marked the beginning of norm internalization as both President Nixon and National Security Adviser Henry Kissinger "both knew that they were constrained by the beliefs of others, even if they did not personally share the Taboo."[94]

These examples demonstrate that the United States has gradually moved away from nuclear first-use since World War II and has internalized the Nuclear Taboo in its foreign policy and national security decision-making processes to the point where the first-use of nuclear weapons is not considered a viable option. But an understanding that nuclear weapons are not a viable option for a first-strike is not enough; a formal announcement of that understanding—a strengthening of the Congressional and bureaucratic checks on the President's ability to unilaterally launch these weapons without an attack on the U.S.—is also required to officially codify the Nuclear Taboo norm.

III. Power Sharing and its Applicability to Nuclear Weapons

The President and the Executive Branch hold significant power over most aspects of foreign policy, such as relations with foreign heads of state, the distribution of troops across the world, covert operations, the ability to receive ambassadors, and the authority to recognize states. But the Executive and Legislative branches should engage in greater sharing of responsibilities over nuclear weapons, especially to prevent the unilateral first-use of nuclear weapons by the President.

Bolstering the ability of Congress to take a more active role in the nuclear decision-making process spreads responsibility and gives greater control to the branch of government with authority under the Constitution to declare war and support the maintenance of the Armed Forces.

The Nuclear Taboo—the norm of customary international law that encourages using nuclear weapons only in retaliation—is already ingrained in U.S. foreign policy decision-making, so delegating some authority to Congress would bring the United States more in line with international legal principles. Finally, the unique potential and destructiveness of nuclear weapons must not be taken lightly.

A. Congressional Oversight of the President Regarding the First-Use of Nuclear Weapons

There have been recent legislative efforts to limit executive power over the first-use of nuclear weapons and bring U.S. nuclear policy in line with customary international law. Most

[94] *Id.* at 31.

recently, on January 17, 2019[95], Representative Ted Lieu [D-CA-33], who sits on the House Judiciary and Foreign Affairs Committees, introduced House Resolution (H.R.) 669: Restricting First Use of Nuclear Weapons Act of 2019.[96] Likewise, in the Senate, Senator Edward Markey (D-MA), a member of the Committee on Foreign Relations, introduced legislation that mirrors the House bill (S. 200: Restricting Use of Nuclear Weapons Act of 2019). These two pieces of legislation were also introduced by Lieu and Markey in 2016 during the Obama Administration, signaling that this legislation transcends the heightened partisan politics of the Trump Administration.[97]

The bills, recognizing that "nuclear weapons are uniquely powerful weapons that have the capability instantly kill millions of people, create long-term health effect and environmental consequences throughout the world, directly undermine global peace, and put the United States at an existential risk from retaliatory nuclear strikes,"[98] would make it "the policy of the United States that no first-nuclear strike would be conducted absent a declaration of war by Congress."[99] The justification for this policy is first and foremost rooted in Article I, Section 8 of the Constitution, which states that only Congress can declare war,[100] and the fact that "the Framers of the Constitution understood that the monumental decision to go to war, which can result in massive death and the destruction of civilized society, must be made by the representatives of the people and not by a single person."[101]

The text of H.R. 669 explicitly states that the first-use of a nuclear weapons by the United States without Congressional approval "would constitute a major act of war…[and] violate the Constitution."[102] Likewise, the legislation reaffirms Section 2(c) of the War Powers Resolution, which prohibits the President from involving U.S. troops without "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[103] H.R. 669 and S. 200 also align with the ruling in *Youngstown Sheet & Tube*, which placed limits on

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[95] *H.R. 669-Restricting First Use of Nuclear Weapons Act of 2019*, CONGRESS.GOV (January 2019).

[96] *Id.*

[97] Patrick Malone, *Survey: Most Americans Want to Curb the President's Power to Launch Nuclear Attacks*, THE CENTER FOR PUBLIC INTEGRITY (May 20, 2019).

[98] *H.R. 669-Restricting First Use of Nuclear Weapons Act of 2019*, *supra* note 95.

[99] *Id.*

[100] U.S. CONST. art. I, § 8, cl. 11.

[101] *H.R. 669-Restricting First Use of Nuclear Weapons Act of 2019*, *supra* note 95.

[102] *Id.*

[103] War Powers Resolution, *supra* note 2, at § 2.

Presidential power in foreign affairs and national defense by requiring the President's actions to conform to the Constitution.[104]

Another option that limits a President's ability to launch a nuclear first-strike unilaterally is the 1973 War Powers Resolution.[105] According to former Representative Lee Hamilton (D-IN), "no President has accepted the constitutionality of the War Powers Act, viewing it as a violation of the separation of powers and the President's authority as Commander-in-Chief."[106] For this reason, instead of constraining the President, the War Powers Act has primarily been used for political grandstanding "as a political tool that allows Congress to criticize a President about the prosecution of a war."[107]

Using the War Powers Resolution (and other authority) as a way to constrain the President instead of as a way to gain political advantage could happen in a variety of ways. Congress could use its appropriations powers (Article I, Section 9)[108] to limit funding to the U.S. nuclear program if a President uses or threatens to use a nuclear weapon without Congressional approval.[109] Additionally, the War Powers Resolution could be strengthened to increase consultation between the President and four key Congressional officials (the House and Senate majority leaders as well as the Speaker of the House and President *pro tempore* of the Senate) and a larger coalition that would also include the majority and minority leadership of the House and Senate Foreign Relations, Armed Services, and Intelligence Committees.[110] Finally, Members of Congress could sue the President or an official in the U.S. Armed Forces in the U.S. District Court for the District of Columbia if these officials violate the War Powers Resolution. However, in the past, the federal courts "have rejected War Powers lawsuits by congressional litigants on the ground that they lacked standing to sue,"[111] and this is not likely to change absent a major conflict that exacerbates friction between the Executive and Legislative Branches.[112]

B. Executive Branch Oversight of the Presidency

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[104] 343 U.S. 579 (1952).
[105] Blair, *supra* note 72.
[106] Greenblatt, *supra* note 65.
[107] *Id.*
[108] U.S. CONST. art. I, § 9, cl. 7.
[109] Matthew C. Weed, *The War Powers Resolution: Concepts and* Practice, CONGRESSIONAL RESEARCH SERVICE (March 8, 2019), at 65-66.
[110] *Id.*
[111] *Id.*
[112] Michael John Garcia, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, CONGRESSIONAL RESEARCH SERVICE (February 17, 2012), at 15-16.

Non-legislative proposals to limit Presidential powers over nuclear first-strike capabilities also exist. For example, Richard K. Betts and Matthew Waxman have proposed changing the nuclear launch procedures to prevent unilateral action by the President. Specifically, their proposal calls for involving the Secretary of Defense and the Attorney General in the nuclear chain of command to respectively guarantee that the first-use nuclear strike was instructed by the President and that the use of nuclear weapons in that scenario is legal.[113] The Betts/Waxman Proposal

> Adds a high-level legal oversight to first-use decisions. If the latter is going to be more than a rubber stamp, however, much deeper consideration of the legal issues will have to be undertaken and firm guidelines drawn in advance…[their] case for introducing checks into the process for nuclear first-use, however, is not just to limit the Commander-in-Chief's power but also to ensure it…Ideally, such a procedural mechanism would be adopted by the Executive Branch, but otherwise Congress could mandate it. There would be strong political and constitutional objections that such a measure interferes with the president's Commander-in-Chief powers. It is justifiable, however, as necessary to ensure that the president's commands are properly carried out. The requirement of Attorney General legal certification would avoid having to resolve through legislation the thorny constitutional issue of when the president may take unilateral nuclear action. Just having the law on the books would provide confidence to the chain of command below a disastrously misguided president to resist an order to start nuclear war without reasonable grounds…[114]

It is interesting that Betts and Waxman justify their proposal as a way to limit, yet also preserve, the power of the Executive. While the proposal does introduce bureaucratic obstacles to unilaterally launching a nuclear first-strike, the power to do so does remain concentrated in the Executive Branch as Congress is not consulted.

C. Are Restrictions on the President Necessary?

Some officials caution that restraining the President's ability to unilaterally launch nuclear first-strikes will have significant negative effects on U.S. national security. Specifically, nuclear deterrence requires a belief among adversaries of the United States that the United States will actually use a nuclear weapon, so the presence of bureaucratic or Congressional obstacles means that there is less credibility that the United States would use

[113] Richard K. Betts & Matthew Waxman, *Safeguarding Launch Procedures: A Proposal*, LAWFARE (November 19, 2017, 11:37 AM).

[114] *Id.*

nuclear weapons to retaliate.[115] For example, Brian McKeon, a senior official in the Obama Administration's Defense Department, wrote that "chang[ing] the decision-making process because of a distrust of this president, that would be an unfortunate decision for the next president."[116] Furthermore, national security experts who have opposed H.R. 669 and S. 200 claimed that these pieces of legislation are not necessary because military officials frequently review nuclear launch orders, can decline to carry out the order if it is deemed illegal, and have ample time to "push back against a President in any situation, apart from responding to an imminent attack."[117] Writing for the Arms Control Association, Bruce Blair notes that these bills:

> Might tie a president's hands too much in some situations…Even if it did not, it might take too long to secure congressional approval. Additionally, if specific authorization is granted but the crisis drags on or takes a turn in unanticipated directions, the president would remain empowered and could still unilaterally make a terribly bad call later.[118]

Restrictions on the President are necessary, and those experts who feel otherwise overlook a number of critical factors in their assessments. Although the President is vested broad powers in national security and foreign affairs as Commander-in-Chief under Article II of the Constitution, regardless of legislative timeframes and ever-changing situations, Congress can assert its power over nuclear weapons because it has the right to "provide for the common Defense and general Welfare of the United States, declare war[119], raise and support Armies[120], provide and maintain a Navy[121], [and] to make Rules for the Government and Regulation of the land and naval Forces."[122] While H.R. 669 and S. 200 would establish greater obstacles to the President's ability to launch a unilateral nuclear first-strike, these pieces of legislation would not diminish the nuclear deterrent because they do not prohibit the President from launching nuclear weapons in the event of an attack on the United States. Furthermore, the absence of implementing further checks increases the likelihood that a future President could violate the important Nuclear Taboo.

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[115] Demirijan, *supra* note 10.
[116] *Id.*
[117] *Id.*
[118] Blair, *supra* note 72.
[119] U.S. CONST. art. I, § 8, cl. 1.
[120] *Id.* at cl. 11.
[121] *Id.* at cl. 13.
[122] *Id.* at cl. 14.

Additionally, although both H.R. 669 and S. 200 have not been voted out of their respective committees, U.S. citizens, on a bipartisan basis, believe that these two pieces of legislation must be passed. A survey of 2,264 likely registered voters conducted by the University of Maryland's School of Public Policy in January and February 2019 found that roughly sixty percent of Republicans and seventy-five percent of Democrats believe that "Congress should pass…a law that says: 1) the President would still have the sole authority to order the use of nuclear weapons in response to a nuclear attack, and 2) to use nuclear weapons first, the President would first have to consult Congress and Congress would have to issue a declaration of war on the country to be attacked with nuclear weapons."[123] Finally, the United States maintains a variety of non-nuclear weapons with offensive capabilities that not only serve as a deterrent to an attack but also are more appropriate for use in conflict without risking escalation, environmental impacts, and the loss of civilian life.

Conclusion

The Constitution, which establishes the framework for the checks and balances and separation of powers that govern the relationships between the three branches of government, delegates foreign policy and national security power to both the Executive and Legislative branches. Under this arrangement of shared power, the President has significant authority over various aspects of foreign policy and military control. Nonetheless, Congressional jurisdiction should be increased to include oversight of a President's decision to launch a nuclear weapon, particularly a first-strike against an adversarial state or group. Nuclear weapons are undoubtedly critical to U.S. national defense and security policy, as well as foreign policy, because their offensive capabilities allow the U.S. to maintain a powerful deterrent, thereby dissuading adversaries from attacking the U.S. But giving the President sole authority to make the nuclear decision goes against the idea of shared power enshrined in the Constitution.

While the President is often the key player in foreign policy and national security and is not constrained by the same decision-making procedures under which Congress operates, it is important to limit the power of the Chief Executive with respect to nuclear weapons due to their destructive capabilities, the importance of the Nuclear Taboo, and the

[123] Malone, *supra* note 97.

bipartisan belief that a single individual should not have the ability to control such a powerful arsenal without consent from a representative body. Potential solutions to this issue include the passage of H.R. 669 and S. 200, which seek to prevent the President from launching a nuclear first-strike without a declaration of war from Congress, amending the 1973 War Powers Resolution to include provisions regarding nuclear weapons, and, non-legislatively, implementing greater checks on the President through important members of the bureaucracy, such as the Secretary of Defense and the Attorney General.

In the future, given that the U.S. has not utilized nuclear weapons against an adversary since August 1945 and that the Nuclear Taboo plays a prominent role in American decision-making process, the probability of the U.S. launching a nuclear strike without being previously attacked is low. Additionally, the political polarization plaguing the United States suggests that it is unlikely that H.R. 669 or S. 200 will be passed by their respective chambers of Congress, let alone signed by the current President. Regardless, it remains necessary to strengthen the ability of Congress and the bureaucracy to check the power of the Chief Executive in order to restrict a future President's ability to unilaterally control the world's most powerful offensive weapon.

The Defenses of Not Guilty by Reason of Insanity (NGRI) and Guilty but Mentally Ill (GBMI): A Brief History and Comparison

Celine Alon

Introduction

Mens rea, translated as "a guilty mind," together with *actus reus*, a "guilty action," are the criteria traditionally required to find criminal culpability. Implementing these concepts into the law began with contriving defenses for situations in which the defendant commits the prohibited conduct but lacks the *mens rea* necessary to impose criminal liability.[1] The plea of insanity is such a defense.

The insanity defense has been utilized to differentiate the mad from the bad, and a successful plea of insanity results in a verdict of not guilty by reason of insanity (NGRI). However, the NGRI verdict, while acknowledging a person's mental inability to appreciate the wrongfulness of their actions or conform their conduct to the law, oftentimes fails to protect society from a potentially dangerous individual. Through the definitions of insanity—the *M'Naghten Rule*, the *Durham Rule*, and the American Law Institute's (ALI) Model Penal Code—the defense has come under attack for leniency in serving justice, as seen in the public response to the infamous case of *US v. John W. Hinckley Jr.*.[2] The jury's verdict of acquittal by reason of insanity in President Reagan's attempted assassination resulted in increased public scrutiny and shifted national opinion of the insanity defense. The

[1] Henry T. Miller, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 La. L Rev. 337, 339 (1985).

[2] *United States v. Hinckley*, 672 F. 2d. 115 (D.C. Cir. 1982).

public backlash has forced both federal and state courts to reconsider the implementation of the insanity defense, with four states wholly abolishing the defense.[3]

Kansas is one of those states. Coincidentally, the Supreme Court has opened this present term with *Kahler v. Kansas*,[4] a case concerning the constitutionality of abolishing the insanity defense. As the nation struggles with both the value and the constitutionality of abolishing the insanity defense, a supplemental verdict has emerged which preserves the principles of criminal responsibility while remedying perceived defects in the NGRI verdict. The "Guilty but Mentally Ill" (GBMI) verdict initially developed in Michigan in 1975,[5] and has now been adopted in eight states.[6] The statistic for states who have abolished NGRI as well as those who have implemented GBMI, however, fluctuates among sources; I will adhere to these estimates throughout the article.

GBMI addresses the perceived flaws of the insanity defense by permitting a finding of guilt while still formally acknowledging a defendant's mental illness. The verdict authorizes conventional criminal procedure together with the necessary psychiatric treatment for a defendant who, though mentally ill, was found guilty beyond a reasonable doubt. The verdict permits society to simultaneously condemn criminal behavior and provide effective treatment throughout a defendant's criminal sentence.[7]

An adoption of a GBMI verdict does not substitute for an NGRI verdict but rather acts as supplemental verdict. A finding of GBMI may be reached if the evidence establishes that, though mentally ill, the defendant was sufficiently in possession of his or her faculties to accept blameworthiness. In *Kahler*, Supreme Court Justice Kagan recently held that due process does not require that Kansas adopt a defense of insanity.[8] However, it appears that a state which completely abolishes the insanity defense is turning a blind eye to the relationship between *mens rea* and criminal culpability. If a state were to completely eliminate a defense based in the claimed absence of *mens rea*, it would be prudent to provide a verdict which both recognizes *mens rea* and ensures the necessary mental health treatment throughout a defendant's sentence.

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[3] Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. Cin. L. Rev. 943, 947 (1987).

[4] *Kahler v. Kansas*, 206 L. Ed. 2d 312, 316 (U.S. March 23, 2020).

[5] *People v. McQuillian*, 221 NW 3d 569 511 (Mich. Sup. Ct. 1974).

[6] Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty but Mentally Ill Verdict: An Empirical Study*, 16 U. Mich. J.L 77, 79 (1982).

[7] Roger George Frey, *The Guilty but Mentally Ill Verdict and Due Process*, 92 Yale L.J. 475, 475 (1983).

[8] *Kahler*, 206 L. Ed. 2d 312 at 317.

This article will briefly review the development of the insanity defense and its criticisms; but, it will focus more on the implementation of the supplemental GBMI verdict and contend that, for the mentally ill defendant, the GBMI verdict preserves traditional concepts of *mens rea* while ensuring the maintenance of public order and the defendant's necessary psychiatric treatment.

I. History of the Legal Interpretation of Mental Illness

A. Origins of the Insanity Defense

The concept of *mens rea* dates back to Roman, Greek, and Canon law[9] and continues to be a fundamental tenet of criminal jurisprudence. Under the contemporary approach of Model Penal Code § 2.02(1), a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.[10] This is, by definition, criminal intent. The concept of intent has always been an intricate issue. A criminal statute or common law must first define the requisite for the offense and then apply it to the facts at issue. In response to the ethical dilemma presented by crimes committed by defendants who lacked the requisite *mens rea*, 17th century common law formulated a defense to acquit those who lack criminal intent. This became known as the insanity defense.

B. "Insanity" in Common-Law Courts

Insanity took its first modern breath with the *M'Naghten Rule* in 1843. Daniel M'Naghten was under the assumption that the Prime Minister of the time, Robert Peel, was planning to kill him. In a case of mistaken identity, M'Naghten shot and killed Peel's secretary, Edward Drummond. At trial, M'Naghten pleaded not guilty by reason of insanity. He attested that, at the time that the crime was committed, he was not in a sound state of mind. Medical experts claimed that M'Naghten's morbid delusions blurred his perception of right and wrong, leaving him with no control over his actions.[11] Lord Chief Justice Tindal instructed the jury to render an acquittal if, at the time of the crime, the prisoner had no sensible understanding that he was violating the laws. If he was acting in a sound state of mind, then they were told to rule against him.[12] M'Naghten was acquitted, and public

[9] Miller, *supra* at 338.
[10] Model Penal Code § 2.02(1) (2020).
[11] *Queen v. M'Naghten*, 8 Eng. Rep. 718, 720 (QB 1843).
[12] *Id.* at 720.

indignation from the acquittal led the House of Lords to answer questions on what "insane" really meant. The *M'Naghten* rule created a presumption of sanity unless the defense proved that (1) at the time of committing the act, the accused was laboring under a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, (2) if he did know it, that he did not know what he was doing was wrong.[13] Following *M'Naghten*, a variation of the insanity defense was debated that focused on the volitional aspect of the defense, that is, whether the act at issue was the product of an irresistible impulse created by a mental disease or defect. This became known as the irresistible impulse test and gained limited acceptance and use for a time in the United States.

The United States established a different formulation of insanity in 1954 when Monte Durham pleaded insane to charges of housebreaking. The Court of Appeals for the District of Columbia Circuit stated that a defendant was not legally responsible if his act was a *product* of mental disease or defect. By relying on the science of psychiatry, the Court recognized that man is an "integrated personality, and that reason, which is only one element in that personality, is not the sole determinant of his conduct."[14] The court claimed that irresistible impulse, or *M'Naghten*, carries a misleading implication that mental conditions produce only sudden, momentary inclinations to commit unlawful acts.[15] The *Durham* rule provided the jury with an adequate explanation of the defendant's mental state at the time of the crime while further providing that the defense of insanity is only applicable if the act was a *product* of a mental disease or defect. However, this rule did not gain wide acceptance because of the inherent difficulties in differentiating the legal and medical definitions of the term "insanity." Psychiatric testimony is generally not well understood by lay jurors and, often times, expert witnesses offer legal conclusions of guilt rather than medical opinions.[16] In *Rollerson v. US*,[17] an expert witness testified that the defendant had a "paranoid personality." He claimed that this was a mental disease and that, in his opinion, the crime was a product of the disease. The expert witness, therefore, concluded that the accused was not criminally responsible for the act rather than just supplying a medical opinion on whether

[13] *M'Naghten*, 8 Eng. Rep. 718, at 722.

[14] Fernand N. Dutile & Thomas H. Singer, *What Now for the Insanity Defense?*, 58 Notre Dame L. Rev. 1104, 1106 (1983).

[15] *Durham v. United States*, 214 F.2d 862, 873 (D.C. Cir. 1954).

[16] *Criminal Responsibility -The Durham Rule-Washington v. United States, _ F.2d _ (D.C. Cir. 1967)*, 9 Wm. & Mary L. Rev. 1172, 1174 (1968).

[17] *Rollerson v. US,* 343 F.2d 269, 272 (D.C. Cir. 1964).

the defendant had a mental disease or defect. Within seven years of its announcement, the *Durham* rule was explicitly rejected in 22 states.

Durham was abandoned in favor of a new test of insanity formulated by the Model Penal Code. The American Law Institute, or ALI, reassessed the insanity defense and reached a compromise between the narrow *M'Naghten* test and the broad *Durham* rule. The ALI test states that an individual avoids criminal responsibility if they lack the substantial capacity to *appreciate* the wrongfulness of their actions or to conform their actions to the requirements of the law.[18] The Code's standards shifted *M'Naghten*'s test of *knowing* the criminality of an act to *appreciating* its criminality. This allows for better calibration in situations in which a defendant knows that killing is criminal but thinks it no worse than littering and, thus, does not *appreciate* the criminality of his or her conduct. Conversely, one who suffers from a mental disease or defect but nonetheless *appreciates* criminality of his or her conduct would not qualify for insanity. It is in the latter case that the verdict of GBMI would apply. Though the ALI's standard did not introduce the GBMI verdict, the verdict became widely accepted after the use and perceived misapplication of the Model Penal Code's standard in the case involving the attempted assassination of President Ronald Regan's, *Hinckley v. US*.[19]

C. Contemporary Legal Precedent

The verdict of President Reagan's would-be assassin, John Hinckley Jr., read "not guilty by reason of insanity." During the summer of 1976, Hinckley lived in Hollywood where he watched the film *Taxi Driver* fifteen times at a local theater.[20] The film tells the story of a man who attempts to assassinate a presidential candidate but then instead saves a twelve-year-old prostitute, played by Jodie Foster, and manages to win over the girl. By the fall of 1980, Hinckley became obsessed with both the President of the United States and actress Jodie Foster.[21] He tracked President Carter's campaign travels and sent hand-written notes to Jodie Foster. Hinckley then planned a trip to D.C. and stalked President Reagan's schedule. He planned to wait outside of Reagan's appearance with a local newspaper, and even documented his plans in a letter to Foster: "There is a definite possibility that I will be

[18] Model Penal Code § 4.01(1) (Official Draft 1962).
[19] *Hinckley*, 672 F. 2d. at 115, 117.
[20] Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 Yale L.J. 1545, 1547 (1985).
[21] *Id.* at 1548.

killed in my attempt to get Reagan… The reason I'm going ahead with this attempt know (sic) is because I just cannot wait any longer to impress you."[22] Hinckley then waited for Reagan to leave his event, shooting at him six times, and ultimately wounding the President and four others.

Hinckley was acquitted under the Model Penal Code's standards for insanity. However, Hinckley purposefully bought a gun, followed the President's moves very closely, waited outside the President's event, knowingly shot six times, and even left behind a note outlining his criminal intentions. The defense argued that, though he may have intended to assassinate President Reagan, his ability to *appreciate* criminality was tainted by his delusion of winning over Foster. There is overwhelming evidence that Hinckley was acting intentionally when he attempted to kill Reagan, as he himself stated, "there is a definite possibility that I will be killed in my attempts to get Reagan." Hinckley's mental illness, however, rendered him morally blameless according to the existing standards for insanity.

What gained popularity after Hinckley's verdict, however, was the verdict of GBMI. Though Michigan had introduced a defense of GBMI in 1975,[23] the rate of finding a defendant guilty but mentally ill skyrocketed after the *Hinckley* case. Within two years, ten additional states adopted the GBMI verdict.[24] Within a month of the trial's conclusion, Congress passed the Insanity Defense Reform Act of 1984.[25] This reform placed the burden of proof of insanity on the defendant while also providing the special verdict, "guilty but mentally ill." Pursuant to the statute, the Attorney General is directed to take action to assure that a person convicted under the GBMI verdict is given proper treatment during the term of such sentence. Despite his mental illness, John Hinckley's understanding of the criminality of his conduct arguably made him particularly well-suited to a verdict of GBMI.

After *Hinckley*, states that abolished the insanity defense allowed defendants to argue the absence of the required criminal intent. Defendants in those states cannot, however, avoid punishment by showing that their mental illness prevented them from knowing their actions were wrong as provided by the ALI test. Kansas, for example, holds defendants responsible if they have the substantial capacity to understand the criminality of their own

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[22] *Id.*

[23] Mich. Code § 768.36(1) (1975).

[24] John H. Blume and Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. Rev. 93 (2003).

[25] H.R. 3771, 98th Congress (1983).

conduct.[26] If a defendant kills a human with the belief that a dog instructed him to do so, he is not held criminally responsible. However, he is held liable for his actions if he is aware of the criminality of their conduct, e.g., killing a human while believing that he is killing a dog.[27] This distinction regains attention as the Supreme Court opens their term with *Kahler v. Kansas*,[28] a case in which the petitioner Kahler shot and killed his estranged wife, two of their three children, and his estranged wife's grandmother in 2009. After their divorce, which followed his ex-wife's affair, the petitioner became preoccupied with trying to psychologically bludgeon her back into the relationship.[29] Kahler entered the victim's home with a gun and shot the four victims. In court, he attempted to establish that severe depression had rendered him incapable of forming the intent necessary for capital murder. *Kahler* asked the court to reconsider a state's rights to abolish the insanity defense.

The Supreme Court addressed the issue of whether, where a state has neither NGRI nor GBMI, it deprives a defendant of the rights protected by the Fourteenth amendment's due process clause[30] and the Eighth amendment's protection from cruel and unusual punishment.[31] Through *Kahler*, the court upheld the elimination of NGRI under due process. However, eliminating the NGRI defense without providing a GBMI alternative arguably undermines the traditional relationship between *mens rea* and guilt. If Kansas were to implement the GBMI verdict, it would be possible to arrive at a verdict that recognized petitioner Kahler's mental illness while still holding him liable for the conduct at issue. Much like Hinckley, Kahler's intentions were clear as he planned his crime to the very last detail: to inflict harm on the women of his family but to let his son, who escaped, to live.

Both *Hinckley* and *Kahler* illustrate the proposition that criminal intent, or *mens rea*, is the appropriate factor in establishing guilt; thus, differentiating between the mad and the bad.

II. Implementation of the Insanity Defense

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[26] Kan. Stat. § 22-3220 (1995).

[27] Adam Liptak, *Supreme Court Opens New Term With Argument on Insanity Defense*, (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/us/politics/supreme-court-insanity-defense.html?rref=collection%2Ftimestopic%2FU.S.%20Supreme%20Court&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=5&pgtype=collection.

[28] *Kahler*, 206 L. Ed. 2d 312.

[29] *Id.* at 316.

[30] US Const. amend. XIV.

[31] US Const. amend. VII.

A. Defining Mens Rea

Mens Rea refers to the mental state or attitude that forms intent for criminal liability. By determining an agent's attitude towards a crime, it is considered the foundation for assessing culpability.[32] Intent, simply, can be defined as acting purposely, knowingly, recklessly or negligently.[33] Accidents happen where no one is at fault. If one's mind is clouded by insanity, they are, accordingly, incapable of forming intent. Insanity may produce irrational beliefs that distort reality and prevent a defendant from appreciating the criminality of his or her conduct as per Model Penal Code §4.01(1). The GBMI verdict, in contrast to a defense of NGRI, contemplates the defendant acting knowingly as per Model Penal Code §2.02(1).

In *Clark v. Arizona*, the defendant was charged with intentionally killing a police officer.[34] In court, Clark plead insanity and claimed that the act was a result of paranoid schizophrenia, arguing that he lacked the required *mens rea.* Arizona, following *State v. Mott*,[35] refuses to allow psychiatric testimony to negate the *mens rea* element of the crime. However, Clark still based his defense on insanity. In the weeks leading up to the incident, Clark had told fellow classmates of his desire to shoot a police officer.[36] While parked in a residential neighborhood, he essentially lured the victim, Officer Moritz, towards his car by blasting the radio. Under Arizona's new standards of intent pursuant to *Mott*, Clark had the burden of proving that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."[37] Although he was suffering from schizophrenia, the evidence created considerable doubt that these delusions interfered with his ability to form criminal intent. Relying on the evidence of the petitioner's behavior both before and during the shooting, there was ample basis on which to conclude that Clark was acting intentionally and knowingly. He was found guilty of first degree murder.

Clark acted purposefully, establishing that he possessed the requisite *mens rea* but arguably lacked the substantial capacity to conform his conduct to the requirements of the

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[32] Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. Crim. L. & Criminology 1071, 1086 (2007).

[33] § 2.02(1).

[34] *Clark v. Arizona*, 584 U.S. 735, 735 (U.S. 2006).

[35] *State* v. *Mott,* 187 Ariz. 536, 541 (Supt. Ct. Ariz. 1997).

[36] Morse & Hoffman, at 1098.

[37] Ariz. Stat. § 13-502(a) (2007).

law, qualifying him for GBMI had it been available. The evidence of Clark's desire to victimize an officer supports a finding of criminal intent. An NGRI verdict for the intentional murder of a police officer would result in an acquittal, which demonstrates the type of lenient outcome that has led to criticism and controversy around the defense. Alternatively, if Clark's intent was directly influenced by his mental illness, he would have been eligible for a finding of GBMI rather than an NGRI acquittal or a traditional guilty. John Hinckley, like Clark, was mentally ill, but acted knowingly and intentionally with regard to his offense.

Hinckley, though his case occurred two decades before *Clark*'s, also meets the requirements for *mens rea*. As demonstrated by the evidence, Hinckley acted knowingly and intentionally in attempting to assassinate Reagan. Analyzed under *mens rea* and the Model Penal Code's principles,[38] Hinckley, though mentally ill, deliberately planned out his crime in his letters to Foster and tracked the President's movements. *Mens rea*, through *Clark* and *Hinckley*, can be best understood as the intent formed to assess and ultimately impose criminal accountability.

B. Does the Constitution Guarantee a Right to the Insanity Defense?

The question of abolishing the insanity defense, however, goes far beyond the issue of *mens rea*. Although the constitution does not explicitly guarantee the right to the insanity defense, abolition of the defense implicates the Eighth amendment's cruel and unusual punishment clause[39] and the Fourteenth amendment's due process clause.[40] To deny the defense of insanity may be a violation of due process, while the denial of appropriate medical care while incarcerated is arguably a violation of the prohibition against cruel and unusual punishment.

The Eighth Amendment of the U.S. constitution states, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[41] Pursuant to an NGRI verdict, those acquitted by reason of insanity are often held under psychiatric care until released. Hinckley, for example, remained under institutional psychiatric care after his acquittal. The insanity defense, thus, protects the insane from being

[38] § 4.01(1).
[39] U.S. Const. amend. VIII.
[40] U.S. Const. amend. XIV, § 1.
[41] U.S. Const. amend VIII.

subjected to the prison system and, as such, to deficient medical care, a potential Eighth amendment violation.

The Fourteenth amendment reads:

> 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 or life, liberty, or property, without the due process of law; nor deny any person within its jurisdiction the equal protection of the laws.[42]

The Fourteenth amendment's due process and equal protection clauses are also implicated by the insanity defense. Though the right to present a defense of insanity seems to be a core principle of due process, the Supreme Court recently upheld its abolition in *Kahler v. Kansas*. If a state, however, elects to abolish the insanity defense completely, it would be sensible to provide an alternative verdict, such as the GBMI verdict, to guarantee the defendant a verdict which recognizes both *mens rea* and guilt while likely surviving constitutional scrutiny.

C. States that have Abolished the Insanity Defense

This section will examine the statutes of specific states that have reformed the insanity defense: Michigan, Montana, Alaska, Maryland, and Kansas. Following the *Hinckley* verdict in 1982, eight states enacted GBMI verdicts, which recognizes a defendant's need for mental treatment without excusing them from criminal culpability.[43]

In 1979, Michigan, through *People v. McQuillan*,[44] became the first state to review and approve the imposition of a GBMI defense.[45] The purpose was twofold:

> (1) to ensure that criminally responsible but mentally ill defendants obtain professional treatment in 'the humane hope of restoring their mental health' while incarcerated or on probation, and, correlatively, (2) to assure the public that criminally responsible and mentally ill defendants will not be returned to the streets to unleash further violence.[46]

In *McQuillan*, the trial court found the defendant NGRI of assault with intent to rape.[47] The defendant was, then, confined to a mental hospital until the trial court vacated the verdict and implemented GBMI. Michigan's criminal code adheres to the GBMI verdict if the trier finds that (a) the defendant is guilty beyond a reasonable doubt of an offense, (b) the

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[42] U.S. Const. amend. XIV, § 1.

[43] Smith & Hall, *supra* at 79.

[44] *McQuillan*, 221 N.W.2d 569 at 511, 512.

[45] John M. Grostic, *The Constitutionality of Michigan's Guilty but Mentally Ill Verdict*, 12 U. Mich. J.L. Reform 188, 188 (1978).

[46] Stephen Michael Sheppard, *Bouvier Law Dictionary Guilty but Mentally Ill (Guilty but Insane or GBMI or G.B.M.I.)*, The Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012).

[47] *McQuillan*, 221 N.W.2d 569 at 511, 519.

defendant has proven mental illness at the time of the offense, and (c) the defendant had *not* established that he or she lacked the substantial capacity to either appreciate the nature of their conduct or conform to the requirements of the law.[48] If a defendant is unable to establish a failure to appreciate criminality while proving beyond a reasonable doubt that he or she was mentally ill at the time of the crime, GBMI would be employed.

The evidence in *Hinckley*—the letters to Foster, the obsession with the film *Taxi Driver*, and the elaborate stalking of both Foster and the president—arguably establishes mental illness at the time of the offense. His possession of *mens rea* is established in his letters to Foster, wherein he writes, "there is a definite possibility that I will be killed in my attempts to get Reagan."[49] Though he struggled with mental illness, Hinckley knowingly attempted to assassinate Reagan. Hinckley's acquittal illustrates the apparent faults of the insanity defense: (1) the early release of a dangerous criminal, (2) the leniency within the punishment of an attempted-assassin of the US President, and (3) the apparent misunderstanding of *mens rea*.

Montana, in 1979, eliminated mental disease or defect as an affirmative defense. While introducing the GBMI verdict, Montana statutes instructed the courts to present a mental evaluation to determine whether or not the defendant suffered from a mental disease or disorder.[50] If the defendant was found to suffer from such a disorder, the court determined guilt by assessing whether or not the defendant was "unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law."[51] The Model Penal Code's definition shifted from "lacks substantial capacity"[52] to being "unable" to appreciate the criminality of one's conduct. This change imposed a greater burden on the defendant than the ALI standard.[53] The Montana Code excludes mental disease or defect as a defense, specifying that evidence of mental disease or disorder is only admissible to prove the state of mind of a defendant.[54] A defendant may be found not guilty on the basis that a mental disease or defect prevented the defendant from possessing the state of mind necessary to appreciate the charged offense,

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[48] § 768.36(1).
[49] Sallet, at 1548.
[50] Mont. Code § 46-14-311 (1979).
[51] *Id.*
[52] § 4.01(1).
[53] Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 Mont. L. Rev. 133, 136 (1984).
[54] Mont. Code § 46-14-102 (1978)

rather than not guilty by reason of insanity. While Michigan reformed their insanity defense and introduced GBMI, Montana was the first state to wholly abolish the insanity defense. The Montana defense, instead, only permits mental disease to conflict with *mens rea* in direct relation to the crime committed. The state, additionally, implemented the GBMI finding: if a court were to find that a mental disease or defect rendered the defendant unable to appreciate the criminality of the offense, he or she would be provided with the necessary treatment[55] and then transferred to the state prison for the remainder of the sentence.[56]

In *Pouncey v. State*, defendant Beverly Pouncey appealed the judgment of Maryland's Circuit Court, which found her both guilty of murder and insane at the time of the crime.[57] Charged with first degree murder of her five-year-old son, the appellant interposed a plea of not guilty by reason of insanity. The evidence in the Circuit Court disclosed that the appellant drowned her son because "she believed that the devil was pursuing him and that the only way to prevent him from going to hell was to kill him."[58] The court found the appellant guilty of first degree murder and legally insane at the time of the offense, sending her first to the State Department of Health for evaluation.[59] Pouncey claimed that a successful insanity defense, by its nature, excuses criminal conduct because it recognizes an absence of *mens rea* and, therefore, moral blameworthiness.[60] However, the state of Maryland finds that insanity is not completely inconsistent with a general intent to commit a crime.[61] The reviewing appellate court concluded that, by drowning her child, the appellant intended to kill him; that intent relieves her only of liability for a full punishment rather than a complete acquittal. The legislature "has not seen fit to remove all consequences of committing a criminal act while insane, *e.g.*, the defendant may be held in a mental institution until it is determined that the release would not constitute a danger."[62] Thus, Maryland's reform of the insanity defense—the implementation of the GBMI verdict—was arguably successful in providing justice to both the offender and society.

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[55] Mont. Code § 46-14-311 (1979).
[56] Mont. Code § 46-14-312(3) (1979).
[57] *Pouncey v. State*, 297 A.2d 264, 265 (Md. 1983).
[58] *Id.*
[59] *Id.*
[60] *Id.* at 478.
[61] *Id.*
[62] *Id.*

The Alaska statute, in regard to the insanity defense, reads as follows: "a defendant found guilty but mentally ill is not relieved of criminal responsibility for criminal conduct."[63] If a defendant is found guilty but mentally ill, the Department of Corrections is mandated by statute to provide mental health treatment until the defendant is no longer dangerous to the public peace or safety of the community; when the treatment terminates, the defendant shall serve the remainder of the sentence in a correctional facility.[64] Alaska's reform to the insanity defense has been successfully implemented in various cases, including *Monroe v. State*.[65] The defendant, who had a history of paranoid schizophrenia, stabbed his father to death. It was found that, without the medication that he often refused to take, the defendant posed a danger to the community.[66] An autopsy revealed that Monroe's father died from approximately thirty-three stab wounds to his head and neck.[67] There is no doubt that Monroe needed to be isolated to ensure the safety of the public. Monroe would often avoid taking his medication and, at times, manipulate his doctors into prescribing smaller dosages than were necessary to treat his condition.[68] At the time of the offense, Monroe had avoided proper medication for about five weeks; thus, his conduct was a result of his mental state as his delusions rendered the defendant incapable of appreciating the wrongfulness of his actions or conforming to the requirements of the law.[69] Though he met the standards for insanity, Monroe was a danger to his community. By consistently manipulating his medication, there was no way to predict whether he would continue his violent pattern of behavior. The expert testimony indicated that, due to the severity of his condition, Monroe would always require treatment.[70] Because of this, Monroe was sent directly to imprisonment rather than the common route for GBMI convicts: treatment, evaluation, and, then, imprisonment. If he were acquitted by reason of insanity, like Hinckley was, the court would have been putting society at risk. Thus, the implementation of the GBMI defense was able to respond to the specific facts of the case and, as such, was effective.

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[63] Alaska Stat. § 12.47.030(a) (1982).
[64] Alaska Stat. § 12.47.050(b)(c) (1982).
[65] *Monroe v. State*, 847 P.2d 84 (Court of Appeals of Alaska 1993).
[66] *Monroe v. State*, 847 P.2d 84 at 86.
[67] *Id.* at 85.
[68] *Id.* at 86.
[69] *Id.*
[70] *Id.*

Kansas became the fourth state to fully abolish the insanity defense in 1995.[71] The Kansas statute provided that "it is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."[72] *Kahler*[73] asked the Court to consider whether it is constitutional to fully abolish the insanity defense. In Kansas, a defendant may argue that, because of their mental illness, they lacked the criminal intent, *mens rea*, to support a guilty verdict. Petitioner *Kahler* argues that, by fully abolishing the insanity defense, Kansas appears to be ignoring the constitutional rights embedded in the Eighth and Fourteenth amendments. The court held that the abolition of the insanity defense is not unconstitutional under the Fourteenth Amendment's due process clause. An implementation of a GBMI option, however, rectifies the abolition by permitting Kansas to justly punish *Kahler* for his offenses while still receiving the proper treatment if a GBMI option were available and employed.

Viewed overall, the abolition of the insanity defense has been most successful when paired with the option of the GBMI verdict. The defense of GBMI, as demonstrated, punishes heinous crimes while still paying mind to the mental illness of the defendant.

III. The GBMI Verdict

The insanity defense, since its use in *Hinckley*, has been the subject of public criticism and attempts at judicial and legislative reforms. By using the supplemental finding of GBMI, mental illness is not ignored in evaluating criminal culpability, but is rather considered in determining whether the defendant can appreciate the conduct at issue and conform to the requirements of the law. GBMI has fairly addressed the repercussions for mentally ill defendants in states like Michigan, Montana, Alaska, and Maryland. If Kansas were to implement the GBMI option, petitioner *Kahler* would be considered guilty but mentally ill as, though his mental illness clouded his actions, he possessed the requisite *mens rea* and is guilty beyond a reasonable doubt.

To protect society from the danger of these mentally ill perpetrators, as well as to dispense justice, a GBMI verdict must be implemented. This verdict conforms with the demands of the constitution as it either sends defendants to psychiatric treatment prior to

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[71] Daniel J. Nusbaum, *The Craziest Reform of them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 Cornell L. Rev. 1509, 1520 (2002).

[72] § 22-3220.

[73] *Kahler*, 206 L. Ed. 2d 312 at 316.

serving time or ensures additional care for the mentally ill within the prison system.[74] Thus, GBMI both protects society and ensures psychological treatment for the insane. Despite the benefits of the verdict, it has been attacked by various academics.

A. Oppositions to the GBMI finding

Opponents of the GBMI defense argue against the constitutionality of the defense with regard to the Eighth and Fourteenth amendments.

By finding mentally ill defendants guilty, the state is in a better position to increase the frequency and depth of intrusions used to supervise the convicted person.[75] Though some claim this violates the Eighth amendment's prohibition against cruel and unusual punishment and the Fourteenth amendment's protection of due process, such supervision is an anticipated result mandated by the verdict. If corrections personnel were to rarely check in on the convict, the defendant would not be receiving the extra care treatment guaranteed by the verdict. As such, the increased supervision consequence of the GBMI verdict should survive Eighth and Fourteenth amendment scrutiny.

Another critique of the verdict is the stigma that a GBMI inmate may experience. As well as being labeled mentally ill, some argue that the GBMI inmates can be dangerous to other prisoners. However, a prisoner is in a highly controlled environment that limits his ability to engage in harmful conduct.[76] Thus, though a GBMI inmate may be exposed to the mentally ill stigma, the rigid environment within correctional facilities protects them from being harmed. Likewise, the mental health treatment guaranteed through the verdict provides the mentally ill inmates an opportunity for care unavailable to the non-GBMI inmates.

Opponents contend that the verdict does not ensure the security of the public.[77] The basis of a GBMI finding, however, is the direct interaction of mental illness and *mens rea*. By providing treatment to a mentally ill inmate, the verdict arguably only increases public safety. If a defendant acts with intent but, because of a mental illness, is unable to appreciate criminality or to conform the conduct at issue to the requirements of the law, the GBMI

[74] § 12.47.050(b)(c).
[75] Frey, *supra* at 481-2.
[76] Frey, *supra* at 491.
[77] *Id.*

verdict is applied. Thus, there is always a direct connection between mental illness and *mens rea*.

The lack of treatment allocated to GBMI defendants is another contention. Critics claim that GBMI inmates do not actually receive any more medical treatment than that which is afforded to standard prisoners.[78] The verdict's purpose in part is to aid the mentally ill criminal, but lack of funds might affect the treatment. If this ever were to happen, it would be because of the financial issues of the state and does not reflect a failure of the verdict.

B. The Future: An Implementation of GBMI

The GBMI verdict enhances public confidence in the criminal justice system by reducing fears of recidivism, malingering, and lenient treatment.[79]

To differentiate between GBMI and NGRI, the legal system must work to reflect and respond to different states of *mens rea*. If a defendant, due to a mental defect, kills a human under the belief that he is killing a dog, GBMI would be applied. A case under GBMI possesses *mens rea*, while one of insanity does not. For example, if a defendant, due to a mental defect, believes that a dog has ordered him to kill the human, NGRI would be applied.

A defense protecting the mentally ill is an integral part of a free-will based criminal justice system. The perceived lenient treatment of criminals has resulted in a societal mistrust of the law's ability to protect the public.[80] This mistrust, as seen in the response to *Hinckley*, has engendered suspicion of and resistance to the insanity defense. GBMI, in contrast, preserves the traditional principles of *mens rea* and moral blameworthiness while justly punishing criminals and reducing recidivism. An implementation of the verdict will enhance public confidence in the criminal justice system and provide the necessary forms of psychiatric assistance for persons found GBMI.

Conclusion

The insanity defense, through its perceived inability to administer justice and preserve public order, has come under attack. As such, some states have responded by either limiting the defense of insanity or wholly abolishing it.

Although insane criminals are governed by their mental defect, this does not render them any less perilous to the safety of society. An individual who is swayed to kill his or her

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[78] Mickenberg, *supra* at 993.
[79] *Id.* at 989, 994.
[80] Mickenberg, *supra* at 995.

own family members[81,82,83] or attempt to assassinate the president of the United States[84] clearly threatens the safety of the public. The outcome of *Hinckley* epitomizes the defects of the insanity defense, which has promulgated the rise of the GBMI verdict. Though neither defense is explicitly guaranteed through the constitution, GBMI is likely to withstand a constitutional challenge under the Eighth and Fourteenth amendments by providing the necessary psychiatric treatment to the defendants and maintaining the public order.

Heinous crimes cannot go unpunished, whether or not they are committed by a sane or insane individual. If states continued to utilize NGRI, these nefarious individuals would go unpunished and jeopardize the safety of the public, as seen in the *Hinckley* case. GBMI, unlike NGRI, is an effective means of ensuring an inmate's psychological treatment while protecting the well-being of the public.

[81] *Monroe v. State*, 847 P.2d 84 at 85.
[82] *Pouncey v. State*, 297 A.2d 264 at 265.
[83] *Kahler*, 206 L. Ed. 2d 312 at 316.
[84] *Hinckley*, 672 F. 2d. at 115, 117.

Responsibility in the Face of Climate Change: Determining Jurisdiction Over Environmental Policy

Ashok Kaushik

Introduction

Anthropogenic, or human-caused, climate change has affected the world since the start of the industrial revolution.[1] Recently, however, its potency has rapidly increased. The IPPC found that, should global temperatures rise beyond an increase of 1.5 degrees Celsius, they would reach a tipping point, making reversibility of any of climate change's dire consequences near impossible.[2] These consequences include, but are not limited to, water scarcity, rising ocean levels, and reduced agricultural production.[3] They also determined that significant cuts to greenhouse gas emissions are necessary in the near future. Otherwise, global temperatures will continue to accelerate quickly, locking in for all of humanity these negative effects. Thus, anthropogenic climate change has now become an issue the United States must address far more urgently, as global temperatures are currently accelerating past a point of no return.[4] However, due to increasing conflict between the state and federal government over climate policy, any solution to the issue of climate change must also answer the significant legal question of which body holds jurisdiction to legislate for much-needed measures to combat climate change.

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[1] John Cook et al, *Consensus on consensus: a synthesis of consensus estimates on human-caused global warming*, 6 Environ. Res. Lett. 11 048002. 1 (2016).

[2] Valérie Masson-Delmotte, et. al., *Global warming of 1.5°C* § 183 (2019).

[3] Id.

[4] In 2016, a collection of scientists at the Intergovernmental Panel on Climate Change (IPCC), confirmed the existence of anthropogenic climate change. The scientists analyzed published academic papers by other climate scientists and confirmed that there was a consensus by 97% of scientists affirming the existence of anthropogenic climate change.

This legal question has become an even more pressing issue in our modern political era, where conflicting political interests has only magnified the lack of jurisdictional clarity, which has caused both individual states and federal government to wrestle each other for control over environmental policy. This is best exemplified by the recent lawsuits that the state of California has filed against the United States federal government, and specifically the Environmental Protection Agency, under the Trump administration.[5] These lawsuits have ranged on a variety of issues, from attempting to ban the pesticide chlorpyrifos, to ensuring that the Environmental Protection Agency (EPA) enforced its own methane emission regulations, to protecting migratory birds such as the bald eagle. [6]

This article proposes that the solution which most effectively addresses the legal question of which body holds jurisdiction over environmental affairs is the establishment of a system of cooperative federalism between the state and federal government on the issue of climate policy. While this article does not address how governments should combat the issue of climate change itself, Part II of this article considers the evolution of environmental policy in the United States, mapping the increase in federal government authority over time. Part III of this article analyzes the core arguments supporting both state and federal jurisdiction over environmental policy, concluding that there are several arguments in favor of both retaining jurisdiction. Part IV of this article proposes that a system of cooperative federalism provides a sound solution to the issue of addressing climate change. In this system of cooperative federalism, the federal government creates a baseline standard of regulation that they are required to uphold, and which states cannot circumvent or opt out of. Additionally, the federal government can use incentives, such as conditional funding, to influence states to adopt their own environmental policies. A system of cooperative federalism would also allow states to implement their own policies, so long as they comply with federal standards and are more stringent in regulating. This solution ensures that both levels of government retain their constitutional powers over the environment, thereby enabling a more aggressive approach to tackling climate change as neither sphere of government is stripped of its jurisdiction to enact climate policy. Additionally, this system of cooperative federalism creates an incentive for states to experiment with ambitious climate

[5] John Bowden, *California has sued the Trump administration 46 times. Here are the lawsuits*, The Hill (February 20, 2019), https://thehill.com/regulation/court-battles/430863-california-has-sued-the-trump-administration-46-times-here-are-the.

[6] Id.

policies that will aid in reducing the carbon emissions from its residents.

I. History of Environmental Policy in the United States

In order to analyze the evolution of environmental policy in the United States, one must begin before the establishment of the EPA, when such regulation relied heavily on cooperation between the federal government and state governments. Such an examination reveals how, over time, the United States federal government has increased its authority over environmental policy, originally through incremental Congressional legislation, and later administrative regulation.

A. Before the Establishment of the Environmental Protection Agency

The first major piece of legislation passed by Congress to address environmental issues was the Federal Water Pollution Control Act.[7] Passed in 1948, the Act explicitly stated that it was "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states in controlling water pollution".[8] The language of states' rights within the legislation itself marked a desire by the federal government not to act in an overly intrusive manner when it came to environmental policy, but instead undertake an oversight role that kept the power at the state level. As such, prior to the existence of the Environmental Protection Agency (EPA), climate policy in the United States gave significant discretion to the states as agents, with the federal government operating in a role that protected state's autonomy.

Even when the Act did increase federal purview over environmental policy, it was careful to do so while considering states interests. This is seen in the power granted to the "Administrator" of the Public Health Service. While the Federal Water Pollution Control Act authorizes the Administrator to "prepare comprehensive programs for eliminating or reducing the pollution of interstate waters", it notes that such programs must be done "in cooperation with other Federal, state and local entities".[9] This further emphasizes the limited exclusive authority granted to the federal government, as it is mandated that the federal government consult with state and local actors. In fact, the most substantial power granted

[7] Federal Water Pollution Control Act, 92nd Cong. § 3.

[8] Id.

[9] United States Fish and Wildlife Service, *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, https://www.fws.gov/laws/lawsdigest/FWATRPO.HTML.*

by the Act exclusively to the federal government, without mandatory consultation of other actors, is the ability of Congress to "support and aid research relating to the prevention, reduction, and elimination of pollution".[10] The limitation of the federal government's role to having exclusive power solely over research and funding was common practice in climate legislation prior to the establishment of the EPA, which was also seen in the Air Pollution Control Act. Passed in 1955, it provided funds for federal research into air pollution, but did not set any regulations or rules regarding air pollution itself.[11]

However, over time, the federal government began to encroach into the states' power regarding environmental policy and began increasing its own power. The first major instance of such action was the Clean Air Act in 1963, which was passed in response to the Donora Smog in Pittsburgh in 1948. The Donor Smog resulted in the death or illness of over half of the working class in the city, and environmental activists claimed it was the result of the city of Donora not implementing air pollution laws that existed in other neighboring counties. This triggered nationwide efforts for the federal government to curb pollution, which ultimately led to the passage of the Clean Air Act, the first major piece of federal environmental legislation driven by public sentiment.[12] The Clean Air Act was also unique as it was the first piece of federal legislation that specifically addressed air pollution control, by creating a federal program within the US Public Health Service for "monitoring and controlling air pollution". [13] This marked the beginning of the shift in the federal government's role in environmental policy. This shift continued with the Clean Water Restoration Act of 1966, which amended the Federal Water Pollution Act to give the Secretary of the Interior the sole power to grant individuals the ability to discharge oil into US navigable waters. Additionally, they also authorized the Secretary of the Interior to "conduct a comprehensive study of the effects of pollution", which ultimately yielded "recommendations for a comprehensive national program for the preservation, study, use and development of estuaries".[14] The increased authority provided to the Department of the Interior marks a shift in authority over environmental policy and pollution regulation from

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[10] Federal Water Pollution Control Act § 4.

[11] United States Environmental Protection Agency, *Evolution of the Clean Air Act*, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act.

[12] Elizabeth Jacobs & Jefferey Burgess, The Donora Smog Revisited: 70 Years After the Event That Inspired the Clean Air Act, American Journal of Public Health (2018).

[13] United States Environmental Protection Agency, *Evolution of the Clean Air Act*, *supra* note 11.

[14] United States Fish and Wildlife Service, *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, https://www.fws.gov/laws/lawsdigest/FWATRPO.HTML.*

the states to the federal government.

B. Establishment of the Environmental Protection Agency

The increasing jurisdiction of the federal government in environmental policy, driven by widespread public support, ultimately led to the creation of the Environmental Protection Agency.[15] The Reorganization Plan No. 3 of 1970, which created the EPA, abolished the Federal Water Quality Administration in the Department of Interior and consolidated the new agency's jurisdiction over environmental matters by transferring to the EPA the functions that formerly belonged to the Secretary of Interior and the Department of Interior[16]. Along with the previous research and funding powers held by the federal government, the new agency was also granted additional powers. These included, but were not limited to, the ability to "set and enforce standards for air and water quality".[17] This codification of the federal government's ability to enact environmental standards represented a key turning point in the division of jurisdiction over environmental policy between the state and federal governments. Following the creation of the EPA, the federal government used their newly established power in subsequent environmental actions to further regulate pollution and other environmental matters.

C. After the Establishment of the Environmental Protection Agency

The legislation that followed the consolidation of the federal government's power into the EPA sought to further the federal government's ability to regulate matters regarding the environment and pollution.[18] In 1970, Congress passed the Clean Air Act, which resulted in a major shift in the federal government's role in air pollution control. Passed at approximately the same time as the establishment of the EPA, it substantially expanded the government enforcement authority over the regulations it had set. The Clean Air Act was later amended in 1990, which again substantially increased the authority and responsibility of the federal government, by authorizing new regulatory programs for control of acid deposition from acid rain, as well as for the issuance of stationary source operating permits. Additionally, the amendments included further regulation around ozone protection

[15] Kenneth Olden, The EPA: Time to Re-Invent Environmental Protection, American Journal of Public Health (2018).

[16]United States Environmental Protection Agency, *The Origins of EPA*, https://www.epa.gov/history/origins-epa.

[17] Id.

[18] United States Environmental Protection Agency, *Evolution of the Clean Air Act*, *supra* note 11.

nationwide and an expansion of the EPA's enforcement authority, which yielded greater federal authority over the states.[19]

Along with the Clean Air Act, Congress also passed the Water Quality Act after the formation of the EPA, in 1987. Despite being vetoed by President Reagan, The Water Quality Act was another piece of legislation that fundamentally increased the federal government's jurisdiction over environmental policy.[20] In doing so, the EPA was able to exercise its influence over state policies regarding environmental matters, which was another step in the gradual escalation of federal authority on environmental policy.

D. Environmental Regulation in the 21st Century

Although the immediate decades following the establishment of the EPA were characterized by the federal government using its consolidated authority over the states, the 21st century was instead marked by the EPA creating financial incentives for states to adopt policies that were more environmentally friendly. This is best exemplified by the EPA Clean Power Plan, under which the EPA would set carbon dioxide emission rates that power plants within states were to abide by. Then, each individual state would craft a plan in order to meet the baseline set by the EPA. This type of cooperation between the state governments and the federal government did not occur during the 20th century, establishing a new dynamic over environmental jurisdiction in the 21st century. Additionally, the Clean Power Plan created the process of emissions trading, which devised a "financial incentive" for states to reduce their emissions. In doing so, the federal government showed a reversal of its 20th century practices of using its increased authority over the states, and instead promoted a more cooperative approach to environmental policy.[21]

II. Arguments in Favor of State and Federal Jurisdiction

This section will outline the various arguments in favor of jurisdiction over environmental affairs falling under the authority of state governments, as well as the

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[19] United States Environmental Protection Agency, *Evolution of the Clean Air Act*, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act.

[20] Along with providing funding for new grants, it also added an anti-backsliding provision, which prohibited the renewal of any permit by the EPA which contained "less stringent" limitations.

[21] United States Environmental Protection Agency, *FACT SHEET: Overview of the Clean Power Plan -- CUTTING CARBON POLLUTION FROM POWER PLANTS*, https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html.

arguments in favor of federal jurisdiction over environmental affairs.

A. Arguments for State Jurisdiction over US Environmental and Climate Policy

The arguments in favor of state jurisdiction over environmental policy derive from four major sources. First, the institution of federalism, as codified by the 10th Amendment, sets limits on the power of the federal government to influence climate policy. Second, the Supreme Court's decision in *New York v. United States* limited the ability of the federal government to influence state action on environmental matters. Third, the decision in *NFIB v. Sebelius* made it unconstitutional for the federal government to coerce state behavior through incentives that were excessive in nature. Fourth, as the California Waiver present in the Clean Air Act exemplifies, states have the ability to implement their own regulations regarding environmental policy so long as such regulations also comply with federal policy.

B. The 10th Amendment/Federalism

When determining the distribution of power between the state and federal governments, many arguments in favor of the states root themselves in the 10th Amendment. As the basis for federalism in US jurisprudence, the Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", which establishes a clear litmus test -- explicit enumeration within the constitution -- that can be used to determine which sphere of government should be responsible for the nation's environmental and climate policy. [22] This litmus test, however, leads to a limited reading of federal power, and therefore grants far more power to the states and the people. Specifically, when applied to the issue of climate change and environmental legislation, we can see that the Constitution says little that explicitly grants significant jurisdiction to the federal government. Article I Section 8 of the United States Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States". Historically, the Supreme Court ruled in Gibbons v Ogden that the Commerce Clause allows for the immediate regulation of waterways within the United States by Congress. [23] This, therefore, implies that Congress can enact environmental legislation over such waterways, such as limitations on pollution. However, no other specifically enumerated powers explicitly empower Congress, or the

[22] U.S. Const. amend. X.
[23] Gibbons v. Ogden, 19 U.S. 448, 5 L. Ed. 302, 182.

federal government at large, to perform environmental regulation. Thus, this lack of enumeration of federal powers regarding other types of environmental regulation, such as deforestation or species conservation, implies that such powers in fact exist at the lower level and are reserved to the states.

Using the 10th Amendment and the institution of federalism to defend state jurisdiction over environmental legislation, unfortunately, undermines its own argument, and therefore is not particularly effective in its advocacy. This is because it is important to consider how federalism was originally intended to function. In Federalist 45, James Madison, writing under the pseudonym Publius, stated that the powers of state governments should "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State".[24] By contrast, he claimed, that the federal government's powers should "be rendered to the national defense", or other "scenes of danger". [25] This dichotomy established by Madison, however, complicates the applicability of federalism in defending state jurisdiction over environmental policy. As indicated in Part I, the problem of anthropogenic climate change, and the need to reduce greenhouse gas emissions, is one of dire urgency, and even described by some experts as a crisis.[26] However, if such urgency qualifies as a "scene of danger" as established by Madison, this would imply that combating climate change would fall under the powers of the federal government, undermining the argument in favor of state jurisdiction.

C. New York v. United States

The Supreme Court's ruling in *New York v. United States* established increased state jurisdiction over environmental policy by limiting the ability of the federal government to influence state action. In 1980, both Washington and Nevada had recently shut down their radioactive disposal sites, which left South Carolina as the only state having an open and operational disposal site within the United States, leaving it with the sole burden of storing all radioactive waste produced throughout the nation. In response, the Governor of South Carolina ordered a 50% reduction in the quantity of waste accepted, and the United States was faced with the possibility of soon having no disposal sites for radioactive material

[24] The Federalist No. 45 (James Madison).
[25] Id.
[26] Cook, *supra.*

altogether. To prevent such an event from happening, Congress passed the Low Level Radioactive Waste Policy Act, which held states responsible for disposing of radioactive waste that were produced in its region. Congress also called for regional compacts between states to be formed by 1986, which would have the authority to restrict the use of their disposal facilities.

However, by 1985, only three regional compacts were formed, leaving 31 states with no mechanism for disposing low level radioactive waste. In response, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985, which allowed the 31 states outside regional compacts seven years (until 1992) to rely on existing compacts for radioactive waste disposal, before they were required to form their own. The Act ensured states would meet the new 1992 deadline by creating a series of three incentives for states to do so. However, the State of New York challenged the constitutionality of each of these incentives, claiming that such incentives to influence state behavior were coercive, and overstepped the powers of Congress. Thus, in *New York v. United States,* the Supreme Court analyzed and ruled on the constitutionality of the ability for Congress to influence the behavior of states, with a case specifically in the realm of environmental policy.[27]

The first incentive in Low-Level Radioactive Waste Policy Amendments Act was described by the court as a "monetary incentive", where a quarter of the surcharges collected by each regional compact were to be sent to the Secretary of Energy, who would use these funds to reward each state that had complied with other deadlines within the Act.[28] This, the court ruled, was " an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce".[29] In the second incentive, Congress gave the states and regional compacts the authority to gradually increase prices for states outside their compact to access their waste disposal sites. Although it was challenged on 10th Amendment grounds, the Court claimed that the second incentive "represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority", and therefore, do "not intrude on the sovereignty reserved to the States".[30]

The third incentive outlined in the Act, however, was far more controversial.

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[27] *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120, 1992**.**
[28] Id at 152.
[29] Id at 171.
[30] Id at 174.

Labeled as the "take title provision", it mandated that:

> If, by January 1, 1993, a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region, (i) each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1993 as the generator or owner notifies the State that the waste is available for shipment.[31]

This incentive, the Court claimed, far more resembled coercion than the encouragement of the first two incentives. However, the Court ruled that it "offers a state government no option other than that of implementing legislation enacted by Congress".[32] Doing so, they argued, was outside Congress' enumerated powers, and violated the principle of state sovereignty as enumerated by the 10th Amendment. Therefore, it established the unconstitutionality of the federal government commandeering states into enacting a certain law or performing certain actions or behaviors.

While the court ruled that the federal government's use of either positive or negative incentives, or encouragement, such as financial rewards or fines, to influence state behavior was permissible, it was not permitted to force states to comply. Practically, this would allow for legal circumvention and non-compliance of almost any federal attempt at environmental regulation by state actors should they dissent, undermining any argument that such jurisdiction belongs to the federal government. Conversely, under a federal government that fails to enact strict climate and environmental legislation, the Court's ruling prevents them from forcing states to also adopt loose regulation, and allows states to implement their own stricter climate policies, further bolstering the argument that state governments have stronger powers than the federal government when it comes to environmental regulation and climate policy. Thus, although the federal government can seek to influence, or guide, the course of environmental legislation, its total influence is limited, which reduces its overall powers.

D. NFIB v. Sebelius

[31] Id at 153.
[32] Id at 177.

In 2012, the Supreme Court was presented with a case to determine the constitutionality of Congress' power to implement several sections of the Affordable Care Act. One key aspect of the legislation was the Medicaid expansion. Specifically:

> The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage by 2014 to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States' costs in expanding Medicaid coverage. But if a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.[33]

However, the Court concluded that the Medicaid expansion violated the Constitution. In Article I Section 8 of the Constitution, the Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States", which historically has allowed for cooperative state-federal spending programs, such as Medicaid. [34] However, the Court argued that the legitimacy of such programs is reliant upon states "voluntarily and knowingly" agreeing to such programs. Additionally the Court argued that previous jurisprudence had established the "Constitution simply does not give Congress the authority to require the States to regulate"[35], and that Congress threatening "to terminate other grants as a means of pressuring the States to accept a Spending Clause program… runs counter to this Nation's system of federalism"[36]. The Court's majority opinion used these principles to argue against the Medicaid expansion, writing that "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head"[37], as states who refuse to comply with the expansion would stand to lose *all* of their Medicaid funding, which accounted for over 20 percent of the average state budget at the time. [38]

The ruling in the Sebelius case, strengthens further the case for increased state jurisdiction over environmental policy. In conjunction with their opinion in *New York v.*

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[33] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 2012.
[34] U.S. Const. Art I, Sec 8 § 1.
[35] New York, 505 U.S. at 178.
[36] South Dakota v. Dole, 483 U. S. 203, 211. Pp. 45–51, 1987.
[37] Sebelius, 567 U.S. at 581.
[38] 42 U. S. C. §1396d(b).

United States, the Court's ruling bolstered the autonomy state governments have in creating their own policy free from intrusion by the federal government and, much like their opinion in *New York v. United States*, limits the ability of the federal government to a position of influence, not authority. Specifically, it prevents the federal government from using grants or incentives to functionally blackmail states into 'acting a certain way'.[39] The principles of this ruling can be used to prevent the federal government from creating incentives that deter states from establishing strict climate policy. Conversely, it also prevents the federal government from forcing states to adopt strict environmental policy through the threat of excessive punishment and helps ensure states retain their own sovereignty. Both of these possibilities indicate the applicability of the Sebelius ruling in supporting increased state jurisdiction over environmental matters.

E. The Clean Air Act

The Clean Air Act was unique in that it granted California the ability to implement its own regulations, as long as the state was able to obtain a waiver from the EPA.[40] However, the EPA had historically acted as a rubber stamp, as for over forty years, all waiver requests were granted either in whole or in part, functionally allowing California to enact its own environmental regulation.[41] That pattern changed, however, when in 2007, the EPA decided to reject a California waiver of "Federal preemption for motor vehicle greenhouse gas emission standards".[42] The EPA justified its decision by noting that previous waivers were regarding "standards covering pollutants that predominantly affect local and regional air quality". However, they argued the current claim by California differed, claiming that:

> The current waiver request for greenhouse gases is far different; it presents numerous issues that are distinguishable from all prior waiver requests. Unlike other air pollutants covered by previous waivers, greenhouse gases are fundamentally global in nature. Greenhouse gases contribute to the problem of global climate change, a problem that poses challenges for the entire nation and indeed the world. Unlike pollutants covered by the other waivers, greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur… just as the problem extends far

[39] Sebelius, 567 U.S. at 581.

[40] Clean Air Act §209,42 U.S.C. § 7543 (2006).

[41] James E. McCarthy & Robert Meltz, California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act, 2008.

[42] Letter from Stephen L. Johnson, Administrator of the Environmental Protection Agency, to Arnold Schwarzenegger, Gov. of California, (Dec 19, 2007).

beyond the borders of California, so too must be the solution.[43]

California responded to the EPA's denial by filing suit in the U.S. Court of Appeals for the Ninth Circuit to overturn the EPA's ruling.[44] However, the case ended up being dismissed, as the EPA eventually reversed their decision and granted California their waiver. In doing so, the EPA implicitly acknowledged the ability for states to create their own regulation on climate policy that is stricter than that of the EPA and the federal government. This ability allows states to potentially overcome a federal government that potentially allows for less stringent regulation on environmental matters, which bolsters the argument in favor of increased jurisdiction and responsibility over environmental matters at the state level compared to the federal level.

F. Arguments for Federal Jurisdiction over US Environmental and Climate Policy

The arguments in favor of federal jurisdiction over environmental policy are derived from two major sources. Firstly, the ruling by the Supreme Court in *Massachusetts v. EPA* established that the federal government has a duty to uphold its regulatory powers, implying that it therefore also has jurisdiction. Secondly, the Good Neighbor Provision in the Clean Air Act, and the Court's subsequent ruling in *EPA v. EME Homer City Generation, L. P.,* shows that the federal government has the power and jurisdiction to set minimum standards.

i. Massachusetts v. EPA

In 2003, the EPA announced that it would no longer regulate greenhouse gas emissions from motor vehicles, as was required by the Clean Air Act. They claimed that "Congress ha[d] not granted EPA authority under the Clean Air Act to regulate CO2 and other greenhouse gases for climate change purposes, and secondly, that they had "determined that setting GHG emission standards for motor vehicles is not appropriate at this time".[45] This, however, ultimately led to 12 states and a variety of other organizations suing the EPA, arguing that it was required to fulfill their duties within the Clean Air Act.

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[43] Id.

[44] Climate Case Chart, *California v. EPA*, http://climatecasechart.com/case/california-v-epa/.

[45] United States Environmental Protection Agency, EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles, Aug. 28 2003, https://yosemite.epa.gov/opa/admpress.nsf/fb36d84bf0a1390c8525701c005e4918/694c8f3b7c16ff6085256d900065fdad!OpenDocument.

The Court's majority ruling disagreed with the arguments used by the EPA to cease its regulation of carbon dioxide and other greenhouse gas emissions. He noted that the "EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants", and that "[e]ven if it had, Congress could not have acted against a regulatory "backdrop" of disclaimers of regulatory authority".[46] Additionally, the Court noted that "EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it had such authority", which further confirms that the EPA had both the ability and regulatory clarity to properly regulate greenhouse gas emissions.

With regard to the EPA's second argument justifying its decision to stop its regulation of greenhouse gas emissions, the Court notes that the Clean Air Act contains a statute that "does condition the exercise of EPA's authority on its formation of a 'judgment,'... to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare'.[47] However, he claims that "the use of the word "judgment" is not a roving license to ignore the statutory text" but rather intended to allow the EPA "to exercise discretion within defined statutory limits".[48] He emphasized that "Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do".[49] As they had failed to do either, the Court found the EPA's rationale an inadequate reason to cease its regulation of vehicle emissions, and thus required the EPA to either restart its regulation or come up with a better reason.

The decision by the Court in this case indicates that there is a responsibility by the federal government, the EPA specifically, to uphold and enforce the regulations set out by legislation, given the failure of the EPA's attempts to circumvent this obligation. If the federal government has a responsibility to uphold such regulation, it implicitly follows that they must also have the ability and jurisdiction to do so, bolstering the argument that the jurisdiction over regulation of the environment and climate policy belongs to the federal

[46] *Massachusetts v. EPA,* 549 U.S. 531, 127 S. Ct. 1438, 167 L. Ed. 2d 248, 2007.
[47] Id at 533.
[48] Id.
[49] Id.

government.

ii.Good Neighbor Provision

The Clean Air Act, among its many provisions, mandates that states must submit State Implementation Plans, or SIPs, which establish minimum standards for the amount of emissions within a state. Additionally, it mandates that states comply with what is known as the Good Neighbor Provision, which require SIPs to:

> contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State.[50]

However, after the U.S. Court of Appeals for the District of Columbia Circuit identified problems with previous attempts by the EPA to incorporate nitrogen oxide and sulfur dioxide emissions into the Good Neighbor Provision, the EPA created the Transport Rule. This Transport Rule curbed emissions of both nitrogen oxide and sulfur dioxide in 27 upwind states, as they "contributed significantly" to the emissions measured in downwind states. In response, several states sued, asking for a review of the Transport Rule. However, the Supreme Court's majority ruling stated that the method through which the EPA divided responsibility for upwind emissions was sound, writing:

> Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address. Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. [51]

Additionally, while Ginsburg noted that the "EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State", it doesn't "[justify] wholesale invalidation of the Transport Rule". [52] Additionally, she emphasized that "the Agency also has a statutory obligation to avoid "under-control," i.e.,

[50] Envtl. Prot. Agency v. EME Homer City Generation, L. P., 572 U.S. 489 (2014).
[51] Id at 519.
[52] Id at 522.

to maximize achievement of attainment downwind".[53] The opinion ends with endorsement of the Transport Rule as an example of good policy within the purview of the EPA's jurisdiction, as Justice Ginsberg writes "EPA's cost-effective allocation of emission reductions among upwind States, we hold, is a permissible, work-able, and equitable interpretation of the Good Neighbor Provision".[54]

The ruling by the Court in *EPA v. EME Homer City Generation, L. P.* indicates that the regulation by the EPA has the capacity to create minimum standards that states must comply with and not circumvent, establishing that the federal government has a significant amount of power in determining environmental and climate policy. Additionally, Justice Ginsburg's emphasis on the need for the EPA to avoid "under-control" emphasizes that the federal government needs to play an important role in setting minimum baseline standards on environmental policy.

III. Solution

A. Cooperative Federalism

In order to best address the impending climate crisis and resolve the problem of anthropogenic climate change, the nation needs to reduce the amount of greenhouse gas emissions produced. However, before any solution to climate change can be determined, the question of to whom the jurisdiction to create such a solution must be answered first, as any solution to climate change must fall within previously established legal boundaries as determined by precedence and jurisprudence. In order to best balance these two tensions, the best course of action is a system of cooperative federalism between the state and federal government on the issue of climate policy.

Cooperative federalism, as a concept, places the state and federal governments as partners who must work together to properly execute laws. Although never explicitly defined, its principles are best embodied by two key Supreme Court decisions concerning United States labor law. Firstly, in *United States v. Darby*, the Supreme Court ruled that the state of Georgia was required to uphold the federal Fair Labor Standards Act of 1938, and that the Darby Lumber company was required to comply with the stipulations of the Act,

[53] Id at 492.
[54] Id at 524.

such as federal minimum wage and overtime pay.[55] In doing so, they also created the precedent that required states to enforce federal regulations and ensure that private companies complied with federal law. Secondly, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court ruled that the Fair Labor Standards Act also extended to state and local governments.[56] This ruling overturned the previous precedent established in *National League of Cities v. Usery*, which ruled that attempts by the federal government to regulate state and local governments violated the 10th amendment.[57] The combination of these two rulings created a modern understanding of cooperative federalism: that state governments must enforce federal regulations within the domain of their sovereignty.

Although states are required to comply with federal regulations, this requirement doesn't preclude states from creating their own laws that add to federal regulation. 29 states have passed minimum wage requirements higher than the federal level, and in those states, employers pay their workers at the elevated rate. These higher wages exemplify the principle that, under a system of cooperative federalism, states have the power to create their own laws that comply with the laws of the federal government. However, employers in the other 21 states, including the six states with minimum wage rates below the federal rate, are required to comply with the federal wage.[58] Through the wage laws in these 21 states, we can see that a system of cooperative federalism prevents states from circumventing federal regulation. Therefore, cooperative federalism creates a balance that allows for a relationship between state and federal governments where each sphere of government is able to retain their constitutional powers to enact environmental legislation, while preventing either branch from undermining the laws originated from the other.

Although cooperative federalism is currently most prominent in the area of labor law, it can be applied to environmental policy. Under a system of cooperative climate policy, the federal government will be allowed to impose minimum climate restrictions through the EPA that no state policy can to circumvent. Additionally, the federal government can create environmental policies it can encourage the states to implement, through an incentive of

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[55] United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 1941.

[56] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016, 1985.

[57] National League of Cities v. Usery, 426 U.S. 833 (1976) Nat'l League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245, 1976.

[58] United States Department of Labor, *State Minimum Wage Laws* https://www.dol.gov/agencies/whd/minimum-wage.

choice (such as conditional funding) that is not overly punitive against states who opt not to follow such guidelines. Conversely, although states should not be able to avoid federal minimum standards, they should also be given the freedom to experiment with environmental policies stricter than the federal regulations without fear of federal intervention. An example of cooperative federalism when applied to climate policy was outlined by the Supreme Court in their opinion in *New York v. United States*, where the Court stated that states should "recognize Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation".[59]

In order to best implement this solution, and have a doctrine of cooperative federalism bear legal standing, the Supreme Court should seek to apply cooperative federalism in its rulings over environmental matters. Recently, a coalition of states, including California, filed a lawsuit against the EPA regarding the Trump Administration's emission standards for automobiles.[60] Although the United States Court of Appeals for the District of Columbia Circuit ruled against the EPA, I think that this present a potential opportunity for the doctrine of cooperative climate federalism to be entered into legal jurisprudence.[61] Specifically, if they accept a potential writ of Certiorari, the Supreme Court can uphold the Appeals Court's ruling and apply cooperative climate federalism, thereby establishing it as legal precedent to be applied to future environmental matters.[62]

B. Advantages of this solution

i.Federal Minimum Standards

Under a model of cooperative federalism applied to climate policy, the federal government will create minimum climate standards that states must comply with, as established by the Court's ruling in *EPA v. EME Homer City Generation, L.P.*. The constitutionality of the federal government setting minimum standards can be determined through the analysis of precedents by the Supreme Court. First, the Supreme Court's ruling in *Massachusetts v. EPA* established that the federal government, and specifically the EPA,

[59] New York, 505 U.S. at 167.
[60] State of California, et al v. EPA, et al, (No. 18-01114) D.C. Cir. (May 1, 2018).
[61] Id.
[62] Id.

cannot circumvent its own standards established through legislation.[63] This ensures that, regardless of the political whims of the President running the executive branch, the EPA must continue to fulfill its obligation to protect the environment. Additionally, in *EPA v. EME Homer City Generation, L. P.*, the Supreme Court upheld the constitutionality of the EPA's Good Neighbor Provision in validating individual State Implementation Plans, which is an example of the minimum environmental standards cooperative federalism supports, and further establishes that having the federal government with a limited ability to regulate and set standards is necessary for addressing environmental concerns.[64] Having the federal government implement minimum standards ensures that the entire nation is progressing in combatting climate change, as federal regulation would apply to the entire country. Additionally, it would also act as an institutional protection against political whims at the state level, as states would be unable to undermine the fight against climate change through laws that are less stringent than federal regulations.

ii.State sovereignty

Additionally, states have the constitutional capacity to pass laws and environmental standards that are stricter than those of the federal government. Such ability was legally codified by the California Waiver in the Clean Air Act. However, for maximum effectiveness, the requirement for a waiver should be eliminated, as it merely slows down the ability for states to combat the climate crisis, and the federal government will have standing to prosecute states that attempt to circumvent their minimum standards, as circumventing minimum standards outlined by the federal government would be a violation of federal law.

However, under this model of cooperative federalism, states retain their own autonomy, and are not subject to excessive intrusion in policymaking by the federal government. Specifically, the federal government will not be able to undermine ambitious or strict policies at the state level through coercive threats akin to, as Justice Roberts described in the Court's majority ruling in *NFIB v. Sebelius*, a "gun to the head". This ensures that the principles of state sovereignty and the institution of federalism, both enshrined by the 10th Amendment, stay protected. The protection of state sovereignty by cooperative federalism ensures that states who wish to be ambitious in their climate policy are able to combat the

[63] Massachusetts, 549 U.S. at 512.
[64] EME Homer City Generation, L. P., 572 U.S. at 524.

climate crisis with increased fervor. Additionally, this sovereignty also grants the states power to compel the federal government to enforce its own regulations. This power is best exemplified by *Massachusetts v. EPA*, where 22 states sued the federal government and forced the EPA to enforce its own regulations. By ensuring that the federal government upholds its duties, cooperative federalism creates a system that maximizes the effectiveness of laws in combatting climate change.

iii.State experimentation

A significant number of experts argue for the necessity of climate policy experimentation at the state level as being necessary to address climate change. Allowing states to experiment with policies within their own boundaries ensures that such policies are tailored to the needs of their constituents, which improves the effectiveness of government regulation in combating the climate crisis.[65] Additionally, experimentation of policies at the state level allow individual states to function as laboratories, where policies can be tested for their effectiveness. Based upon these results, policies that were successful in addressing the issue of anthropogenic climate change can be scaled up and applied on a nationwide scale, thus ensuring that the federal policies become more effective as time goes by.[66]

Under this proposed model of cooperative climate federalism, the state and federal government engage in a relationship where their powers complement each other to facilitate an improved climate policy for the nation. The federal government ensures a minimum baseline protection for the country as a whole, and states are given the autonomy to experiment with policies of their own that, if successful, can be scaled up and applied to the nation as a whole, ensuring that the climate crisis is adequately combated in the 21st century.

Conclusion

Although anthropogenic climate change has existed since the dawn of the Industrial Revolution, the rate at which temperatures across the globe increase has grown at a quickening pace in the recent past. As humanity barrels closer to the tipping point of 1.5 degrees Celsius, the need to act with urgency in order to combat this crisis continues to increase. Failure to prevent a 1.5 degree rise in global temperatures makes climate change's

[65] Robert Lempert & Jae Edmonds, *PATHWAYS TO 2050: ALTERNATIVE SCENARIOS FOR DECARBONIZING THE U.S. ECONOMY*, § 30 (2019).

[66] Id.

horrid effects, such as water scarcity, rising ocean levels, and reduced agricultural production permanent. Additionally, as the existence of anthropogenic climate change is confirmed by overwhelming consensus, the United States needs to ensure that it is effectively able to combat this crisis and prevent the tipping point from being reached.

Any solution that is pragmatic in addressing the issue of climate change, however, must also comply with existing Constitutional distributions of power. Establishing a system of cooperative federalism in the realm of climate policy is best able to balance these two tensions. By allowing the federal government to establish minimum climate standards that states are required to comply with, cooperative federalism ensures that the entire nation is aligned in the fight against climate change. Additionally, it allows the federal government to guide the nation in combatting climate change, by allowing the federal government to use incentives such as funding to influence state action.

Along with clearly defining the role of the federal government in combatting climate change, cooperative federalism also empowers the states to create their own policies stricter than federal regulation, increasing the effectiveness they have in combatting the climate crisis. Cooperative federalism also gives states the right to compel the federal government to uphold its duty to enforce its own regulations, which prevents the political whims of the executive branch from undermining its own policies. This ensures that the climate crisis is effectively able to be combatted regardless of the administration in power.

Finally, cooperative federalism creates a system that incentivizes the experimentation of policy at the state level, as states can craft their own ambitious climate policy without fear of federal interference. Such experimentation allows for the development of effective climate policy, which is instrumental in the fight against climate change, as effective policies can be scaled up and applied at the national level, ensuring that the United States becomes more effective over time at combatting climate change.

Rendering Rights Null and Void: An Analysis of Extraordinary Rendition's Impacts on Civil Liberties

Anuka Upadhye

In December of 2003, while traveling from Germany to Macedonia, Khaled El-Masri was mysteriously detained by officials at the Macedonian border for three weeks. Upon release, he was handed over to CIA officials where they beat and drugged him, flew him to Baghdad, then Kabul, and subsequently tortured and interrogated him for five months. El-Masri was a victim of extraordinary rendition, an extralegal procedure where the United States "render(s) people to nonjudicial authorities outside of treaty and legal procedures." While rendition, the surrendering of persons to other countries, occur by treaty and is in accordance with the laws and stipulations of the United States, the extraordinary rendition program used by the CIA in the aftermath of the war on terror is extralegal.[1]

The extraordinary rendition network relies on 'black sites' such as Egypt and Jordan for the "outsourcing of interrogation."[2] These black sites are notorious for their admittance of torture during such interrogations, as well as unsafe imprisonment conditions for prolonged periods of time.[3] Based on publicly available documentation, victims of extraordinary rendition have ranged from Canadian citizens such as Maher Arar, to German citizens such as Khaled El-Masri. El-Masri is not a unique example of an extraordinary rendition victim not being guaranteed due process or a fair trial—these victims are stripped

[1] William Weaver & Robert Pallito, *The Law: "Extraordinary Rendition" and Presidential Fiat,* 36 Pres. Stud. Q. 102 (2006).

[2] *See Id.* at 36.

[3] *Supra,* at 36

of their constitutional rights that are technically afforded to them by proxy of being handled by United States officials, even if they themselves are not United States citizens.[4]

Extraordinary rendition highlights one of the most unfortunate consequences of wartime: the deprivation of citizens' guaranteed civil liberties. As Geoffrey Stone, professor of law at the University of Chicago states: in times of war, the prioritization of national security comes at the expense of individual rights and the sanctity of the American Constitution, as the balance of power sways disproportionately to the executive branch to meet military and security demands.[5] Civil liberties have also historically been violated,[6] and recently, scholars argue that extraordinary rendition seems to be fitting this trend.[7]

The difference between previous wartime civil liberties violations and the purported wartime civil liberties violations today is that critics have labeled the War on Terror a "forever war", meaning that since no war has ever truly been declared despite the United States having active troops in the Middle East, the line between fighting and peace has been blurred, and no precedent exists for what the end of the 'war' will look like.[8] A blurred line between war and peace legally implies that the United States government can potentially indefinitely permit the use of certain practices above the law in the name of national security, even if these are at the expense of civil liberties protection.[9]

In this article, I am arguing that since the War on Terror, extraordinary rendition is destroying the foundation of American civil liberties by giving the executive branch unrestrained authority. Because there is no defined line between wartime and peace, the use of extraordinary rendition and thus the encroachment on civil liberties may be indefinite. In part one, the article will review what historical civil liberties violations have looked like to understand how today's violations are different than in the past. Part two of the article will articulate how extraordinary rendition is a violation of citizens' domestic and international civil liberties, but this despite this, part three it will illuminate how the United States has still

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[4] Michael Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition,* 37 Cal. W. Int'l L.J. 121 (2006).

[5]Symposium, Alan Brinkley, *Civil Liberties in Times of Crisis,* 59 Bulletin of the Academy 29 (2005).

[6]Geoffrey Stone, *National Security v. Civil Liberties,* 95 Calif L. Rev. 2203, 2204 (2007).

[7] Michael Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition,* 37 Cal. W. Int'l L.J. 121 (2006).

[8]Sean Illing, *How America's "War on Terror" Was (Unwittingly) Designed to Last Forever, VOX* (January 6, 2017 9:30am) https://www.vox.com/conversations/2017/1/6/14166684/terrorism-iraq-war-al-qaeda-9-11-donald-trump-bush-obama-afghanistan.

[9]Rosa Brooks, *There's No Such Thing as Peacetime,* FOREIGN POLICY (March 13, 2015 3:47pm) https://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/.

justified the practice. Lastly, part four will suggest possible remedies to limit the executive branch's abuse of power and restore civil liberties.

I. Review of Wartime Civil Liberties

The origins of wartime civil liberties being violated is embedded in even the first twenty years of the United States becoming a sovereign state. Upon fear of an imminent invasion of the United States by France, the Federalist majority in Congress passed the Alien and Sedition Acts of 1798 to mitigate the threat of French spies.[10] This law aimed to "criminalize seditious writing, talk, and behavior" to present a united American front against France.[11] However, immediately after its passing, the public was quick to criticize the laws as "unconstitutional, impolitic, unjust, and a disgrace to the American name" as the laws clearly violated the citizens' protection to free speech and expression under the First Amendment.[12] However, Chief Supreme Court Justice John Marshall soon after published a statement affirming the federal government's expansion of power during a time of imminent danger,[13] setting precedent for the federalist notion of strong executive power and the lenience of constitutional rights in the wake of threats to the state. However, after the threat of war had diminished, the Alien and Sedition Acts were both repealed four years after, showing that the civil rights violations were only limited to the threat of war.[14]

The outbreak of the Civil War in 1861 presented the same pattern of the executive branch prioritizing national security at the expense of constitutional rights. However, in this instance, the permission of the executive government to overrule constitutional rights is explicitly codified in the document itself. Article 1 Section 9 states that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[15] In order to subdue the seceded Southern states, President Abraham Lincoln decided that he would suspend habeas corpus, or the law that protects citizens from imprisonment without a fair trial, in order to efficiently arrest

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[10] Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts,* 65 Wm. & Mary Q 565, 567-8 (2008)

[11] *Id.* at 567

[12] U.S. Const. amend. I, § 2

[13] Kurt Lash & Alicia Harrison, *Minority Report: John Marshall in the Defense of the Alien and Sedition Acts,* 68 Ohio St. L.J. 1, 3-5 (2007)

[14] Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts,* 65 Wm. & Mary Q 565, 567-8 (2008)

[15] U.S. Const. art. I, § 9

Southern military officials on the grounds of treason without having to abide by the procedures of the court.[16] Upon the suspension of this right, Union General George Caldwalder refused to release secessionist John Merryman, who claimed that troops had no evidence to imprison him.[17] Upon Merryman's pursuit of legal action, Chief Justice Taney disputed the suspension of Habeas Corpus in his statement Ex Parte Merryman, stating that Congress, not the executive branch, has the power to suspend the section of the Constitution. Nevertheless, President Lincoln blatantly ignored the judicial ruling, another example of the executive branch completely strong-arming other government institutions out of the necessity of war, thereby creating precedent for its permissibility.[18] The caveat to the suspension of habeas corpus, however, was that it was valid so long as the Civil War was ongoing.[19] Because the Civil War was formally declared by Congress, there were set boundaries between war and peacetime. Thus, after the Civil war, habeas corpus was naturally reinstated during the Johnson presidency and peacetime civil liberties were restored.

The beginning of World War I echoed the country's history with familiar legislation: the Espionage and Sedition Acts.[20] The Espionage Act of 1917 gave the government the right to "imprison or fine" citizens if they "knowingly and willfully communicated, furnished, transmitted, or otherwise made available classified information to the detriment of the United States.[21]" The Sedition Act of 1918, by the same token, condemned any citizen who would "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States."[22] Shortly after the outbreak of World War I, Charles Schenck was detained on the basis of the Sedition Act for handing out flyers opposing the mandatory war draft. Although his right to free expression as articulated in the first amendment[23] would have normally protected Schenck against arrest, wartime superseded this protection. Even if the Alien and Sedition Acts clearly violated the constitution, the judicial system subsequently defended it. In the unanimous opinion for the landmark case, *Schenck v. United States*, the Supreme Court ruled that national

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[16] S.G.F, *The Suspension of Habeas Corpus During the War of Rebellion,* 3 Pol. Sci. Q 454, 455-57 (1888)

[17] Ex Parte Merryman, 17 F. Cas. 144 (D. Md. 1861)

[18] *Supra* at 456

[19] House of Representatives Executive Document No. 5, *Suspension of the Writ of Habeas Corpus: Letter from the Attorney General, transmitting, in answer to a resolution of the House of the 12th instant, and opinion relative to the suspension of the writ of habeas corpus*

[20] Geoffrey Stone, *National Security v. Civil Liberties,* 95 Calif L. Rev. 2203, 2204 (2007).

[21] Espionage Act, 1918, U.S.C. § 37 (repealed 1921).

[22] Sedition Act, 1918, U.S.C. § 40 (Repealed 1920).

[23] U.S. Const. amend. I, § 2

security surpassed his claim to the violation of individual rights.[24] Although the Alien and Sedition Acts of World War I remained two years after Armistice Day in 1918, the formal end to the war prompted Congress to enforce sweeping repeals of exclusively wartime legislation, eventually invalidating these pieces of legislation and restoring civil liberties to the status quo.[25]

World War II presented similar violations of civil liberties that were deemed permissible by the courts as a matter of national security. Public fear and outrage caused by the Pearl Harbor attacks prompted the government to react with an executive order allowing Japanese internment[26]. However, Fred Korematsu chose to directly disobey this executive order on the basis that it was discriminatory but was consequently arrested. Despite his claims to internment's unconstitutionality, the Supreme Court 6-3 deemed that the executive order was justified by the "exigencies of war and the threat to national security," setting yet more precedent of giving the executive branch unadulterated power during wartime.[27] Since then, Korematsu has been overturned. Although the Supreme court decision still stands, a San Francisco district court has cleared his name and Executive Order 9066 has been revoked.[28] Although civil liberties were violated during wartime by executive strong-arming, peace has also been restored after war is over.

Most recently, widespread fear and havoc following the largest terrorist attack on US soil led the Assistant Attorney General John Yoo under the Bush Presidency to sign the "Torture Memos"—legal memoranda that authorized the use of "abductions, detentions, and transfers of presumed terrorists to secret prisons in third party states,[29] or extraordinary renditions. Moreover, the Bush-led Congress signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. This act allows the United States government to surveil possible suspects of terrorism by tapping into and recording phones, cameras, and other technology

[24]Schenck v. United States, 249 U.S. 47, 50-53 (1918).

[25] Thomas Emerson, *Freedom of Expression in Wartime, 116* U. Pa. La. Rev. 975, (1968).

[26]Geoffrey Stone, *National Security v. Civil Liberties,* 95 Calif L. Rev. 2203, 2205 (2007).

[27]Korematsu v. United States, 319 U.S. 432 (1943)

[28] *Facts and Case Summary: Korematsu v. US,* UNITED STATES COURTS, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-korematsu-us

[29] Patricio Galella and Carlos Espósito, *Extraordinary Renditions in the Fight Against Terrorism. Forced Disappearences?*, 9 Int. J. of Hum. Rts. 7 (2012).

without warrants or traditional protocol.[30] Upon passing, the American public has considered it to be a blatant overreach of the executive branch's power: dissenters state that the USA Patriot Act "disregards the rights to free association and expression, freedom from discrimination, from arbitrary arrest and invasions of privacy, and the right to a fair trial."[31] Despite these claims, the United States courts have still favored this legislation over the protection of individual rights because national security was in question.[32] The most clear example of the USA PATRIOT Act justifying the otherwise blatant ignorance of individual liberties can be seen with the arrest of the Saudi grad student Sami Al-Hussayen.[33] Without any warrants, the federal agents tapped into Al-Hussayen's phone lines and emails, concluding from there that he was providing material support to terrorists.[34] Only after being convicted of terrorism and imprisoned for one and a half years did the court realize that the evidence that had linked him to terrorism was mistakenly interpreted, and he was sent home to his family.[35] Under normal circumstances, the evidence gathered by the FBI would have been a clear violation of citizens' fourth amendment protections, which states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[36] Precedent had already been set prohibiting federal officials from violating a citizen's constitutional rights through unlawful searches and seizures in the Supreme Court's ruling of *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*[37], however, the court that convicted Al-Hussayen ignored Supreme Court precedent in light of the USA PATRIOT Act, again exemplifying the power of wartime to trump citizens' inherent rights.

Although the USA PATRIOT Act expired in 2015,[38] the most important provisions of the act were still restored and renewed up to 2019. In November of 2019, the expired provisions were then renewed up to March 15, 2020. The House most recently has passed

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[30] Christine Zozula, *Human Rights in Our Own Backyard: Injustice and Resistance in the United States* 129 (2011).

[31] *Id.*

[32] *Id.* at 129

[33] Ashcroft v. Al-Kidd 563 US 761 (2011)

[34] *Id.*

[35] Christine Zozula, *Human Rights in Our Own Backyard: Injustice and Resistance in the United States* 129 (2011).

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

[37] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388

[38] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, H.R. 3162, 107th Congress, 56 U.S.C. § Sec. 201-2015 (2015).

the USA Freedom Reauthorization Act, which reinstates some of the terms written in the PATRIOT Act. Although the new bill does not include Section 215[39] of the USA PATRIOT Act which allowed the NSA to collect information from citizens' electronic devices, the new Freedom Reauthorization Act still allows "FISA-authorized orders to obtain information and collect surveillance."[40] Because there was no official start or end date to the War on Terror, legislation passed during that time is not deemed as wartime legislation enacted for the uses of national security, unlike legislation passed during the Civil War, World War I, and World War II. Instead, these bills, as shown in Al-Hussayen's case, violate citizens' rights in the name of national security, but are at threat of doing so unlimitedly because there is no set boundary in which they can and cannot use national security as a justification for encroaching on civil liberties. The same goes for extraordinary rendition—it is a practice that started in reaction to the War on Terror, but because of the nature of the "undeclared" war, the United States government has put no restrictions on when the practice can and cannot be used. Although the Obama Administration vowed to end the practice of extraordinary rendition,[41] Attorney General Eric Holder stated that rendition would continue "with more oversight."[42] However, the 'increased oversight' provisions remain classified, making it uncertain to the public whether extraordinary rendition has truly ended.

Therefore, while the US government practice of extraordinary rendition as part of the War on Terror continues the trend of civil liberties violations during wartime, the difference between the nature of historical wars and today's war against terrorism leaves the implications on citizen's civil liberties in question. In order to understand the lasting impacts extraordinary rendition may have on citizens' civil liberties, an in-depth analysis of which laws extraordinary rendition violates and yet how the practice is still justified will illustrate the implications on citizens' individual rights.

II. Extraordinary Rendition Violates Domestic and International Law

[39] *Id.*

[40] U.S.A. Freedom Reauthorization Act of 2020, H.R. 6172, 116th Congress

[41] U.S. DEP'T OF JUSTICE OFFICE OF PUBLIC AFFAIRS, SPECIAL TASK FORCE ON INTERROGATIONS AND TRANSFER POLICIES ISSUES ITS RECOMMENDATIONS TO THE PRESIDENT (2009).

[42] *Id.*

Since the definition of extraordinary rendition presumes its extralegality, an analysis of what laws the practice violates better characterizes it. As most domestic and international laws prohibit torture and not extraordinary rendition specifically, the distinction between the two must be made as it will determine which laws do and do not apply to extraordinary rendition. According to the United Nations Convention Against Torture, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[43]

Meanwhile, extraordinary rendition is the act of abducting a terrorist suspect "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[44] Thus, extraordinary rendition and torture are not mutually exclusive. However, the practice of extraordinary rendition requires the suspicion of torture, even though it does not guarantee the practice of torture, even if in most scenarios it implies that one will subsequently also be tortured.

Under domestic law, torture for the means of interrogation (thereby components of extraordinary rendition) is explicitly prohibited under the Detainee Treatment Act of 2005-- it prohibits "cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States government."[45] Extraordinary rendition is a violation of this law, given that suspects are abducted by the United States government and sent to black sites to be potentially tortured in order to gather intelligence.

Moreover, the 5th amendment to the Constitution guarantees citizens the right to due process which extraordinary rendition explicitly denies:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

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[43] 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984)
[44] *Id.*
[45]Detainee Treatment Act of 2005 42 U.S.C. § Ch. 21D (2005)

> the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation[46].

However, the status of individuals suspected of terrorism and detained through extraordinary rendition, referred to as detainees, have been questioned over whether they are actually privy to constitutional rights, since they are neither criminals nor terrorists-- or, as the fifth amendment notes, the "accused", a protected group. However, both in the language of the fifth amendment, as well as in *Zavydas v. Davis*, the fifth amendment applies to any *person*-- be it citizen, non-citizen, or any individual detained by the United States government.[47] Since extraordinary rendition holds detainees without the "the presentment or indictment of a Grand Jury", and any detainee is subject to the Fifth Amendment, extraordinary rendition violates the due process clause. Not only is extraordinary rendition in violation of these domestic laws, but the international nature of the practice may mean that it is also in violation of international laws.

The most notable conventions that speak to international standards on torture that the United States abides by are the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment and Punishment (UNCAT)[48], International Covenant on Civil and Political Rights[49], and Geneva Convention in Relation to Prisoners of War and Civilians[50]. While all explicitly prohibit the act of torture, the UNCAT outlines in more detail a definition of extraordinary rendition: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[51] Nevertheless, all three condemn the use of torture and extraordinary rendition, and since the US abides by these conventions and organizations, it becomes codified as accepted international law.

Despite codified laws of both an international and domestic nature condemning extraordinary rendition, the practice continues to be used by the United States. Thus, an inquiry into how the United States surpasses both domestic and international law to sustain

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[46] U.S. Const. amend. V
[47] Zavydas v. Davis 533 U.S. 678 (2001)
[48] 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984)
[49] 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)
[50] 6 U.S.T. 3316; 75 U.N.T.S. 135
[51] *Supra*

the practice of extraordinary rendition will suggest how exactly the United States may be violating individual rights.

III. Mechanisms Used by the United States to Justify Extraordinary Rendition is Unlawful

The United States government has exploited the burden of proof set forth by the United Nations Convention Against Torture in order for extraordinary rendition to continue. While the UNCAT explicitly prohibits extraordinary rendition in Article 3: "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture,[52]" the law also clearly states that the state can only be considered complicit in extraordinary rendition if an agent who helped to deliver the suspect to torture "has substantial grounds for believing a suspect will be tortured in the violation."[53] This means that the state must have full awareness that the torture will happen in order to face the blame for conducting the extraordinary rendition. The United States has been able to utilize this loophole in the UNCAT and continue the practice of extraordinary rendition by fabricating ignorance towards the torture that occurs from the practice, since "full awareness" and foresight of intended torture is a hard burden of proof to overcome. *Arar v. Ashcroft* serves as a poignant example of the United States using this high burden of proof to rid themselves of responsibility of extraordinary rendition. Officials told plaintiff Arar upon his transfer to Syria that "his removal there was consistent with Article 3 of the United Nations Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[54]," meaning, US officials promised that his detainment was in accordance with the clause in the UNCAT that prevented torture. Soon thereafter, US officials handed Arar over to Jordanian authorities. While the Jordanians did not torture him, they subsequently handed him over to Syrian officials that conducted the enhanced interrogation.[55] It is likely that the Americans handed over Arar to the Jordanians to decrease the perceived culpability of his forthcoming torture with the Syrians, especially since they explicitly knew and told Arar about the clause

[52] 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)

[53] Michael Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition,* 37 Cal. W. Int'l L.J. 121, 137 (2006).

[54] Arar v. Ashcroft 585 F 3d. 559, 567 (2d Cir. 2009).

[55] Michael Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition,* 37 Cal. W. Int'l L.J. 121, 138 (2006).

that states "no state shall expel…a person to another state where there are *substantial grounds for believing* that he would be in danger."[56] By using the Jordanians as a buffer, the United States was able to purposely circumvent the incriminating image that they sent him directly to be tortured.

Another means of the United States justifying extraordinary rendition has come through the expanded power of the executive branch, allowing the government to enact legislation with very little checks and balances. In the aftermath of 9/11, President Bush was able to expand his executive war powers with little public pushback as doing so was a means to speed up the retaliatory forces against terrorism.[57] Months after the attacks, Bush enacted the 2001 Authorization for Use of Military Force, which stated:

> "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[58]

The ambiguous language of "necessary and appropriate force" allowed the executive branch to gain substantial power, giving the president the power to subsequently pass the Torture Memo. In 2002, the Department of Justice Office of Legal Counsel explicitly issued a memorandum that stated that the President could authorize torture of human beings despite the act being in violation of treaties ratified by the United States, as well as federal laws that prohibit such conduct.[59] This memo, backed by a legal expansion of executive power, allowed the President to derogate from existing torture laws and conventions and ultimately justify the use of extraordinary rendition by the United States.

The expanded executive power and, implicitly, the use of extraordinary rendition, was affirmed by the judicial branch. Rulings for both *Arar v. Ashcroft* and *El-Masri v. Tenet* stated that commenting on the cases would interfere with national security, invoking the state secrets privilege.[60] The state secrets privilege is immunity that "permits the government

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[56] 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)

[57] Alison Parker & Jamie Fellner, *Above the Law: Executive Power after September 11 in the United States*

[58] Authorization for Use of Military Force, 2001, 42 U.S.C. § 1

[59] Edward Barrett Jr., *Assault on the Constitution- Executive Power and the War on Terrorism,* 40 U.C. Davis L. Rev. 3 (2006).

[60] Arar v. Ashcroft 585 F 3d. 559, 567 (2d Cir. 2009); El Masri v. Tenet, 479 F. 3d 296, 302 (4th Cir. 2007).

to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security."[61] However, the scope of the state secrets privilege to this day remains ambiguous, and can easily be invoked by the executive branch of government whenever "they deem it to be in the public interest."[62] During the year following 9/11, as executive power soared and checks and balances on the government swayed disproportionately to the executive branch, the courts had very little say in questioning "the foreign affairs strategies [the executive branch] believes necessary for national security."[63] Therefore, the possible violations of civil liberties presented in the two extraordinary rendition cases were more or less shut down by the burgeoning powers of the executive branch, and the practice continued.

The courts have not just backed the use of extraordinary rendition through omission, however. *Hamdi v. Rumsfeld* constitutes another circumvention of international treaty that was actively backed by the courts. Currently, the Geneva Conventions only articulates the prohibition of torture regarding Prisoners of War and civilians.[64] However, President Bush was able to undermine this clause by avoiding the use of the words "prisoners of war" and "civilians" in his characterization of potential terrorist suspects. Instead, he coined these extraordinary rendition victims as "illegal enemy combatants.[65] In *Hamdi v. Rumsfeld,* Hamdi questioned the legality of his detainment as an illegal enemy combatant, stating that the President lacked the right to detain people of such title.[66] However, the Supreme Court ruled that President Bush did in fact have the power to detain people classified as such as per the 2001 Authorization of the Use of Military Force (AUMF) Act. Justice Clarence Thomas's opinion states: "the Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."[67] This assertion characterizes the

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[61] *Background on the State Secrets Privilege*, ACLU, https://www.aclu.org/other/background-state-secrets-privilege (LAST VISITED Jan. 25 2020)

[62] Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (And Should) Fix the State Secrets Privilege,* 80 Temp. L. Rev. 500, 505 (2007)

[63] *Id.* at 507

[64] 6 U.S.T. 3316; 75 U.N.T.S. 135

[65] Michael Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition,* 37 Cal. W. Int'l L.J. 121 (2006).

[66] Hamdi v. Rumsfeld 542 U.S. 507 (2004)

[67] *Id.*

sweeping power that the justices of the Supreme Court thought the executive branch should have at the time. The reach of the executive government, combined with the backing of the judicial branch, ensured that the detainment and extraordinary rendition of these "illegal enemy combatants" continued despite its technical extralegality.

The continued practice of extraordinary rendition has overall been characterized by the executive branch's expanded powers resulting in the judicial branch refusing to comment on the basis of national security, thereby encouraging this sweeping authority at the expense of citizens' rights. As seen in Part one, this trend remains quite historical, as the cause of most civil liberties violations prior to today were also caused by the expanded authority of the executive branch. Therefore, Part three of this paper will identify if there are any structural factors that have consistently allowed the executive branch to continually augment their authority. If any factors are found, the implications of continually expanding executive authority will be explored, eventually suggesting solutions.

IV. Remedies for Expanded Executive Power's Encroachment on Individual Rights

The methods that the United States has used in order to historically violate civil liberties during war as well as the continued practice of extraordinary rendition has ultimately been reliant upon increasing executive authority. This ever-expanding executive authority, starting from the violation of the first amendment in 1798, to the admittance of torture and the violation of fundamental human rights present day, violates the constitutional checks and balances and the separation of powers, leading the government to mirror more of what is known as "executive branch unilateralism," in which the executive branch influences all other parts of the government.[68] However, this trend has been ongoing since the beginning of the nation's history, possibly implying that there may be a greater structural deficiency of checking executive power in the American system.

The Constitution itself remains ambiguous in the scope of executive power. While Article I creates specific bounds for the legislative branch,[69] Article 2 of the Constitution

[68]Mark V. Tushnet, *Controlling Executive Power in the War on Terrorism,* 118 Harv. L. Rev. 2673, 2674 (2004-2005)

[69] U.S. Const Art. 1 § 1

does not expand on what inherently "executive power" is.[70] For example, nowhere in the Constitution is it mentioned that the president has the authority to act in times of national emergency because, as scholars such as Professor William P. Marshall note, the president has been deemed to possess "certain inherent powers" that did not need to be articulated in the Constitution.[71] Because the terms in the Constitution itself are so ambiguous, presidents have been able to expand and contract power to their liking with very little backlash from the courts as no concrete evidence to do so otherwise exists.[72] This structural shortcoming means that there is very little legal precedent to check the executive branch, because the executive branch has created immunities and customs that the courts can do very little about because of the ambiguity of the Constitution.[73] In the case of extraordinary rendition, no case law exists challenging the practice because of the executive immunity known as the state secrets privilege invoked every time extraordinary rendition cases have reached a court of law.

As invoked in *El Masri v. Tenet,* and *Arar v. Ashcroft,* the state secrets privilege "permits the government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security."[74] Although not mentioned in the Constitution, this privilege was conceived in the landmark Supreme Court case *US v. Reynolds.* An Air Force airplane carrying several military personnel among civilians crashed, and subsequently, three of the civilians' family members sued, asking for complete disclosure about the accident.[75] However, the Air Force refused to comply, stating that disclosing such information would be a threat to national security.[76] Upon the declaration of the state secrets privilege for the first time, *US v. Reynolds* created four important precedent guidelines that is distinct from how the immunity is being used today. *US v. Reynolds* established that the privilege can only be used by the federal government; formal procedures are required to invoke the privilege; judicial review of the privilege is required; and invocation of the

[70] U.S. Const Art. 2 § 1

[71] William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters,* 88 B. C. L. Rev. 506, 509-510 (2008)

[72] *Id.* at 511

[73] *Supra* at 511

[74] *Background on the State Secrets Privilege*, ACLU, https://www.aclu.org/other/background-state-secrets-privilege (LAST VISITED Jan. 25 2020)

[75] United States v. Reynolds, 345 U.S. 1

[76] *Id.*

privilege is not a *complete dismissal* of the complaint.[77] Through this framework, *US v. Reynolds* set a balance between the immunity of the executive power and the judicial branch's still inherent right to review evidence and make a ruling on the case. Despite the declaration of the privilege, the court should still be able to perform judicial review on the necessity of the complaint, whether it be in the form of "allowing courts to review the underlying documents if necessary" or creating a "balancing test" to deem the legitimacy of the invocation. As the court states, "when the necessity by the litigant is strong the claim of privilege should not be lightly accepted; but, when the necessity is dubious, the claim of privilege will prevail."[78]

This precedent has been completely sidelined in the Bush presidency onwards—instead of the case being reviewed as per the "balancing test" despite the invocation of the state secrets privilege, courts nowadays are conflating the state secrets privilege with dismissing the case altogether. As the Brennan Center for Justice asserts, the state secrets privilege is "evidentiary privilege", meaning it is only meant to shield the public from some sensitive documents.[79] However, Bush administration courts onwards have claimed that entire subject matters are the reason to call for immunity.[80] By doing so, the executive power blatantly operates by unitary executive theory to overpower the judicial review still given by precedent in *US v. Reynolds.* Notably, in *El Masri v. Tenet* and *Arar v. Ashcroft,* invoking the state secrets privilege meant that the violation of 5th amendment due process arguments were never heard by the courts, even if they were technically still guaranteed some form of judicial review. Thus, the misuse of the state secrets privilege, and therefore, the strong-arming of the executive branch over the judicial branch, is one of the reasons why individual liberties have been neglected. If courts were to operate by the "balancing test" precedent set in *US v. Reynolds,* the court could substantively balance the deliverance of justice versus the still valid claims to national security.

In fact, the Obama administration attempted to pass legislation to restrict the power of the state secrets privilege, however, the proposed legislation was still missing the key component that has allowed the executive branch to use the state secrets privilege as an all-

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[77] Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse,* 11 Lewis & Clark L. Rev. 99, 101-110 (2007)

[78] United States v. Reynolds, 345 U.S. 1

[79] Elizabeth Gotlein & Frederick A. O. Schwarz Jr., *Congress Must Stop Abuses of Secrets Privilege,* BRENNAN CENTER FOR JUSTICE, https://www.brennancenter.org/our-work/research-reports/congress-must-stop-abuses-secrets-privilege (LAST VISITED Jan. 29 2020)

[80] *Id.*

encompassing silencer of the courts: it still did not prohibit cases from being completely dismissed without pertinent judicial review.[81] In order to compensate for some of the ambiguity of the Constitution that allows for the executive branch to wield such power, and for the executive branch to abide by already-held precedent outlined in *US v. Reynolds*, Congress must pass a revised version of the Obama-era legislation to allow cases the chance to still be heard by the courts even if immunity is incurred. This remedying measure will guarantee that the violation of civil liberties as in *El- Masri v. Tenet* and *Arar v. Ashcroft* still have the chance to be heard in a court of law.

In the event that such legislation does pass, *El Masri v. Tenet* and *Arar v. Ashcroft* should be reeviwed by the United States Supreme Court based upon a write of Certiorari to set the correct precedent for the violation of civil liberties through extraordinary rendition. In *El Masri v. Tenet,* El-Masri claims a violation of his fifth amendment due process rights, citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* as precedent for his violations: "Tenet and John Does 1-10 violated the Due Process Clause's prohibition against anyone acting under color of U.S. law (1) to subject any person held in U.S. custody to treatment that "shocks the conscience," or (2) to deprive any person of liberty in the absence of legal process."[82] *Arar v. Ashcroft* makes a similar claim asking for "a Bivens remedy under the fifth amendment for Arar's injuries."[83] To the plaintiffs' claims of arrest without probable cause and agents' unlawful conduct, the ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* gave "rise to a federal cause of action for damages consequent upon the agent's unconstitutional conduct."[84] Thus, both El-Masri and Arar should receive comparable redress for damages caused to them by extraordinary rendition in order to preserve the upholding of civil liberties by legal precedent.

Conclusion

This article has sought to exemplify that the historical trend of violating civil liberties during wartime is not so historical, despite the United States not technically being at war. In the 21st century, the nature of war has changed—wars that were once tangible with a starting declaration and final treaty to distinguish between war and peacetime have now become

[81] *Supra*
[82] El Masri v. Tenet, 479 F. 3d 296, 302 (4th Cir. 2007).
[83] Arar v. Ashcroft 585 F 3d. 559, 567 (2d Cir. 2009).
[84] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971)

blurred, as the United States can send troops to other countries without any physical home-front consequences. However, this new type of invisible war has seemingly only given the executive branch more leeway to violate civil liberties through programs like extraordinary rendition as combat is not in the critical public eye. While the war is not tangible, the intangible consequences are drastic: through the extraordinary rendition program, the executive branch has ignored legal precedent, disrupted constitutional checks and balances, and furthered an international security agenda at the expense of citizens' constitutional security.

However, one must ask: do the benefits of protecting national security and promoting international stability really outweigh the cost of undermining individual rights at home? While a utilitarian perspective would argue that the state must do whatever it can to protect the common good, what would the "common good" be without the basic constitutional rights that American society runs on? It is this question we must ask when assessing our foreign policy goals, as we use our constitutional ideals and values to promote democracy abroad. But if by doing so we are undermining these very same values, we become spineless on the world stage.

Moreover, the historic trend of civil liberties violations is a humble reminder that our Constitution is not an exhaustive document. While the founding fathers intended to cover every contingency, no one of that time could have predicted the global interconnectedness that allows the War on Terror to exist in the first place. It may be instructive to reevaluate the Constitution's ambiguous nature of the executive in the perspective of today's age in order to avoid clashes with the vital structure of checks and balances of our system.

Terrorism is a valid threat and must be dealt with accordingly. But, if we neglect our values for reactionary torture methods such as extraordinary rendition, we are letting terrorists attack something far greater than just our home: we are letting it erode our identity.

The Government Breakup of Corporations: The Legacy of Antitrust Laws and Their Use in Today's World of Big Tech

Ryan Nassar

Introduction

A 2017 CNBC report claimed that around 64% of Americans own a product made by Apple.[1] Pew Research found that almost 70% of Americans ages 18 and older use Facebook.[2] These numbers demonstrate how only a few companies have been able to dominate the American technology market and become large players in what the American public purchases. According to Bill Gates, the co-founder of Microsoft, the government should not see the size of these companies as a reason to break them up and that Microsoft has been able to capture the market by merely being innovative.[3] On the other hand, Facebook's co-founder Chris Hughes states that Facebook, along with other major technology companies, should be broken up because any competitor attempting to enter the market would not be able to raise enough money to effectively compete with Facebook or other companies.[4] This, consequently, gives these companies too much power over the market, allowing them to overcharge consumers for a product or service.[5]

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[1] Liesman, Steven, *America loves its Apple. Poll finds that the average household owns more than two Apple products,* CNBC (Oct. 10, 2017), https://www.cnbc.com/2017/10/09/the-average-american-household-owns-more-than-two-apple-products.html.

[2] Gramlich, John, *10 facts about Americans and Facebook*, Pew Research Center (May 16, 2019), https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/.

[3] De Luce, Ivan, *Don't break up Big Tech, says Bill Gates. The world's second-richest man says regulation is the way forward – and he's speaking from experience,* Business Insider (Sep. 19, 2019), https://www.businessinsider.fr/us/gates-doesnt-think-government-should-break-up-big-tech-companies-2019-9.

[4] Hughes, Chris, *It's Time to Break Up Facebook*, New York Times (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html.

[5] Hughes, Chris, *It's Time to Break Up Facebook*, New York Times (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html.

While it may be difficult for everyday citizens to avoid using the services these large companies provide, the United States government has taken it upon itself to ensure that competition remains in the market through law and policy decisions. Some early examples of the federal government's attempt to ensure consumers are protected by free and fair competition include the decision in *Standard Oil Co. of New Jersey v. United States*, 22 U.S. 1 (1911)[6] in 1911, which led to the dissolution of Standard Oil Company. At the time, Standard Oil practically controlled the nation's oil business.[7] However, the government's hard stance on monopolies and trusts hasn't always been the case. The government began to loosen their antitrust enforcement between WWI and WWII and continued to do towards the end of the 20th century.[8] Their stance is currently changing due to the House of Representatives' order towards to Apple, Facebook, Amazon, and Google to turn over documents for the House's antitrust probe in June 2019. It appears that the government, as well as the public, are ready for another period of stronger antitrust laws.[9]

While the Sherman Antitrust Act[10] and the Clayton Act[11], put into effect in 1890 and 1914, ensured that large corporations such as Ford and Standard Oil don't take over the market, they still influence many court decisions today regarding antitrust litigation, yet the language of these laws have rarely been changed. Since these laws were written before the rise of social media and large technology corporations, it has consequently become increasingly difficult to break up these massive companies. The inability of the Federal Trade Commission (FTC) to properly regulate these companies can lead to overpriced goods in the markets, which is a major determinant of consumers. Therefore, the FTC and Congress should reevaluate how they combat the destructive growth of big tech companies, growth which has led to invasions of privacy and monopolistic behavior. Furthermore, the federal government should create new laws that specifically define the rules regarding trust making and price fixing of technology companies.

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[6] Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 40 (*Court abbreviation* 1911).

[7] *Id.*

[8] Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, Harvard Business Review (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

[9] Wuerthele, Mike, *Some Apple, Facebook, Amazon, Google documents for US antitrust probe submitted,* Apple Insider (Oct. 16, 2019), https://appleinsider.com/articles/19/10/16/some-apple-facebook-amazon-google-documents-for-us-antitrust-probe-submitted.

[10] Sherman Antitrust Act, 15 U.S.C. § 1-7 (*Court abbreviation* 1890).

[11] Clayton Act, 15 U.S.C. § 12-27 (*Court abbreviation* 1914).

I. Background and Evolution of Federal Antitrust Laws

A. Creation of Federal Antitrust Laws in the 19th and 20th centuries

While the term *antitrust* wasn't incorporated into federal law until late in the 19th century, Congress' justification over commercial matters in the United States can be traced back to 1824 with the Supreme Court's ruling in *Gibbons v. Ogden*.[12] After the partnership between two steamboat operators in New York and New Jersey, Aaron Ogden and Thomas Gibbons, fell apart, Ogden sued Gibbons for violating New York navigation rules.[13] The Supreme Court upheld the state court's ruling, stating that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[14] This ruling broadened Congress' power over business and commerce within the United States, allowing them to eventually develop rules forbidding the creation of monopolies. Furthermore, the Court's decision also stated that, "[Commerce] describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[15] Therefore, the inclusion of this statement upholds the purpose of future antitrust laws, such as the Sherman and Clayton Antitrust laws, by stating that there should be rules for carrying out interstate commerce.

Later, in 1887, Congress passed the *Interstate Commerce Act*, which was enacted in order to regulate interstate commerce conducted by either rail or waterway.[16] Section III of the Act states that it, "Shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality."[17] While this act only applies to trains and boats crossing state borders to conduct commerce, the Interstate Commerce Act is still instrumental in defining what business practices are considered illegal.[18] This act states that it is illegal to give a preference to any person or group of people, since that would, in effect, cut out others from the market, potentially creating a price that is above or below market

[12] Gibbons v. Ogden, 22 U.S. 1 (1824).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Interstate Commerce Act, 49 U.S.C. § 1 (*Court abbreviation* 1887).
[17] Interstate Commerce Act, 49 U.S.C. § 3 (1887).
[18] Peoples, James, *The Legacy of the Interstate Commerce Act and Labor: Legislation, Unionization, and Labor Earnings in Surface Transportation Services*, 43 Rev. Ind. Organ. 63, 82 (2013) (discussing the legacy of the Interstate Commerce Act and its adaptation to new forms of commerce).

price, giving that firm an undeserved advantage. These are the same ideas that are present in antitrust laws and highlight Congress' ability to impose interstate commerce regulations.

By the end of the 19th century, Congress passed two acts aimed at creating regulations against monopolies across the entire market, not just interstate commercial lines. The first major law passed was the *Sherman Antitrust Act*, enacted in 1890.[19] The act is intended to protect trade and commerce by stating that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce…is declared to be illegal."[20] Here, Congress is using its power to ensure that companies aren't placing restraints on the market, as well as stating that monopolies are a type of unfair business practices.[21] Furthermore, the act goes on to state that it is illegal for anyone to monopolize or conspire to monopolize.[22] By passing this act, Congress is further defining the unfair practices of creating a monopoly, stating that creating one or conspiring to create one is against the law.[23]

In 1912, the Supreme Court cited the Sherman Antitrust Act in their argument for the dissolution of the deal between Union Pacific Railroad Company and the Southern Pacific Company.[24] In the decision, the Court stated that the Act should be used to preserve free trade and commerce.[25] This statement further enforces the notion that Congress used its power over interstate trade in order to enact the law in an effort to preserve competition.[26] This also helps to define the purpose of antitrust law and what types of contracts and mergers the government should prevent.

By 1914, Congress had passed the Clayton Act,[27] which was created to further the work that was previously done by the Federal government in order to ensure they had jurisdiction over protecting their competition of the free market.[28] Section 13 of the act reads, "It shall be unlawful for any person engaged in commerce…to discriminate in price between different purchasers of commodities of like grade and quality…where the effect of

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[19] Sherman Antitrust Act, 15 U.S.C. § 1-7 (*Court abbreviation* 1890).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 2.
[23] *Id.*
[24] United States v. Union Pacific R. Co., 226 U.S. 61, 61 (*Court abbreviation* 1912).
[25] *Id.* at 95.
[26] *Id.*
[27] Clayton Act, 15 U.S.C. § 12-27 (*Court abbreviation* 1914).
[28] *Id.*

such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce."[29] This broadens the scope of what can be considered unlawful or harmful trade practices, which includes price discrimination.[30]

B. The FTC and Antitrust Laws

Along with the various federal laws created to ensure a free market, the government also created the FTC, a body that operates under the Federal Trade Commission Act, and oversees the market ensuring that it is working in favor of the consumer.[31] "The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations…from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[32] Through the language of the text, it is clear to assume that the two acts play a large role in aiding the FTC in determining the unfair practices that the Commission should be prosecuting. Furthermore, the FTC created three bureaus in order to better conduct their job. The Bureau of Competition attempts to prevent any mergers and practices that could be deemed anticompetitive, and potentially create an atmosphere of price fixing.[33] The Bureau of Consumer Protection is tasked with protecting consumers against unfair and fraudulent business practices by investigating companies and creating rules to prevent harmful actions.[34] Lastly, the Bureau of Economics analyzes how the actions of the FTC impact the marketplace.[35] Through the Federal Trade Commission Act, the Federal government has demonstrated that it is attempting to promote a free and fair marketplace.

Since its creation, the FTC has taken on hundreds of cases aimed at protecting consumers. There are several cases that demonstrate how the FTC, along with the federal government have worked to support consumers. In one case, decided in 2014, *Federal Trade Commission v. AT&T Mobility, LLC*, the FTC claimed that "AT&T participated in deceptive and unfair acts or practices…by including unauthorized charges on the telephone bills of its mobile phone customers." In this suit, the FTC argued that AT&T charged its customers

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[29] *Id.* at 13.

[30] *Id.*

[31] Federal Trade Commission Act, 15 U.S.C § 45 (*Court abbreviation* 1914).

[32] *Id.*

[33] Bureaus and Offices, Federal Trade Commission: About the FTC, https://www.ftc.gov/about-ftc/bureaus-offices (last visited Jan. 4, 2020).

[34] Bureaus and Offices, Federal Trade Commission: About the FTC, https://www.ftc.gov/about-ftc/bureaus-offices (last visited Jan. 4, 2020).

[35] *Id.*

for third-party services which the customer did not agree or consent to.[36] AT&T then kept 35% of the charges it imposed on their customers.[37] Therefore, AT&T was utilizing deceptive practices since these customers did not agree to pay AT&T this money, yet AT&T kept a large portion of this profit.[38] This, in turn, would allow AT&T to receive money for services they are not providing, giving them an unfair advantage in the marketplace. In response, AT&T was forced to pay over $100 million to consumers for the violation of their consumer's rights.[39] This demonstrates how the FTC can use its power to evaluate and prosecute unfair business practices.

While the FTC has taken on many cases involving monetary loses by other companies or consumers, it also ensures the protection of consumer's privacy. In *United States v. Google Inc.* decided in 2012, the FTC stated that Google agreed with certain Google users that the search engines will not use tracking cookies or provide targeted advertisements. However, Google did, in fact, place tracking cookies and send these consumers targeted advertisements.[40] Again, similar to *Federal Trade Commission v. AT&T Mobility, LLC*, the FTC charged Google with several counts of misrepresentation.[41] Even though these actions did not necessarily cause the consumer to lose any money directly, the misrepresentation could still give Google an unfair advantage in the marketplace, since they can disperse more advertisements than they should be allowed to by law and get money from the advertisers. Furthermore, Google released consumer data, without the consumer's consent, further adding to the charge of misrepresentation.[42] This, again, demonstrates that the FTC primary purpose is to ensure that consumers are treated fairly in the marketplace, whether the consumer is unnecessarily losing money or not.

Even though there are several examples of how the FTC has successfully prevented large corporations from increasing and absorbing a larger percentage of the marketplace, the Commission has also failed at executing its mission with the legal framework that it has been provided, especially with cases that relate to privacy issues. An article written by Michael

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[36] Press Release, AT&T to Pay $80 Million to FTC for Consumer Refunds in Mobile Cramming Case (Oct. 8, 2014) (on file with author).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] United States v. Google Inc., CV 12-04177 SI, 5 (N.D. Cal. 2012).

[41] United States v. Google Inc., CV 12-04177 SI, 11 (N.D. Cal. 2012).

[42] *Id.*

Scott, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has The Commission Gone Too Far?*, and published by the American Bar Association, argues that the FTC failed to provide any guidance on how it would apply its authority over unfair practices when it came to data security breaches.[43] Scott used the complaints filed against BJ's Wholesale Club stores, which failed to implement reasonable data security, resulting in thousands of stolen credit and debit card information, as an example.[44] By examining this complaint, Scott argued that, since the FTC did not provide clear guidance as to what constitutes as unfair practices when it comes to data security, the Commission falsely employed their powers to prosecute companies for this reason.[45] This misapplication of the FTC's power comes from the definition of "unfair practices," which are defined as practices that "injures consumers" and "violated established public policy," under the 1980 Unfairness Statement.[46] That being said, in the FTC's complaint against BJ's, the Commission makes no mention of any particular injury to consumers, seeing as all the consumers were reimbursed for the fraudulent purchases by their banks.[47] This would appear to indicate that the FTC had no right to prosecute BJ's for any unfair business practice. This example demonstrates how a lack of guidance and specific policy by the federal government and FTC can potentially lead to an overreach of the FTC's powers.

Along with the FTC, the Department of Justice (DoJ) also works to bring suits against companies they suspect of anticompetitive behavior. One of the biggest suits brought by the DoJ was in 1974 in *United States v. AT&T*.[48] The DoJ stated that AT&T had become a monopoly since it owned Bell Operating Companies, regional companies providing local and regional services across the continental United States.[49] With this breakup, AT&T became a long-distance cellular provider, while the Bell companies remained local providers.[50] Since these services were merged before, long-distance connection received subsidies from the short-distance components of the companies, therefore allowing for

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[43] Scott, Michael, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has The Commission Gone Too Far?*, 60 Admin. Law Rev. 127, 151 (2008) (discussing the FTC's power over data security breaches).

[44] *Id.* at 153.

[45] *Id.*

[46] *Id.* at 151.

[47] *Id.* at 153.

[48] Pinheiro, John, *AT&T Divestiture & The Telecommunications Market*, 2 High Technology Law Journal 303 (1988) (discussing DoJ case against AT&T).

[49] *Id.*

[50] *Id.*

lower costs but also for a lack of innovation.[51] However, once the breakup occurred, costs rose for the long-distance provider, forcing AT&T to innovate their connection.[52] This demonstrates that ending monopolies also forces corporations to ensure that their products are working for the benefit of the consumer by improving what they produce to attempt to lower both the cost for themselves and those buying their products.

II. Shortcomings of Antitrust Law and Current Litigation

A. Criticism of Antitrust Practices and the FTC

While the FTC and its governing documents claim that their main purpose it to promote free and fair competition to support consumers across the country, a closer examination of antitrust practices would indicate that these ideas do not always play out correctly when they are applied. One of the main criticisms that antitrust laws face is the difference between horizontal and vertical integration. Vertical mergers refer a companies' integration up and down the supply chain, such as Coca Cola buying out a supply plant manufacturing its aluminum cans.[53] On the other hand, horizontal integration refers to a company merging with another company competing in the same market, such as a merger between General Motors and Ford.[54] While both of these types of deals would raise flags for the FTC, they each have different effects on the economy and the costs to its consumers.[55] Many have criticized antitrust law and the FTC because they have failed to make a clear distinction between the economic effects of vertical versus horizontal integration, and whether the prevention of one or the other would help or hurt the consumer.[56]

According to *Vertical Integration and Antitrust Policy*, an article published by the University of Chicago, vertical and horizontal integration have different effects on the economy and the United States Supreme Court should distinguish between the two when determining if a merger is illegal under antitrust laws.[57] Even though this article was written in 1950, its ideas are still applicable today concerning the government's approach to these

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[51] *Id.*

[52] Jerry Hausman et al., *The Effects if the Breakup of AT&T on Telephone Penetration in the United States*, 83 American Econ. Ass'n. 178, 178 (1993) (discussing rise in long-distance prices).

[53] Ryan Young & Clyde Wayne Crews, Jr. *The Case against Antitrust Law*, Competitive Enterprise Institute 1, 2 (2019) (discussing benefits of vertical mergers contrary to horizontal mergers).

[54] Ryan Young & Clyde Wayne Crews, Jr. *The Case against Antitrust Law*, Competitive Enterprise Institute 1, 2 (2019) (discussing benefits of vertical mergers contrary to horizontal mergers).

[55] *Id.*

[56] Spengler, Joseph, *Vertical Integration and Antitrust Policy*, 58 Journal of Political Econ. 347 (1950) (discussing the difference vertical and horizontal integration have on competition).

[57] *Id.*

practices, including cases with big technology companies.[58] Using the economic analysis of firm elasticity and economies of scale, the article concludes that horizontal integration, if carried beyond a certain point, may reduce competition.[59] Therefore, this would indicate that, while the government should be scrutinizing horizontal mergers, they should examine the full extent that the particular merger will have on the economy and not ban all horizontal mergers. [60] Conversely, the article states that vertical integration, does not suppress competition but instead lowers prices for consumers and promotes better allocation of resources.[61] Therefore, the government's inability to distinguish between these various types of mergers can have consequences on consumers, the very group of individuals that the FTC and the Department of Justice are supposed to protect. The result of this lack in distinction and economic analysis can be seen in the unintended consequences of the blocked merger attempts between Staples and Office Depot in 1997 and 2016.[62] Allowing this merger could have allowed underserved localities to receive the benefits of the profits made by this potential superstore.[63]

Along with scrutinizing merger deals, the FTC and the Department of Justice also examine a company's threat to other emerging competitors. According to the FTC, one way for a company to remove a new competitor from the market is through predatory pricing.[64] According to the idea of predatory pricing, a company could undercut the profits of a competitor by selling their goods at a loss, effectively forcing consumers to purchase their product instead of the competitors since it becomes very cheap, and waiting for their competitors to leave the market and then increase their prices.[65] However, as stated by the Supreme Court in 1986 in *Matsushita Electrical Industrial Corp. v. Zenith Radio Corp*, "predatory pricing schemes are rarely tried, and even more rarely successful."[66] This idea is supported by the fact that a the amount of money the company would have to make up due to these

[58] Ryan Young & Clyde Wayne Crews, Jr. *The Case against Antitrust Law*, Competitive Enterprise Institute 1, 2 (2019) (discussing how economic effects of horizontal and vertical mergers are still relevant today)
[59] Spengler, Joseph, *Vertical Integration and Antitrust Policy*, 58 Journal of Political Econ. 347, 351 (1950) (discussing limits to horizontal integration).
[60] *Id.*
[61] *Id.* at 347.
[62] Ryan Young & Clyde Wayne Crews, Jr. *The Case against Antitrust Law*, Competitive Enterprise Institute 1, 18 (2019) (discussing consequences of blocking horizontal mergers).
[63] *Id.*
[64] *Id.* at 20.
[65] *Id.*
[66] *Id.* at 21.

hostile actions would make this scheme too expensive, and overall a waste of money.[67] Furthermore, it is increasingly difficult to carry out predatory pricing schemes in the technology sector, since most applications such as games and social media are free and most of the revenue comes from advertisements. This, in turn, further adds to the idea that few companies would attempt this type of business tactic.[68] Therefore, if a business is economically able to lower its prices compared to its competitors, as a result of innovation (for example), it could be put at risk if the FTC or the DoJ chooses to go after the company for predatory pricing.

The lack of correct distinction between various unfair business practices is not the only shortcoming of the FTC. The Commission has also failed to explore other reasons for why a company might have the upper hand in the market, such as the natural progression of consumer behavior.[69] For example, technology companies have exploited the technological lock-in, which refers to companies creating an application that keeps consumers from switching to a better alternative, such as the case with computer browsers.[70] If a consumer uses only one browser on their computer, their life might appear easier since all their passwords and information would be stored on their singular browser.[71] This feeling of ease might, consequently, make a consumer less eager to switch to a different browser, lowering competition and a need to innovate.[72] However, while it may seem unfair for companies to do this, this issue deals more with consumer behavior than actual unfair practices since all the older browsers, such as Internet Explorer and Firefox, are still in existence and free to use.[73] Therefore, it is difficult to prevent this type of stifling of competition and innovation since it relates more to consumer behavior and there are no clear laws against it.

B. Recent FTC and Justice Department Antitrust Litigation

As the public has watched companies such as Google, Apple, Facebook, and Amazon increase their shares of the market, the federal government has begun to examine the possibility of unjust practices. On September 13, 2019, the House Judiciary Committee

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 28.
[70] Ryan Young & Clyde Wayne Crews, Jr. *The Case against Antitrust Law*, Competitive Enterprise Institute 1, 28 (2019) (discussing problems with technological lock-in).
[71] *Id.* at 29.
[72] *Id.*
[73] *Id.*

sent out a demand for documents from Amazon, Apple, Facebook, and Google.[74] According to the letters sent directly to the heads of each of these companies, the Judiciary Committee wants to examine "(1) competition problems in digital markets; (2) whether dominant firms are engaging in anti-competitive conduct online; and (3) whether existing antitrust laws, competition policies, and current enforcement levels are adequate to address these issues."[75] These letters demonstrate that the House of Representatives is focused on ensuring that these major technology companies have not stifled competition and hurt consumers. However, by October 14, 2019, the date to turn over said documents, the Judiciary Committee had not received all the documents, making it unclear if these companies are likely to fully comply.[76]

While this is certainly a major step towards the federal government's investigation into major technology companies, even though the government would need to work with the FTC to enforce any of its future decisions, this is not the first time the government has attempted to rein in the power of these types of businesses. On December of 2009, the FTC filed a complaint against the Intel Corporation's alleged monopoly over the personal computer and the central processing unit (CPU) markets.[77] In their complaint, the FTC states that Intel used unfair business practices since 1999 to remain a monopoly and maintain 75% to 85% unit share of the markets.[78] The unfair business practices in the complaint include: 1) paying CPU manufacturers to not sell to others, 2)redesigning its library software to reduce the performance of other CPUs without adding any benefit to Intel CPUs and, 3) misleading consumers by falsely stating that Intel CPUs represented industry benchmarks.[79] The FTC stated that the monopoly Intel kept on the CPU and on the personal computer market led to higher priced CPUs – reducing manufacturers' incentive to innovate, and reducing the industry's quality benchmark relied by manufacturers.[80] As demonstrated in this complaint, the monopoly Intel held on the market for a decade cost consumers and manufactures money. Furthermore, Intel's control of the market also stifled innovation

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[74] Lohr, Steve, *House Antitrust Panel Seeks Documents from 4 Big Tech Firms*, New York Times (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/technology/amazon-apple-facebook-google-antitrust.html.

[75] Letter from United States House of Representatives, Committee on the Judiciary, to Tim Cook, CEO, Apple Inc. (Sept 13, 2019) (on file with author).

[76] Press Release, Nadler, Collins, Cicilline, Sensenbrenner Statement on Tech Companies' Response to Information Request (Oct. 15, 2019) (on file with author).

[77] Complaint at 2, In the Matter of Intel Corporation, No. 9341 (D.C. 2009).

[78] *Id.* at 7.

[79] *Id.* at 3.

[80] *Id.* at 16.

within the sector since there existed few competitors, companies which would have needed to innovate to compete with Intel. By the end of 2010, the FTC and Intel reached a settlement, allowing Intel to continue to innovate and offer competitive pricing, but it barred them from using threats or bundled prices to hamper competition and from deceiving computer manufacturers about the performance of non-Intel CPUs.[81] According to the FTC, the case against Intel went further than any other antitrust case due to the fact the settlement helped to protect competition in general, and not one competitor.[82] This set an important precedent, especially with the Judiciary Committee's case against the large technology companies today, because they also would most likely be looking at restoring general competition and not allowing one competitor of Apple or Facebook to enter the market.

While the FTC has been a major player in conducting antitrust lawsuits, the Justice Department is also heavily involved. One example is *United States v. Microsoft Corporation*, beginning in 1998, for monopolizing computer software markets.[83] In a press release by the Department of Justice, Microsoft was accused of violating several antitrust laws including: persuading a competing internet browser software company from competing; unlawfully requiring PC manufacturers to license and install Microsoft's browser, Internet Explorer, as a condition for obtaining Windows' operating system; and entering into agreements with Internet Content Providers barring them from advertising competitor's browsers. [84] Furthermore, the DoJ stated that these actions resulted in Microsoft owning at least 95% of the Intel-compatible PC operating system.[85] In an examination of the effect on consumers, the DoJ found that these actions caused much immediate harm to consumers.[86] This harm included lower memory and a decrease in system performance of operating systems for consumers who asked manufacturers to provide computers without Microsoft's system as well as a significant decrease in innovation, demonstrated by Microsoft's pressure towards Intel to cut back on its software development efforts.[87] By 2001, Microsoft agreed on a

[81] Press Release, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug 4, 2010) (on file with author).

[82] *Id.*

[83] Press Release, Justice Department Files Antitrust Suit Against Microsoft For Unlawfully Monopolizing Computer Software Markets (May 18, 1998) (on file with author).

[84] *Id.*

[85] United States v. Microsoft Corporation, CV 98-1232, 16 (D.C. 1999).

[86] *Id.* at 204.

[87] *Id.* at 205.

settlement offered by the Justice Department, which places some restrictions on the company, including: 1) prohibiting Microsoft from retaliating against a computer manufacturer for selling or licensing other software that competes with Microsoft, 2) allowing any user to remove Microsoft Products from the computers and, 3) prevent any competitor from attempting to create a competing software.[88] This case marked a major step in the Justice Department's ability to recognize monopolies when it came to technological software. However, the Department of Justice, along the with FTC and the federal government, will still have a difficult time applying antitrust law to in any current and future antitrust cases.

C. *Difficulties Applying Antitrust Law to Apple, Facebook, Google, and Amazon Probes*

As the House Judiciary Committee began to investigate some of the big names in technology, it becomes vital to examine how well antitrust law can adapt to the changing landscape of antitrust enforcement. Luckily, this conversation has been going on for several years, with Fiona Scott Morton, a professor of economics at Yale, discussing several upcoming challenges with antitrust enforcement.[89] Morton began by highlighting the main issue that is being faced: the lack of precedent.[90] While there exists centuries of legal precedent on what constitutes monopolistic business practices by railroads and oil companies, there exists few major cases on internet and social media companies, mainly because these technological areas have not existed as long.[91] This can make it very difficult for the judges to use precedent in order to reinforce their positions. This issue with antitrust enforcement will, however, only come with time and more antitrust cases. Morton goes on to state that another issue with this type of enforcement relates to the widely different pricing model that these types of companies use. Contrary to a traditional brick and mortar store, the marginal costs for technology companies (i.e. the cost adding an addition user to their app) is close to zero, there are more pricing schemes that a technology company can use to attract more users.[92] Along with this increase in pricing schemes, it will be more difficult for antitrust regulators to determine which ones are legal versus illegal.[93]

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[88] *Id.* at 1.

[89] Scott Morton, Fiona, *Is antitrust law keeping up?*, Yale Insights (July 12, 2013), https://insights.som.yale.edu/insights/is-antitrust-law-keeping-up.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

Furthermore, *Why Antitrust Regulators Don't Scare Big Tech,* Kellogg Insight (Aug 19,2019), discusses specifically why these four technology companies might not face many charges if current antitrust regulation is applied.[94] Mark McCareins, the author, states that antitrust laws have traditionally focused on protecting consumers, and therefore, since these companies are offering many of their services for free, it is more difficult for regulators to claim that harm is being done to consumers based on these companies' size.[95] McCareins also points out that the technology sector is constantly changing, and one tactic that the federal government might use is to wait and see what happens.[96] McCareins states that Sears used to be the biggest name in retail, pushing out most of its competitors, especially through its delivery, until its retail market was overshadowed by companies such as, Walmart and Target, and its delivery aspect was taken over by Amazon.[97] McCareins argues that the same thing could be happening to the major technology companies seen today, especially seeing the threat that Facebook is facing with apps such as TikTok.[98] Therefore, based on past trends, market influences could certainly help the federal government tamper the growth of these technology companies, especially the innovations in technology that may not have even been thought of yet. However, this does not exclude the need for antitrust law to be updated to fit into an ever changing marketplace. Updating these laws will serve to lessen the harm these companies could bring to consumers and help to catch companies attempting to monopolize instead of waiting until it's too late.

III. Solutions and Implications

A. The Need to Modernize Antitrust Legislation to Fit Today's High-Technology Landscape

With constant changes and innovations in America's technology marketplace, it is now that Congress, the Justice Department, and the FTC take a close look at antitrust legislation and regulation and adapt to this change. However, this is not the first time Congress has felt the pressure to examine their antitrust tactics. In 2002, Congress took major steps to review their antitrust legislation by creating a United States Antitrust

[94] McCareins, Mark, *Why Antitrust Regulators Don't Scare Big Tech*, Kellogg Insight (Aug 19, 2019), https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech.

[95] *Id.*

[96] McCareins, Mark, *Why Antitrust Regulators Don't Scare Big Tech*, Kellogg Insight (Aug 19, 2019), https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech.

[97] *Id.*

[98] *Id.*

Modernization Commission.[99] There was no specific focus of this Commission with regards to any specific antitrust law, hence, just leaving the Commission to simply conduct a broad examination of antitrust statutes.[100] By 2007, the Commission delivered its findings and claimed that antitrust laws do not need to be revised since current rules can still be applied to technology companies.[101] The report goes on to say that antitrust enforcers examining these types of industries, most notably technology industries, should conduct themselves in the same way as with other industries: by examining market dynamics and competitive effects.[102] Therefore, this report added little to the discussion on modernizing antitrust laws and provided no guidance as to how enforcers should approach technology industries. Furthermore, this is only the sixth time a commission has conducted such a widespread review of antitrust law; therefore, it is unlikely there will be another review any time soon.[103]

Even though this Commission did not find much in the way of bolstering antitrust law, it found that it is increasingly necessary that the federal government review their antitrust laws and regulations with their massive technology company probe on the horizon. One of the relatively new issues regulators will have to deal with is intellectual property laws, since innovation in the technology sector is dependent on the right to protect one's intellectual property.[104] While both intellectual property rights and antitrust laws promote innovation, there is a chance that these laws can come into conflict, since antitrust regulators might find a certain patent to hamper competition and propping a monopoly.[105] Therefore, it should be important for antitrust regulators and the Department of Justice to ensure that antitrust laws and enforcement does not conflict with intellectual property policy.[106] This would hopefully ensure that intellectual property rights do not protect monopolies in the name of innovation, and antitrust regulators do not put innovation at risk when deciding if a patent should be approved.[107]

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[99] Hemphill, Thomas, *Modernizing U.S. Antitrust Law: The Role of Technology and Innovation*, 40 Business Economics 70, 70 (2005) (discussing the US Antitrust Modernization Commission of 2002).

[100] *Id.*

[101] Robert Crandall & Charles Jackson, *Antitrust in High Tech Industries*, 38 Rev. of Ind. Organ. 319, 320 (2011) (discussing finds of antitrust modernization commission).

[102] Hemphill, Thomas, *Modernizing U.S. Antitrust Law: The Role of Technology and Innovation*, 40 Business Economics 70, 70 (2005) (discussing past antitrust modernization commissions).

[103] *Id.*

[104] *Id.* at 72.

[105] *Id.*

[106] *Id.*

[107] *Id.*

Another reason for a need to review antitrust policy results is from the mere fact that several businesses in today's economy rely on the network effect.[108] This effect refers to how companies, such as digital databases and telecommunications, reap benefits only when there are many consumers on the same platform. This can lead to a winner-take-all situation within competition, such as the need for Google to be the most popular search engine above all others.[109] Furthermore, as seen with the rapid changes in most popular Internet browsers, this type of competition can lead to a bandwagon effect, causing many consumers to switch to a different company's service the second it appears to be coming on top.[110] While this type of competition could raise red flags for antitrust regulators, since companies rely on capturing the market, there is a need for the federal government to analyze how exactly this new type of economy is affecting competition in the market and change, or not change antitrust policies accordingly.[111]

When examining any changes antitrust regulators should consider, it is necessary to study the past few cases against technology companies. "Modernizing U.S. Antitrust Law: The Role of Technology and Innovation," an article published in the Review of Industrial Organizations, discussed *United States v. Microsoft Corp.*, and what the effects were of the decree the DoJ gave to the company.[112] The article states that the remedies implemented by antitrust regulators did very little to promote competing web browsers, such as Firefox and Google, because Microsoft's share in the web browser market was already declining before the DoJ delivered its ruling, forcing more websites to be compatible with both Microsoft and other web browsers.[113] Therefore, this indicates the government's need to review their strategies when it comes to imposing remedies, especially since technology in the industry is changing so rapidly, it is difficult to discern what remedies will be able to ensure competition in a decade.[114] A further issue presented in the Microsoft case was the DoJ's attack on Microsoft's bundling of features as part of their operating system.[115] As the article argues, an

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[108] *Id.* at 73.

[109] *Id.*

[110] Hemphill, Thomas, *Modernizing U.S. Antitrust Law: The Role of Technology and Innovation*, 40 Business Economics 70, 73 (2005) (discussing network effect in competitive behavior).

[111] *Id.*

[112] Robert Crandall & Charles Jackson, *Antitrust in High Tech Industries*, 38 Rev. of Ind. Organ. 319, 356 (2011) (discussing effect DoJ case against Microsoft had on the market).

[113] *Id.* at 354.

[114] *Id.* at 356.

[115] *Id.*

attack on this type of feature threatens to limit innovation and any promotion of competition since these types of bundles make the operating system more efficient while not necessarily preventing users from downloading competing browsers or media players.[116] Therefore, antitrust regulators should review past decisions and determine if whether or not they have done more harm than good.

B. Rethinking Vertical Integration in the Technology Market

Another issue that needs to be examined is antitrust regulator's approach to vertical integration, especially in the technology sphere. In *Antitrust in High Tech Industries*, an article published in the Review of Industrial Organization and written by Robert Crandall and Charles Jackson, discusses how antitrust regulators focus on vertical integration that exploits market power.[117] The article points out that, along with many other economists, vertical integration, even the type that regulators are monitoring, tend to have positive welfare effects and usually are pro-competitive.[118] Furthermore, literature that attempts to demonstrate that vertical integration has negative effects on the economy often come short because their analyses tend to be based on assumptions and are difficult to apply to the real world.[119]

Furthermore, antitrust regulator's attack on vertical integration and can itself be the cause of welfare-harming actions.[120] As presented in the article, a problem that public officials might face is the pressure from competitors of a firm that is attempting to vertically integrate.[121] This intervention could then lead to a lack of innovation, as well as other adverse effects.[122] Furthermore, increased scrutiny by the DoJ and FTC could reduce welfare because it might dissuade firms from increasing efficiency through vertical integration if the firm does not want to risk bringing on the full weight of the Justice Department.[123] Therefore, this demonstrates a need for clear and concrete conditions which will warrant intervention, reducing fears welfare-positive integration.[124] However, as Crandall and Jackson point out, these clear conditions will only become apparent after examining the harm that vertical

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[116] *Id.*

[117] Owen, Bruce, *Antitrust and Vertical Integration in "New Economy" Industries with Application to Broadband Access*, 38 Rev. of Ind. Organ. 363, 374 (2011) (discussing negative vertical mergers).

[118] *Id.*

[119] *Id.*

[120] *Id.* at 381

[121] *Id.* at 382.

[122] *Id.*

[123] *Id.* at 381

[124] *Id.*

integration could cause.[125] Therefore, it is important for the Justice Department to take their time in investigating these types of economic risks to ensure no harm is done to the economy.

Conclusion

The first antitrust laws were written in order to combat unfair business practices by steamboat operators and railways. Now, with the growth of social media companies and one-day delivery services, the landscape of the market today has drastically changed; however, antitrust laws and practices have not. While the FTC and federal government have rarely reviewed their empirically-based antitrust policies or implemented amendments to major antitrust laws, there is still a need to adapt these laws to the 21st century.[126] This is largely due to the fact that the very nature of our business economy is changing. These changes can be seen with the growth of the networks effect, forcing technology companies to work at capturing the whole market, and technological 'lock-in,' which is more due to consumer behavior than firm behavior. Therefore, while these policies have been well thought through out and tested, the ever-changing economy requires that these laws be amended.

While more work and empirical research is certainly needed to determine the exact amendments and policy changes required, the federal government should be taking steps to determine where they have failed in the past. Furthermore, regulators of antitrust law and intellectual property law need to ensure that they don't conflict with each other, as a misapplication of either regulation can severely hamper a company. Congress should conduct another review of their antitrust legislation in order to ensure that they are targeting areas that they have failed in before and investigate the competitive impact that the new phenomena is having on the market, such as the network effect and technological 'lock-in,' and develop appropriate methods. Finally, the federal government and FTC need to reexamine their approach to vertical integration and ensure that their regulation of such regulatory actions do not threaten the innovation of a company. Overall, the federal government, FTC and Department of Justice must reexamine their approach to antitrust legislation, especially in the wake of their major probe against some of the largest technology

[125] *Id.*

[126] Hemphill, Thomas, *Modernizing U.S. Antitrust Law: The Role of Technology and Innovation*, 40 Business Economics 70, 73 (2005) (discussing how antitrust laws must evolve).

companies, to ensure that appropriate measures are taken to protect competition in the market and not scare innovation away.

"Particularized Views": The First Amendment, Academic Freedom, and Departmental Intervention in University Curricula

Julia Brown

Introduction

In September of 2019, the Department of Education (ED) stoked controversy by publicly condemning the Middle East studies program jointly run by Duke University and the University of North Carolina at Chapel Hill.[1] As part of a nationwide crackdown on anti-Israel sentiment in higher education, the ED accused Duke and UNC of—among other things—perpetuating "narrow, particularized views" of Middle Eastern society and falling short on federally-mandated quotas for language instruction.[2] The ED viewed these purported shortcomings as violations of Title VI requirements for federal funding and ordered the schools to alter their curriculum. Suggested changes included placing more emphasis on religious minorities in the Middle East, particularly Christians and Jews, and providing "area studies advancing the security and economic stability of the United States."

Such drastic lateral action on the part of the Department of Education raises a multitude of legal and ethical questions. Does the ED have the constitutional right to revoke federal funding for an educational program due to ideological differences? Do academic institutions not, under the First Amendment, have the right to decide the content of their own curricula? What, if anything, can be done to protect the autonomy of universities against government intervention in the future? This article will seek to answer these questions.

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[1] Erica L. Green, *U.S. Orders Duke and U.N.C. to Recast Tone in Mideast Studies,* THE NEW YORK TIMES (September 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/anti-israel-bias-higher-education.html.

[2] Robert King, *Notice of a Letter Regarding the Duke-UNC Consortium for Middle East Studies*, THE FEDERAL REGISTER (September 17, 2019), https://www.federalregister.gov/documents/2019/09/17/2019-20067/notice-of-a-letter-regarding-the-duke-unc-consortium-for-middle-east-studies.

Part One will provide the background necessary for a comprehensive understanding of this issue. It will explain the ED's retaliatory actions against Duke and UNC and dissect the justifications for federal intervention ED cited in its official statement. Part Two will outline the guidelines for departmental action relating to federal funding for National Resource Centers (NRCs) and discuss the overarching ethics of federal funding for public university programs. Part Three will discuss the constitutional implications of academic freedom from *Sweezy v. New Hampshire* (1957) through the present. It will examine the delineation between the two subsets of academic freedom—individual and institutional—and the relevance of both branches to the Duke/UNC controversy. This section will then explain, citing court precedent and First Amendment doctrine, why this instance of government intervention in higher education was not only inappropriate, but unconstitutional. Finally, Part Four will explore the ideological leanings in the Department of Education and explain how these biases apply to the case at hand. The result will be a comprehensive look into academic freedom, its relevance to the world of higher education, and the need for institutional safeguards preventing its suppression.

I. The Department of Education and Middle Eastern Studies at Duke/UNC

In September 2019, the Department of Education publicly threatened to defund the Middle Eastern studies program run by Duke University and UNC Chapel Hill, citing Title VI of the Higher Education Act of 1965:

> Congress authorizes grants to protect the security, stability, and economic vitality of the United States by teaching American students the foreign languages and cultural competencies required to develop a pool of experts to meet our national needs.[3]

Using this sparse set of guidelines, the ED issued a statement detailing seven different grievances against the program, ranging from a lack of language proficiency among students to an inadequate selection of course offerings.

The Department's first complaint regards language instruction, a factor expressly referenced in the text of Title VI. The statement Duke/UNC's yearly report stating that out of the 6,791 students enrolled in Middle Eastern Studies courses in 2019, only 960 were enrolled in language courses, with no indication of these students' level of fluency.[4] Further,

[3] 20 U.S.C. 1021.
[4] King, *supra* note 2.

the Department claims that Duke/UNC's program does not do enough to help students in science, technology, engineering, and math achieve foreign language fluency.[5] Course offerings such as "Love and Desire in Modern Iran" and "Radical Love: Teachings from Islamic Mystical Tradition" are cited as evidence of a "fundamental misalignment" between the school's academic offerings and Title VI mandates.[6]

The Department then accuses the program of "lacking balance" due to a dearth of material focusing on religious minorities in the Middle East, namely Christians and Jews, and cites the absence of teachings about the "positive aspects" of Christianity and Judaism. The Department states that the program does not meet the requirement outlined in Title VI that federally funded programs must provide a "*full* understanding of the areas, regions, or countries" in which the language taught is commonly used.[7]

The Department further claims that Duke/UNC's program offers "very little serious instruction preparing individuals to understand the geopolitical challenges to U.S. national security and economic needs but quite a considerable emphasis on advancing ideological priorities."[8] The "ideological priorities" advanced by the program, as the remainder of the statement explains, are the positive aspects of Islamic religion and culture in contrast to an outsized focus on the regional minority populations subscribing to Christianity and Judaism.[9] The statement concludes by asserting that the program's lack of lawful focus on language development is due to the universities' preoccupation with advancing "narrow, particularized views."[10]

On its face, the ED's statement appears to be a bona fide attempt to hold a university program accountable for meeting national standards for Title VI funding. Upon closer inspection, however, it is apparent that the letter constitutes no such thing. As the remainder of this article will prove, the Department of Education has instead attempted to mold federal guidelines to fit its own agenda, and the Middle Eastern studies program offered by Duke and UNC will suffer as a result.

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[5] 20 U.S.C. 1122(a)(2)(J).
[6] King, *supra* note 2.
[7] 20 U.S.C. 112(a)(1)(B)(ii); 34 CFR 656.3(b)(1).
[8] King, *supra* note 2.
[9] Id.
[10] Id.

II. Federal Funding Guidelines for National Resource Centers (NRCs)

The 1965 Higher Education Act promulgated specific guidelines for the provision of federal funding to university programs. This landmark piece of legislation coined the term "National Resource Center," abbreviated to "NRC," to describe international studies programs that aimed to promote American interests abroad.[11] Title VI provides the basis for the Act:

> The security, stability, and economic vitality of the United States in a complex global era depend upon American experts in and citizens knowledgeable about world regions, foreign languages, and international affairs, as well as a strong research base in these areas.[12]

The statute explains that factors such as technological advancement and "dramatic changes in the world's geopolitical and economic landscapes" require "systematic efforts" to enhance American universities' capacity to produce research regarding international cultural and foreign language expertise, as well as graduates who possess such knowledge.[13]

In its September statement, the DOE cited Title VI as justification for its order that Duke/UNC alter their Middle Eastern studies program. The reasoning presented in the statement—that the consortium's curriculum advances "narrow, particularized views" and "lacks balance" due to a lack of course offerings surrounding religious minorities—bears little resemblance to the requirements outlined in the statute, which state only that a National Resource Center must teach "any modern foreign language," provide a "full understanding of areas, regions, or countries in which such language is commonly used," facilitate "research and training in international studies, and the international and foreign language aspects of professional and other fields of study," and supply "instruction and research on issues in world affairs that concern one or more countries."[14] This sort of baseless intervention marks an undue exercise of departmental authority that largely lacks statutory support.

A. Title VI and the Department of Education

The Department's assertion that the Middle Eastern Studies program offered by Duke and UNC falls short of federal funding requirements for NRCs is ill-founded. Contrary to the statement issued by the Department of Education, it is apparent that the program

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[11] 20 U.S.C. 1121, 601(a).

[12] Id. It is important to note that the statute lists multiple areas of study in addition to just foreign language proficiency as essential to the study of foreign regions.

[13] Id.

[14] 20 U.S.C. 1122(a)(1)(B).

does not fall short of federal requirements. Instead, it is the Department that falls short of guidelines for the removal of federal funding implied by Title VI.

The ED's complaint that the Duke/UNC consortium fails to adequately promote language proficiency, for example, is not adequately supported. The statement fails to demonstrate that the level of language proficiency among the program's students is in direct violation of the statute. Instead, it deems the number of students enrolled in language courses insufficient without the necessary statutory justification. The statute contains no specific guidelines for *how many* students must be enrolled in language courses; rather, it merely mandates that programs must contain *some degree* of language instruction in addition to "area studies and other international studies."[15] Further, the ED fails to provide any standard for what they would deem to be enough of a focus on language instruction to qualify for Title VI funding.

The remainder of the ED's statement is equally, if not more, problematic than its objection to Duke/UNC's language program. Grievances such as offering courses "irrelevant to Title VI mandates" and an alleged failure to emphasize the "positive aspects" of religions such as Christianity and Judaism are not only inadequate, but contradictory. When discussing the lack of minority religions covered by the curriculum, the Department argues that in order to qualify for Title VI funding the program must provide a "full" understanding of the Middle East; at the same time, the ED condemns classes that teach students about niche aspects of Middle Eastern culture and history as "irrelevant."[16] These complaints are also lacking in statutory support and were likely extrapolated from general guidelines in order to push a specific agenda.

It is also worth noting that the courses jointly offered by Duke and UNC do, in fact, provide students with a wide arrange of knowledge—or a "full" understanding—of Middle Eastern language and culture. Any purported deficiencies are certainly not glaring enough to warrant a violation of the vague guideline outlined in Title VI, despite what the ED has claimed in its statement. The Middle East major offered by the Consortium, for example, mandates that each student take three to six language courses in Arabic, Hebrew, Turkish or Persian; further, classes offered at the 100 level do not count for the major, requiring that

[15] 20 U.S.C. 1121, 601(a).
[16] King, *supra* note 2.

students take upper level language courses. In addition to language, students must take four to seven courses in Middle East literature and culture, some of which involve the ability to read texts in regional languages such as Arabic or Hebrew. In light of these program requirements, it is difficult to see how the Department of Education can rightly claim that the Duke/UNC Middle Eastern studies program is falling short of Title VI mandates.

Furthermore, although the Department of Education claims that Duke/UNC is advancing "narrow, particularized views" in its curriculum, the ED itself is attempting to push its own "particularized" views of the Middle East by ordering the consortium to alter its program. The vague nature of these grievances, in addition to the ED's recent history of aggressive pro-Israel policy (discussed in section V), suggests that the ED is seeking not to protect the integrity and effectiveness of international studies programs, but to misuse federal funding as an enforcement apparatus to promote its own ideological leanings in higher education.

III. Academic Freedom and Government Intervention

The September 2019 statement issued by the Department of Education has sparked widespread debate regarding the constitutionality of the ED's actions. Such drastic action from a government agency certainly raises a variety of potential constitutional issues, the most prominent of which is the First Amendment principle of academic freedom. While not expressly referenced in the Constitution, academic freedom has long been recognized as an individual and institutional right by the courts, one that should not be subject to government infraction. In order to understand the constitutionality—or lack thereof—of the ED's recent policies, one must develop a comprehensive understanding of academic freedom in all its iterations.

The First Amendment has been used to justify a variety of doctrines that it does not explicitly mention; chief among these is the concept of academic freedom, a term derived from Justice Frankfurter's concurring opinion in the 1957 Supreme Court case *Sweezy v. New Hampshire*.[17] In 1951, the state of New Hampshire passed a law that targeted "subversive organizations" and deemed "subversive persons" ineligible for employment. Further, the state legislature granted the attorney general to investigate such individuals and organizations. In light of this law, the state deemed University of New Hampshire professor Paul M. Sweezy deemed a subversive person due to his suspected involvement in the

[17] Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218 (1957).

Communist Party. Sweezy denied any involvement with the Party in his testimony before the attorney general; however, when asked about a potentially "subversive" speech he had given at his university, he refused to disclose any additional information. The attorney general did not have the authority to hold Sweezy in contempt, so he decided to refer the case to the New Hampshire Supreme Court in order to issue a contempt citation.

The case eventually reached the Supreme Court, where the contempt citation was overturned on the grounds that such a sanction violated "academic freedom and political expression." Chief Justice Earl Warren wrote in the majority decision that legislative investigations have the potential to encroach upon individual liberties, especially when committees are granted "broad and ill-defined jurisdiction."[18] Warren continued that the New Hampshire legislature had not properly outlined its definition of "subversive" persons or organizations; further, the lower court erred in its lack of consideration of First Amendment rights in the academic and political spheres. In addition to Warren's majority opinion, Justice Felix Frankfurter authored a now-famous concurrence, citing a report on Open Universities in South Africa in order to define the concept of academic freedom:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[19]

Frankfurter's "four essential freedoms" were further developed by subsequent court precedent, eventually giving way to the two modern branches of academic freedom—individual and institutional—that are now widely recognized by the courts.

A. Individual and Institutional Academic Freedom

Individual academic freedom concerns the right of individual faculty members to teach his or her curriculum without excessive intervention from university officials or government agencies. This doctrine is grounded in a guidance statement issued by the American Association of University Professors (AAUP) and the Association of American Colleges (AAC) in 1940, which stated that teachers are entitled to full freedom in research and publication of findings, subject to the adequate performance of their other academic duties, freedom in the classroom in discussing their subject save for religious restrictions or

[18] Sweezy v. New Hampshire, 354 U.S. 234.
[19] Id.

controversial matters, and recognition as "citizens, members of a learned profession, and officers of an educational institution," with the stipulation that their respective institutions will be judged by the ideas they teach.[20] The courts have repeatedly cited this type of academic freedom in order to justify the protection of university professors from government or faculty retaliation.[21]

In *Keyishian v. Board of Regents*, for example, faculty at the University of Buffalo became state employees when the school was inducted into the State University of New York system.[22] During the transition from private to public employment, faculty members at the school became subject to statutes meant to prevent the appointment of "subversive persons" to academic positions. When several faculty members refused to sign a statement saying that they were not and had never been Communists, they were either wrongly terminated or subject to non-renewal of their contracts. They then sued on the grounds that the "subversive persons" program violated the Constitution. When a three-judge federal court upheld the constitutionality of the program, appellants appealed to the Ninth Circuit, who ultimately ruled in their favor. Representing a 5-4 majority, Justice Brennan wrote in his opinion that the provisions through which New York State justified its policies were so vague that they infringed upon the First Amendment rights of academic employees. The Court held that the government could only regulate these rights with "narrow specificity," rather than vague, narrow requirements.

Institutional academic freedom, meanwhile, refers to the right of a university to determine its educational mission free from government intervention, whether departmental or legislative. This doctrine in particular is derived from Frankfurter's concurrence in *Sweezy,* specifically his reference to "what may be taught" and "how it shall be taught."[23] It is decidedly more complicated than its individual counterpart, as it ascribes First Amendment rights to the institution itself rather than the individuals it employs. Scholars and the courts have repeatedly sought to define the limits of institutional academic freedom, with a number of commentators asserting that this sort of freedom is "triggered only by those institutional

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[20] *1940 Statement of Principles on Academic Freedom and Tenure* ("1940 Statement") in *Policy Documents and Reports* 3 (AAUP, 1984) (*"1984 Red Book"*); see Appendix B, 53 L & Contemp Probs 407 (Summer 1990).

[21] See Sweezy v. New Hampshire 354 U.S. 234; Keyishian v. Board of Regents*,* 384 U.S. 998 384 U.S. 998, 86 S. Ct. 1921, 16 L. Ed. 2d 1012, 1966.

[22] Keyishian v. Board of Regents*,* 384 U.S. 998.

[23] See also Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., concurring): "The [academic] freedom of a university to make its own judgments as to education includes the selection of its student body."

actions that implicate their educational functions, which are subsumed under the 'four essential freedoms.'"[24]

Given their somewhat ambiguous nature, the concepts of institutional and individual academic freedom are best understood in conjunction with each other. As legal scholar Steven G. Poskanzer explains:

> … the courts' willingness to defer to [institutional] policies is in large part a consequence of their having been established or reviewed by duly constituted faculty bodies (e.g., course content is the province of curriculum committees; the overall level of academic rigor is ultimately traceable to decisions of faculty committees). In a very real sense, then, the institutional academic freedom recognized in many judicial opinions may be viewed as the sum of acts of individual faculty academic freedom.[25]

In light of Poskanzer's analysis, academic freedom is inherently an extension of the individual right to free speech guaranteed by the First Amendment. One cannot, therefore, restrict the speech of an academic institution without triggering the First Amendment rights of its faculty members.

B. Violation of the Four Essential Freedoms

The Department's action towards Duke/UNC's CMES program marks a violation of the First Amendment principle of academic freedom. The Department of Education has largely failed to statutorily justify the aforementioned actions through Title VI; instead, it has attempted to twist an otherwise broad guideline into justification for a drastic case of ideological policing. In doing so, the ED has infringed upon the "four essential [academic] freedoms" outlined in Frankfurter's concurrence in *Sweezy v. New Hampshire*. The ED's grievances against Duke/UNC's Middle Eastern Studies program are largely ideological differences masked with faulty legal reasoning, posing an inherent threat to the First Amendment right of an academic institution "to determine for itself…what may be taught [and] how it shall be taught."[26]

C. Academic Freedom, the Courts, and Middle Eastern Studies at Duke and UNC

[24] Donna R. Euben, *Academic Freedom of Professors and Institutions,* American Association of University Professors, https://www.aaup.org/issues/academic-freedom/professors-and-institutions (last visited November 24, 2019).

[25] Steven G. Poskanzer, *Higher Education Law: The Faculty* (Johns Hopkins University Press, 2002).

[26] Sweezy v. New Hampshire, 354 U.S. 234.

Should a civil action be initiated on behalf of Duke and UNC, the courts would likely condemn the ED's statement on the grounds that it violates the First Amendment. This conclusion follows decades of precedent in which the courts have protected academic freedom following *Sweezy*, including *Keyishian v. Board of Regents*.[27] The above-mentioned "narrow specificity" standard established in this case set a precedent that ideological differences do not justify the restriction of academic freedom; further, federal encroachment on First Amendment rights requires, to echo the language used in Justice Brennan's majority opinion, *narrow* and *specific* justification. The Court would likely find that the Department of Education fails to meet the *Keyishian* standard in its attempts to restructure Duke/UNC's Middle Eastern Studies program, as its grievances are far too vague to trump the First Amendment.

More recently, *Demers v. Austin* expanded upon existing precedent when it reinforced First Amendment protections for academic speech by university faculty members.[28] When appellant Professor Demers began to take issue with certain practices adopted by his employer, the Edward R. Murrow School of Communication at Washington State University (WSU), he published two articles that sought to bring attention to and propose solutions for issues within the institution. Following alleged retaliation by the university in the form of low performance evaluations and an unwarranted internal audit, Demers sued the university on the grounds that they violated his First Amendment rights. When his claim was dismissed, he appealed to the Ninth Circuit. Citing an *amicus* brief filed by the AAUP, the Ninth Circuit ruled that employee speech in the form of "teaching and writing on academic matters" was protected by the First Amendment.[29]

The court reached this conclusion by applying the holding in *Pickering v. Board of Education*.[30] When a school teacher named Marvin Pickering wrote a letter to the editor at the Lockport Herald criticizing the school board's handling of a recent proposal to increase school taxes, claiming that the board had a tendency to wrongly allocate funds towards athletics instead of academics, Pickering was terminated on the grounds that his public criticism was "detrimental to the efficient operation and administration" of the school. Pickering sued, claiming that his First Amendment rights were violated, and the case was

[27] Keyishian v. Board of Regents, 384 U.S. 998.
[28] Demers v. Austin, 729 F.3d 1011, 2013 U.S. App. LEXIS 18355, 36 I.E.R. Cas. (BNA) 849, 2013.
[29] Id.
[30] Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811, 1968.

appealed to the Supreme Court. Justice Thurgood Marshall wrote an 8-1 majority opinion that Pickering's firing constituted a violation of the First Amendment right to free speech. While the Court conceded that speech was not protected if it contained purposefully false information, the decision nevertheless established that teachers may speak on "issues of public concern" without fear of retaliation.[31]

The Duke/UNC controversy differs from *Demers* in that it concerns government retaliation against an institution and not institutional retaliation against an individual. In light of the intersectional nature of individual and institutional academic freedom, however, the *Pickering* standard could still be applied here. The subjects discussed in Duke/UNC's consortium are matters of "public concern" whose discussion in an academic setting promotes the "security, stability, and economic vitality of the United States in a complex global era."[32] In today's social and cultural climate, it is more important than ever that American students are taught about other cultures, specifically those in the Middle East where diplomatic efforts are crucial. The *Demers* decision suggests that federal courts, too, would deem the Department's action contrary to national interests.

IV. Ideological Bias in the Department of Education

The constitutional and statutory failings of the Department's recent threats to withhold funding from Duke and UNC pose a glaring question: why would the Department of Education go to such lengths to defund this particular program? The answer lies in the ED's recent history of aggression towards Middle Eastern studies programs in general, particularly ones that fail to portray Israel in a positive light.[33] This effort has largely been headed by civil rights chief Kenneth L. Marcus, who, according to a *New York Times* article on the Duke/UNC conflict, "has waged a yearslong campaign to delegitimize and defund Middle East studies programs that he has criticized as 'rife with anti-Israel bias.'"[34]

Marcus was a vocal critic of the Title VI program years before his appointment to the Department of Education. In 2014, Marcus wrote in an op-ed for *The Hill* that Title VI funds were being used to "support biased and academically worthless programming on

[31] Id.
[32] Id.; 20 U.S.C. 1121, 601(a)(1-4).
[33] Green, *supra* note 1.
[34] Id.

college campuses," citing the "intellectual vapidity" of such programs.[35] The language employed in this article bears a remarkable similarity to that of the Department's September letter to the consortium at Duke and UNC, suggesting that Marcus's crusade against Middle Eastern studies programs long predates the Trump administration. Additionally, recent years have seen a trend in recasting the tone of school curricula concerning the Middle East in relation to Israel. In the fall of 2018, the Texas State Board of Education made the decision to revamp its K-12 social studies curriculum. Among the changes made was a reconsideration of the root cause of conflict in the Middle East, which Texas schools now teach was the "Arab rejection of the State of Israel."[36]

Advocates on both sides of the issue have voiced their concerns regarding the clear political leanings of the ED. Miriam Elman, a Syracuse University professor who has openly opposed the Boycott Israel movement during her tenure as executive director of the student advocacy group Academic Engagement Network, said of the Duke/UNC controversy: "What [the ED is] saying is, 'If you want to…show an unbalanced view of the Middle East, you can do that, but you're not going to get federal taxpayer money."[37] Such brazen departmental action, she continued, should be a "wake-up call."[38]

Tallie Ben Daniel, the director of research and education at the liberal advocacy group Jewish Voices for Peace, said that the threat of sanctions against Duke and UNC marked an attempt by the Trump administration to "enforce a neoconservative agenda onto spaces of academic inquiry and exploration" and censor a curriculum she called "rich and diverse."[39] Palestinian advocacy groups have also voiced their opposition to the measure. Zoha Khalili, a staff lawyer at Palestine Legal, said of the Department: "They really want to send the message that if you want to criticize Israel, then the federal government is going to look very closely at your entire program and micromanage it to death…[it] sends a message to Middle Eastern studies programs that their continued existence depends on their willingness to toe the government line on Israel."[40]

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[35] Kenneth L. Marcus, *Title VI and campus bias,* THE HILL (September 19, 2014), https://thehill.com/blogs/congress-blog/education/218110-title-vi-and-campus-bias.

[36] Jonna Perillo, *Once again, Texas's board of education exposed how poorly we teach history,* THE WASHINGTON POST (September 21, 2018), https://www.washingtonpost.com/outlook/2018/09/21/once-again-texass-board-education-exposed-how-poorly-we-teach-history/.

[37] Green, *supra* note 1.

[38] Id.

[39] Id.

[40] Id.

The existence of such bias is not in itself a reason to block the ED's attempts to defund Duke/UNC's consortium or Middle Eastern studies programs as a whole, but it certainly bears examination when such drastic measures are so scarcely supported by constitutional or statutory law. Further, the specific grievances advanced in response to a vague statute such as Title VI suggest that the ED is attempting to project their ideology onto a broad guideline originally intended to facilitate broad and diverse academic interests. In light of First Amendment doctrine, court precedent, and Title VI itself, this sort of action is unacceptable.

Conclusion

The Department of Education's efforts to defund the consortium offered by Duke and UNC—as well as the presence of such a clear ideological bias in the Department as a whole—is troubling. Such blatant government intervention in university curricula when masked by supposed violations of federal funding mandates conflicts with the First Amendment right to academic freedom and fails to accurately reflect the standards set by statutes such as Title VI. Further, the existence of ideological leanings in the Department calls their judgment into question, further delegitimizing their attempts to alter collegiate course offerings.

The ED's attempt to interfere in the Duke/UNC Middle Eastern Studies program is unjustifiable. Should the courts have occasion to rule on this issue, or another like it, they would likely find that the ED overstepped its bounds, setting an important precedent that would prevent such action in the future. Furthermore, the legislative and executive branches should make statutory provisions to ensure that government agencies do not overstep their bounds in this way again.

It is, after all, the prerogative of academics and their institutions to inquire, speculate, and reflect on their fields of study as they see fit. Justice Frankfurter said as much in his landmark concurrence in *Sweezy,* upon which the foundation of academic freedom is built. "Political power," he wrote, "must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."[41] As this article has established, the reasons for this particular departmental intrusion are neither.

[41] Sweezy v. New Hampshire, 354 U.S. 234.

The Legality of Genetic Modification in Human Embryos

Nicolette Joe

Introduction

Soon parents may have the ability to choose the physical traits and inherent characteristics of their children like their eye color, hair color, athleticism, and intelligence. The prospect of genetically engineered designer babies is no longer science fiction or a far-off possibility. It is something that doctors and scientists can currently do.[1] New genetic technology, such as CRISPR/Cas9, enables doctors to directly modify the genes of a singular embryo, allowing for the selection of certain qualities and characteristics of the individual.[2] Therefore, modern day genetic technologies have the capacity to allow parents to determine the sex, eye color, hair color, height, etc. of their offspring. Although this choice is possible, it is not yet available in the United States since there have been no trials of genetic modification in human embryos in the country.[3] Regardless, with continuous technological advancement and increasingly simplified and less expensive genetic engineering tools, gene therapy being carried out in human embryos in the United States is more feasible than ever before.[4] However, the power that new genetic modification technologies wield in being able to permanently alter the way in which we procreate does not come without a slew of moral, ethical, legal, and societal implications, as well as safety concerns. For ethical reasons, there

[1] Elyse Whitney Grant, *Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach*, 61 Hastings L.J. 997, 1004 (2010).

[2] F. Ann Ran et al., *Genome Engineering using the CRISPR-Cas9 system,* Nature Protocols, (October 14, 2013), https://www.nature.com/articles/nprot.2013.143#citeas

[3] Jocelyn Kaiser, *Update: House Spending Panel Restores U.S. Ban on Gene-Edited Babies,* Science Magazine, (June 4, 2019), https://www.sciencemag.org/news/2019/06/update-house-spending-panel-restores-us-ban-gene-edited-babies

[4] Heidi Ledford, *CRISPR, the disruptor,* 522 Nature 20, 24 (2015).

is currently a ban on the use of federal funding for research involving the genetic modification of a human embryo in the United States.[5]

While genetic engineering is capable of eradicating genetic diseases by deleting or modifying the gene for the disease within the embryo, the notion of genetic engineering being used for cosmetic or non-therapeutic reasons has raised ethical concerns.[6] People who oppose genetic modification in human embryos are concerned about the consequences. Some fear that genetic modification technologies will perpetuate inequality because only wealthy individuals will be able to afford gene therapy treatment for their offspring.[7] Without any existing legislation in the United States explicitly protecting or outlawing genetic modification, genetic engineering appears to have largely outpaced policymakers. However, should the legality of genetic engineering in human embryos be questioned in a United States court of law, precedent for both parental and procreative autonomy has established that individuals have the right to choose how to start a family on their own terms. Consequently, the right to the genetic modification of one's embryos ought to be considered a fundamental right in accordance with the framework established by precedential case laws facilitating procreative and parental autonomy.

I. The Usage and Capabilities of Genetic Engineering Technology

A. Reproductive Technology

There are many types of technologies that can carry out genetic modification. Two examples of earlier types of genetic engineering tools are Transcription Activator-Like Nucleases (TALENs), and its predecessor, Zinc Finger Nucleases (ZNFs). Both ZNFs and TALENs consist of different DNA binding and DNA cleaving mechanisms that enable them to target any sequence of genes and make site-specific cuts in the DNA so that the existing genome can be altered.[8] ZNFs and their application to genome editing were

[5] *What are the Ethical Issues Surrounding Gene Therapy?* National Institute of Health, (Dec. 10, 2019), https://ghr.nlm.nih.gov/primer/therapy/ethics

[6] Stephen Baird, *Designer Babies: Eugenics Repackaged or Consumer Options?,* 66 The Technology Teacher 7, 12, (2007).

[7] *Id.*

[8] Michael Boettcher et al., *Choosing the Right Tool for the Job: RNAi, TALEN, or CRISPR*, 58 ScienceDirect 575, 575-585 (2015).

discovered in the 1990s.[9] TALENs was introduced as an alternative to ZNFs in 2007.[10] TALEN was an improvement of ZNFs because it was less expensive and easier to use.[11] CRISPR-Cas9 is the most recently developed genome editing tool.[12] While all three types of gene editing tools cut DNA, they do so by using different mechanisms with varying levels of complexity and specificity.[13] CRISPR-Cas9 has become the most prominent form of gene editing because it is an improvement of both of the aforementioned types of gene editing technology due to not only its increased specificity and efficiency, but also its increased simplicity and cost-effectiveness.[14]

CRISPR-Cas9 debuted in 2012, and scientists have argued that it holds the key to curing most of known genetic diseases, which number over 6,000.[15] CRISPR-Cas9 is made up of a DNA cutting protein called Cas-9 and an RNA molecule known as a single guide RNA that can recognize the sequence of desired genes to be edited.[16] Bound together, the Cas9 protein and guide RNA form a Cas9 complex.[17] This complex can identify and cut out specific sections of DNA, allowing CRISPR-Cas9 to eliminate designated genes.[18] Once the DNA is cut, scientists can edit the existing genome by modifying, deleting, or inserting new sequences.[19] Therefore, CRISPR-Cas9 enables scientists to essentially perform a cut and paste within a gene by cutting out the part of the gene that codes for the undesired characteristic and inserting code for the desired characteristic. In order to be able to accomplish the modification of a specific characteristic of an embryo, scientists must first identify the sequence within the embryo's DNA that corresponds to that characteristic.[20]

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[9] Marjorie A. Hoy, *Transposable-Element Vectors and Other Methods to Genetically Modify Drosophila and Other Insects,* 4 Insect Molecular Genetics 345, 345-361 (2019).

[10] Aaron Klug, *The Discovery of Zinc Fingers and Their Applications in Gene Regulation and Genome Manipulation,* 79 Annual Review of Biochemistry 213, 214 (2010).

[11] *Id.* at n.8

[12] *Id.* at n.8

[13] *Id.* at n.8

[14] *Id.* at n.8

[15] Tina Hesman Saey, *CRISPR Enters its First Human Clinical Trials,* 4 ScienceNews 196, (Aug. 14, 2019) https://www.sciencenews.org/article/crispr-gene-editor-first-human-clinical-trials

[16] Jennifer A Doudna, *The New Frontier of Genome Engineering with CRISPR-Cas9*, 346 Science Magazine 1077, https://science.sciencemag.org/content/346/6213/1258096.abstract

[17] *Id.*

[18] *Id.*

[19] Michael Boettcher et al., *Choosing the Right Tool for the Job: RNAi, TALEN, or CRISPR*, 58 ScienceDirect 575, 575-585 (2015).

[20] Tina Hesman Saey, *CRISPR Enters its First Human Clinical Trials,* 4 ScienceNews 196, (Aug. 14, 2019) https://www.sciencenews.org/article/crispr-gene-editor-first-human-clinical-trials

Then they must design a specific RNA to target the identified sequence so that it can be cut out by the Cas9 complex and modified to produce the desired characteristic in the embryo.[21]

With CRISPR-Cas9 technology, scientists are not only able to choose the characteristics and qualities of an embryo like physical traits, disposition, athleticism, etc., but they are also capable of revolutionizing the study, treatment, and ultimate elimination of both common and rare genetic diseases.[22] The eradication of hereditary diseases is possible because of germline engineering.[23] There are two different types of genetic engineering: somatic and germline, which are differentiated because germline genetic engineering targets germline cells and somatic genetic engineering targets somatic cells.[24] Somatic cells are the body cells that are not sex cells, meaning sperm or egg cells.[25] Mutations in somatic cells will affect the embryo or the individual, but they will not be passed onto offspring.[26] Therefore, any type of modification conducted through gene editing technology targeting a somatic cell would not affect offspring. On the contrary, a germline is the sex, or egg and sperm, cells of a sexually reproducing organism.[27] Thus, the modification of germ cells via genetic engineering would not only affect the embryo, but it would also affect the embryo's future offspring.[28] The new gene is then replicated in all future cells and is ultimately expressed in the offspring.[29]

Genetic modification is not the only technology that allows for the prevention of genetic diseases or selection of an embryo's characteristics. Previously, preimplantation genetic diagnosis (PGD) was the only option for any type of embryo characteristic

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[21] *Id.*

[22] Thomas Gaj et al., *ZFN, TALEN and CRISPR/Cas-based Methods for Genome Engineering,* 31 Trends in Biotechnology 397, 400 (2013).

[23] David Baltimore et al., *A Prudent Path Forward for Genomic Engineering and Germline Gene Modification,* 348 Science Magazine 36, 36-38 (2015).

[24] Paul McDonough, *The Ethics of Somatic and Germline Gene Therapy,* 816 Annals of the New York Academy of Sciences 378, 378-382 (1997).

[25] *Somatic Cells,* National Human Genome Research Institute, genome.gov/genetics-glossary/Somatic-Cells

[26] Paul McDonough, *The Ethics of Somatic and Germline Gene Therapy,* 816, Annals of the New York Academy of Sciences, 378, (1997).

[27] *Germ Line,* National Human Genome Research Institute, https://www.genome.gov/genetics-glossary/germ-line

[28] Paul McDonough, *The Ethics of Somatic and Germline Gene Therapy,* 816 Annals of the New York Academy of Sciences 378, 378-382 (1997).

[29] *Id.*

selection.[30] PGD is used as an early form of prenatal diagnosis in the United States.[31] Embryos created in vitro are analyzed and screened for genetic defects, and only the embryos free of genetic defects are placed in the womb.[32] The primary use of PGD is to screen the embryos of individuals with a high risk of having a genetic disease before implanting the embryo so that the individual has the choice of whether or not to implant the embryo based on the probability that the offspring will be born with or develop a genetic disease.[33] Like CRISPR, PGD allows for the selection of an embryo's characteristics, such as gender.[34] The 'spare' or 'affected' embryos created in vitro for PGD screening are either disposed of or used for research[35]. Unlike PGD, CRISPR never involves the discarding of viable embryos because the technology modifies a single embryo, eliminating any moral dilemma that some may have over the wasting of a viable embryo.[36]

B. Gene Editing Technology in Practice

Although doctors and scientists currently have the technological capabilities to 'design' babies for parents, there are not facilities that offer these services.[37] However, in 2009, the Fertility Institutes clinic in Los Angeles, California offered prospective parents the opportunity to select cosmetic traits of their children, such as hair, eye, and skin color through the use of PGD.[38] About a month later, the clinic was forced to stop offering these services due to a flood of opposition.[39] The use of PGD is unregulated in the United States

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[30] Michelle Bayefsky, *Who Should Regulate Preimplantation Genetic Diagnosis in the United States?*, AMA J. Ethics, (Dec. 2018). https://journalofethics.ama-assn.org/article/who-should-regulate-preimplantation-genetic-diagnosis-united-states/2018-12

[31] *Id.*

[32] Bernard Dickens, *Ethical and Legal Aspects of Noninvasive Prenatal Genetic Diagnosis,* Intl. J. of Gynecology and Obstetrics, (Nov. 14, 2013) https://obgyn.onlinelibrary.wiley.com/doi/abs/10.1016/j.ijgo.2013.11.001%4010.1002/%28ISSN%291879-3479.ELIRH

[33] *Id.*

[34] *Id.*

[35] Kathryn Ehrich et al., *The Embryo as Moral Work Object: PDG/IVF Staff Views and Experiences,* 5 Sociology of Health and Illness 772, (2008).

[36] Tandice Ossareh, *Would You Like Blue Eyes With That? A Fundamental Right to Genetic Modification of Embryos,* 117, Columbia L. Rev. 3, (2017).

[37] Jocelyn Kaiser, *Update: House Spending Panel Restores U.S. Ban on Gene-Edited Babies,* Science Magazine, (June 4, 2019), https://www.sciencemag.org/news/2019/06/update-house-spending-panel-restores-us-ban-gene-edited-babies

[38] Philip Sherwell, *Designer Baby Row Over Clinic That Offers Eye, Skin, and Hair Colour,* The Telegraph, (Feb. 28, 2009), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/4885836/Designer-baby-row-over-clinic-that-offers-eye-skin-and-hair-colour.html

[39] *Id.*

and fertility clinics currently use the technique to offer parents the ability to make a sex selection and prevent disease.[40]

Currently, trials in the United States using CRISPR-Cas9 are only being carried out in somatic, adult cells, not embryos.[41] In 2019, clinical trials in the United States began using CRISPR-Cas9 on human patients with blood disorders and cancer.[42] The Dickey-Wicker Amendment is an amendment that has been attached to the appropriations bills for the Departments of Health and Human Services, Labor, and Education each year since 1996.[43] The Dickey-Wicker Amendment prevents the federal funding of work destroys human embryos or creates them for research purposes.[44] Research and trials of genetic modification of embryos was made increasingly difficult by the inclusion of language in the 2016 fiscal year spending bill for the US Food and Drug Administration (FDA).[45] Section 736 of the bill, H.R. 5054 "prohibits the FDA from acknowledging applications for an exemption for investigation use of a drug or biological product in research in which a human embryo is intentionally created or modified to include a heritable genetic modification."[46] Similarly, language in the spending bill for the National Institute of Health (NIH) restricts its usage of federal funds for the funding of research involving genetic medication in human embryos.[47] The NIH justifies the restriction of clinical trials of genetic modification in human embryos by highlighting the ethical concerns that arise from the person who would be affected by the genetic modification being unable to choose whether or not to have the treatment because they are not yet born.[48] In light of recent advancements in gene therapy, such as the development of CRISPR, the FDA released a new statement on its website explaining:

> FDA considers any use of CRISPR/Cas9 gene editing in humans to be gene therapy. Gene therapy products are regulated by the FDA's Center for

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[40] Michelle Bayefsky, *Who Should Regulate Preimplantation Genetic Diagnosis in the United States?*, AMA J. Ethics, (Dec. 2018). https://journalofethics.ama-assn.org/article/who-should-regulate-preimplantation-genetic-diagnosis-united-states/2018-12

[41] Tina Hesman Saey, *CRISPR Enters its First Human Clinical Trials,* 4 ScienceNews 196, (Aug. 14, 2019) https://www.sciencenews.org/article/crispr-gene-editor-first-human-clinical-trials

[42] *Id.*

[43] Katherine Harmon, *A 1996 Federal Budget Amendment Darkens the Future of Embryonic Stem Cell Research,* Scientific American, (Sep. 15, 2010), https://www.scientificamerican.com/article/stem-cell-research-funding-amendment/

[44] H.R. 2880, 104th Cong. § 128 (1996).

[45] H.R. 5054, 114th Cong. § 736 (2016).

[46] *Id.*

[47] Jocelyn Kaiser, *Update: House Spending Panel Restores U.S. Ban on Gene-Edited Babies,* Science Magazine, (June 4, 2019), https://www.sciencemag.org/news/2019/06/update-house-spending-panel-restores-us-ban-gene-edited-babies

[48] *What are the Ethical Issues Surrounding Gene Therapy?* National Institute of Health, (Dec. 10, 2019), https://ghr.nlm.nih.gov/primer/therapy/ethics

> Biological Evaluation and Research (CBER). Clinical studies of gene therapy in humans require the submission of an investigational new drug application (IND) prior to their initiation in the United States, and marketing of gene therapy product requires submission and approval of a biologics license application (BLA).[49]

While the requirement of submission for clinical studies of gene therapy in humans implies openness to and potential approval of said trials in humans, the government still does not condone the usage of gene therapy in embryos for ethical reasons.[50] In the same statement, the FDA also made it clear that the sale of self-administered gene therapy kits is against the law, citing safety and risks as their justification.[51] Similarly, California passed the first law in the United States that directly regulates CRISPR/Cas9.[52] The bill, California Senate Bill 180, which is a consumer protection rule, makes it illegal to sell gene therapy kits in California unless they contain a warning saying not to use them on yourself.[53] The importance of this bill to the legality of genetic engineering lies in its justification for the restriction of the use of gene therapy in humans, which in this case is consumer safety. On the contrary, the NIH justification for the regulation on CRISPR/Cas9 in embryos is ethics. The new bill establishes a juxtaposition that draws upon the debate of embryonic rights.

II. Landmark Procreative, DNA Ownership, and Parental Rights Cases

A. Right to Abortion

Procreative, parental rights, and DNA ownership cases establish an individual's right to make decisions about their genetic material and on the behalf of their future child. While there is no legal precedent explicitly protecting or outlawing the right to use gene editing technologies on an embryo, *Roe v. Wade* has set a precedent that has established a woman's right to make autonomous decisions about her pregnancy.[54] The case began in 1970 when

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[49] *Information About Self-Administration of Gene Therapy,* United States Food and Drug Administration, (Nov. 21, 2017), https://www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/information-about-self-administration-gene-therapy

[50] *What are the Ethical Issues Surrounding Gene Therapy?* National Institute of Health, (Dec. 10, 2019), https://ghr.nlm.nih.gov/primer/therapy/ethics

[51] *Information About Self-Administration of Gene Therapy,* United States Food and Drug Administration, (Nov. 21, 2017), https://www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/information-about-self-administration-gene-therapy

[52] Antonio Regalado, *Don't Change Your DNA at Home, Says America's First CRISPR Law,* MIT Tech. Rev., (Aug. 9, 2019), https://www.technologyreview.com/s/614100/dont-change-your-dna-at-home-says-americas-first-crispr-law/

[53] California Senate Bill 180 § 1 (2019).

[54] Roe v. Wade, 410 U.S. 113, 164-65 (1973).

the plaintiff, referred to by the fictional name of "Jane Roe," incited federal action against Henry Wade, the district attorney of Dallas Country, Texas, where Roe resided, on the basis that a women should have the absolute right to terminate her pregnancy in any manner and regardless of the stage of pregnancy.[55] The Supreme Court ultimately ruled unduly state regulation of abortion to be unconstitutional.[56] As such, the *Roe v. Wade* decision established women's a fundamental right to procreative choice and right to choose.[57] The right to genetically modify an embryo should fall squarely within the same framework and logic allowing a woman to terminate her pregnancy. The procreative liberty granted by this decision reinforces other choices regarding the fate of embryos since this case recognizes that embryos are not human beings and therefore are not privy to the rights of personhood[58]. The assertion that embryos are not human beings bolsters the notion that gametes are yours since they are your genetic material. If a woman can walk into a clinic with an embryo in her uterus and have it surgically or medicinally removed, she should be able to walk into a clinic with an embryo in her uterus and choose to have it undergo genetic modification. It is the very establishment of ownership and ability to make decisions regarding the embryo that is foundational to the argument that individuals have the right to genetically modify their embryos.

B. DNA Ownership

Despite the implications of *Roe v. Wade* on the question of personhood status of an embryo, there is no case "that holds that a fetus is a person within the meaning of the Fourteenth Amendment." [59] Courts have typically chosen to define embryos as "life, property, or an amalgamation of the two."[60] However, with the rise of people choosing to freeze their embryos, courts have been confronted with ownership disputes regarding the fate of frozen embryos, especially in the case of divorce. For example, in the 2008 case *Dahl v. Angle,* the Oregon State Appeals Court found frozen embryos to be considered "personal property" in divorce proceedings.[61] A plethora of court cases have been instituted over the

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[55] *Id.* at 113 n.49
[56] *Id.* at 164 n.49
[57] *Id.* at 128 n.49
[58] Roe v. Wade, 410 U.S. 113, 156-57 (1973).
[59] *Id.* at 157 n.49
[60] Tracy J. Frazier, *Comment, Of Property and Procreation: Oregon's Place in the National Debate over Frozen Embryo Disputes*, 88 Or. L. Rev. 931, 932, 936 (2009).
[61] In re Marriage of Dahl & Angle, 194 P.3d 834, 838–39 (Or. Ct. App. 2008).

allocation or fate of frozen embryos in custody disputes, with contract law often providing resolution to the matter without the personhood status of the embryo being questioned at all.[62,63,64,65] The act of resolution of ownership disputes over frozen embryos being resolved via contract law demonstrates that embryos are being treated as property rather than persons.

While United States jurisprudence has yet to provide a concrete answer to the question of whether or not we own our bodies, DNA ownership cases that have passed through the courts have set precedent for the ownership of some of the bits and pieces of our bodies.[66] In 2007, *Washington University v. Catalona* saw the court faced with an ownership dispute over donor tissues between Washington University in St. Louis, where the research using the donor tissues was being conducted, and William Catalona, a researcher formerly employed by Washington University who was moving his research to another university and wanted to take the tissues with him.[67] The court ultimately ruled in favor of Washington University, citing contract law and the terms of the consent documents signed when the patients originally released their tissue.[68] The court's ruling in *Washington University v. Catalona* establishes that biological material is the property of the person whose body it is from and that person is able to decide the fate of their biological material.[69] This idea translates to genetic modification in embryos as an embryo is the biological material of a person(s) and they should be able to decide the fate of their biological material.

C. Procreative Rights

In the 1972 case *Eisenstadt v. Baird,* William Baird had given a vaginal foam contraceptive to a woman following one of his lectures to students on contraceptives.[70] Baird was charged with a felony to distribute contraceptives to unmarried men and women because under Massachusetts law, it was a felony for anyone except a registered physician or pharmacist to distribute them and only married couples could obtain contraceptives.[71] Baird

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[62] A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000).
[63] Kass v. Kass, 696 N.E.2d 174, 182 (N.Y. 1998).
[64] Davis v. Davis, 842 S.W.2d 588, 589, 604–05 (Tenn. 1992).
[65] Roman v. Roman, 193 S.W.3d 40, 54–55 (Tex. App. 2006).
[66] R. Alto Charo, J.D., *Body of Research—Ownership and Use of Human Tissue,* N. Engl. J. Med., (Oct. 12, 2006)
https://www.nejm.org/action/showPdf?downloadfile=showPdf&doi=10.1056/NEJMp068192&loaded=true
[67] Washington University v. Catalona, 490 F.3d 667 (8th Cir. 2007).
[68] *Id.* at 676 n.58
[69] *Id.* at 675 n.58
[70] Eisenstadt v. Baird, 405 U.S. 438, 438 (1972).
[71] *Id.* at 438 n.61

was also not an authorized provider.[72] The court ultimately struck down the Massachusetts law and Justice William J. Brennan wrote: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[73]

Eisenstadt v. Baird sets a precedent establishing procreative autonomy of the mother in her choice of whether to reproduce or not reproduce through the usage and availability of contraceptives.[74] Justice William J. Brennan's words help establish the mother's right to privacy from the government and government intrusion in regard to her own personal reproductive matters[75]. While Justice William J. Brennan's stance on privacy and government intrusion was referring to the use of contraceptives, genetic modification technology like CRISPR/Cas9 had yet to be discovered. However, it is arguable that the principles, specifically procreative rights and a right to privacy regarding procreation, that Justice William J. Brennan maintained when delivering the opinion of the court extend to embryo modification because the *Eisenstadt v. Baird* decision asserted that when it comes to procreation, individuals have the right to choose on their own terms whether or not to start a family free from government intrusion[76]. The existence of new genetic technology should not change the fact that how and when one procreates in a way that they deem right for themselves and their future family is not government business.

D. Parental Autonomy

The Fourteenth Amendment of the United States Constitution establishes a parent's rights to make decisions for their child, who is considered a full person.[77] Therefore, individuals should have the right to make decisions on the behalf of their genetic material, the embryo, which is not universally recognized amongst the courts as having personhood status and has even been considered personal property in the aforementioned frozen embryo custody dispute cases. In demonstrating the vast extent to which parents can make decisions on the behalf of their children, this article seeks to promulgate the undeniability that

[72] *Id.* at 438 n.61
[73] *Id.* at 453 n.61
[74] *Id.* at 453 n.61
[75] *Id.* at 453 n.61
[76] *Id.* at 453 n.61
[77] U.S. Const. amend XIV § 1

individuals have the fundamental right to make decisions regarding the genetic modification of their embryo. Thus, emphasis on parental autonomy is not to liken an embryo to a child, but rather to counteract the FDA's reasoning that genetic modification in embryos is ethically problematic because the person who would be living with the modification has not yet been born and therefore cannot make a decision about the treatment.

The courts have long upheld parents' rights to make important decisions regarding the upbringing and future of their children. In the 1923 case *Meyer v. State of Nebraska,* the court declared a Nebraska statute prohibiting the teaching of any language other than English to students before they reached eighth grade to be unconstitutional on the grounds that it violated the Due Process Clause of the Fourteenth Amendment.[78] In an attempt to define the liberty guaranteed by the Fourteenth Amendment, the court "denotes not merely freedom from bodily restraint but also the right of the individual to…marry, establish a home and bring up children...and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[79] In reference to the right to bring up children, the decision of the court cited the statute's interference the ability of parents to control the education of their children as part of the reason for its unconstitutionality.[80]

A case that was decided a few years later in 1925, *Pierce v. Society of Sisters,* called into question the Compulsory Education Act of 1922, which required parents or guardians to send children between the ages of six and eighteen to public school instead of private school.[81] The court drew on *Meyer* to strike down this statute, also citing it as a violation of the liberty ensured by the Due Process Clause of the Fourteenth Amendment by finding that the statute violated the rights of parents to choose the type of education for their child.[82]

The court has also heard more recent cases, such as *Wisconsin v. Yoder*, which continues the history of established parental autonomy in the United States. The case, which was decided in 1972, saw members of the Old Order Amish religion who were convicted of violating Wisconsin's compulsory school attendance law by choosing to prepare their children for life in the rural Amish community rather than continuing to send to them to receive a formal education, arguing that the attendance law was a violation of their rights

[78] Meyer v. Nebraska, 262 U.S. 390, 319 (1923).
[79] *Id.* at 399 n.67
[80] *Id.* at 401 n.67
[81] Pierce v. Society of Sisters, 268 U.S. 510, 511 (1925).
[82] *Id.* at 534-35 n.67

under the Free Exercise Clause of the First Amendment.[83] The Court ruled in their favor, holding that the "fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children" outweighs state interest in universal education.[84] *Wisconsin v. Yoder* is an especially significant display of the expansiveness of parental rights as the decision of the Amish parents made important and definitive decisions about the futures of their children, namely, limiting the professional career prospects of their children by terminating their formal education before they have reached the age of sixteen. The decision to terminate formal education also assumes that the child will live out his or her life in accordance with the Amish ways.

While past court rulings have illustrated that parents' rights regarding the upbringing of their children is substantial, parental autonomy is not absolute. The doctrine of parens patraie, which was adopted from English common law, is used in the courts of the United States to give the state power to intervene if it is believed that a parent's decision is not in the best interest of their child's well-being.[85] The doctrine has been described as "declaring the state to be the ultimate guardian of every child."[86] In regard to genetic modification, there should be regulation in place to restrict cases in which an individual wants to make a decision about gene therapy treatment that is not in the best interest of their future child. However, a case like that should not enough to restrict access to genetic modification of embryos to all individuals, especially since many interested in the treatment for their embryos may want to act in the best interest of their children by eradicating fatal genetic diseases from the genomes of their embryos.

III. Protecting Access to Genetic Modification

A. FDA as an imperfect regulatory body of reproductive technologies

The ban on federal funding of genetic modification in embryos inhibits the ability of both the FDA to direct research and safety standards, limiting the research being done and lessening the likelihood of clinical trials being conducted. The FDA is an agency that

[83] Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

[84] *Id.* at 205 n.72

[85] Camela Steinke, *Parens Patriae,* The Encylopedia of Criminology and Criminal Justice, (Jan. 22, 2014), doi:10.1002/9781118517383.wbeccj351

[86] Raymond Chao, *Parens Patriae and the Juvenile Death Penalty,* 21 Children's Legal Rights Journal 21, (2001).

focuses on imposing safety regulations, not research ones.[87] Since the FDA was not designed to act as an ethics council for reproductive technologies, its blanket restriction of clinical trials of genetic modification in human embryos appears to fall outside of its purview and authority.[88] A regulatory body assembled to assess the moral and legal permissibility of reproductive technologies, not their safety, would be far better suited to determine research regulations. However, since no such body nor concrete laws regarding reproductive technologies currently exist, genetic modification is left unprotected and vulnerable to limiting state regulations. States like California, with its Senate Bill 180 placing restrictions on the use of gene therapy kits, have begun to inject themselves into the regulation of genetic modification technologies.[89] The best way to protect against state regulations of the technology surmounting to the point where genetic modification is nearly outright banned is for the right to genetic modification to be legitimized by the court. The right to choose genetic modification existing as both a parental and procreative choice and the court's historical protection of procreative and parental rights demonstrate that declaring genetic modification to be a fundamental right is well within the authority vested in the court. Furthermore, status as a fundamental right would ensure individuals access to the genetic modification of their embryos.

B. The Wellbeing of Society: Fear of Eugenics and Inequality

With the question of fundamental rights status addressed, the technology would still need to satisfy state regulations. One of the first and most important tests that genetic modification would have to pass would be that its usage does not interfere with the preservation of the well-being of society. Due to CRISPR/Cas9's unique ability to allow parents to select the hair, eye, skin color etc. of their future offspring, genetic modification technologies are capable of taking the place of sterilization in carrying out a form of modern-

[87] Committee on Ethical and Scientific Issues in Studying the Safety of Approved Drugs; Board on Population Health and Public Health Practice; Institute of Medicine, *Ethical and Scientific Issues in Studying the Safety of Approved Drugs,* National Center for Biotechnological Information, (May 1, 2012), https://www.ncbi.nlm.nih.gov/books/NBK200908/

[88] Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them from Harm?*, 57 Utah L. Rev. 88 (2004).

[89] Antonio Regalado, *Don't Change Your DNA at Home, Says America's First CRISPR Law,* MIT Tech. Rev., (Aug. 9, 2019), https://www.technologyreview.com/s/614100/dont-change-your-dna-at-home-says-americas-first-crispr-law/

day eugenics in America.[90] Because of America's dark past of state sanctioned sterilizations for the purpose of eugenics, this idea is not foundationless.[91] However, genetic modification and state sanctioned sterilization are two completely different things, as the genetic modification of human embryos would be done with the consent of a prospective parent and would not be forced or state sanctioned. Since the use of genetic modification on embryos would be decided by prospective parents, the occurrence of homogeneity in the form of eugenics would be unlikely. Eugenics would require and rely on the collective decision of every prospective parent who chooses to genetically modify their embryos for cosmetic purposes to choose the exact same characteristics for their future children, which is an unlikely occurrence in a country with an increasingly diversifying, multicultural and mixed-race.[92] Furthermore, focusing on cosmetic usage of the treatment negates the prerogative of parents who want to use the treatment to eradicate a genetic disease like Huntington's disease, which is fatal and has no cure, from the genome of their embryo.[93]

Another point of contention which may arise is that the technology will only be available to the wealthy, which will further exacerbate issues of inequality in the United States.[94] However, as the trend in the development of new genetic modification technologies has shown that from the development of ZNFs to TALEN and now CRISPR/Cas9, genetic modification tools are becoming increasingly less expensive.[95] It is likely that this pattern of cheapening costs will continue, so the affordability and therefore accessibility of genetic modification will only continue to broaden. Regardless, the argument of accessibility would not be enough to warrant state regulation, as there is widespread disparity in what parents can afford for their children, such as private tutors, athletics camps, and other paid for privileges that give their children a leg up. Thus, despite how unfair it may seem, financial inequality is a product of the United States political and economic system and it should not eclipse an individual's right to make a decision about their genetic material.

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[90] Stephen Baird, *Designer Babies: Eugenics Repackaged or Consumer Options?,* 66 The Technology Teacher 7, 12, (2007).

[91] Molly Ladd Taylor, *Saving Babies and Sterilizing Mothers: Eugenics and Welfare Politics in the Interwar United States,* 4 Social Politics: International Studies in Gender, State & Society 136, (1997).

[92] Tandice Ossareh, *Would You Like Blue Eyes With That? A Fundamental Right to Genetic Modification of Embryos,* 117, Columbia L. Rev. 3, (2017).

[93] Robert E. Pacifici, *An Overview of Energy Metabolism in Huntington's Disease as a Therapeutic Target,* 87 J. of Neurology, Neurosurgery & Psychiatry, (2016), https://jnnp.bmj.com/content/87/Suppl_1/A2.1

[94] Tandice Ossareh, *Would You Like Blue Eyes With That? A Fundamental Right to Genetic Modification of Embryos,* 117, Columbia L. Rev. 3, (2017).

[95] Thomas Gaj et al., *ZFN, TALEN and CRISPR/Cas-based Methods for Genome Engineering,* 31 Trends in Biotechnology 397, 397-405 (2013).

C. Well-Being of the Embryo: Diminishment of a Future Life

An important question for consideration in the potential court legalization of genetic modification is the question of whether or not individuals' autonomy over genetic modification should be unlimited and if not, to what extent it should be regulated. As was addressed in the discussion of the parens patraie doctrine in this article, the state should have the right to intervene in the case that an individual is making decisions regarding genetic modification treatment of an embryo that are not in the best interest of the health and well-being of the future child. Examples of such a case would be if the parent is using the technology to cause a negative impact on the health and well-being of the future child, which could include, but is not limited to sadistic or twisted experiments being carried out on the embryo.[96]

A patch of gray area exists in what is considered a threat to the health and well-being of a child. For example, a deaf, lesbian couple succeeded in ensuring that they would have a deaf child by seeking out a deaf sperm donor.[97] To increase their chances of having a deaf child, the women initially sought out a deaf sperm donor at a sperm bank but were told that deafness is exactly the type of characteristic that would disqualify a person from being able to be a sperm donor.[98] Rather than settle for a non-deaf sperm donor, the women were determined enough to have a deaf child that they decided to seek out their own deaf sperm donor and ultimately got a deaf friend to agree to donate his sperm.[99] Were the technology for genetic modification in embryos available, the women would have been able to choose any sperm donor and utilize a tool like CRISPR/Cas9 to modify the gene for hearing ability in the embryo to make it so that the future embryo would be deaf. This would be a controversial treatment because donor selection and use of PGD to choose an embryo with the gene for deafness are characteristic selection. Individuals would be making selections of either a donor or an embryo in order to have a deaf child, not actively using reproductive technology to create the gene within an embryo and make a child who would have otherwise had the ability to hear. The state could argue that actively and intentionally manipulating genetics to impose a disability upon a future life could permanent debilitate a future child

[96] Tandice Ossareh, *Would You Like Blue Eyes With That? A Fundamental Right to Genetic Modification of Embryos,* 117, Columbia L. Rev. 3, (2017).

[97] M. Spriggs, *Lesbian Couple Create a Child Who is Deaf like Them,* 28 J. Med. Ethics 283, (2002).

[98] *Id.* at 283 n.86

[99] *Id.* at 283 n.86

and their opportunities for profession and personal endeavors in the future.[100] Furthermore, genetic modification could impose pain and suffering on the future child that would not have otherwise been experienced. This would rest the burden of weighing an individual's interest in the potential diminishment of an embryo against the state's interest in protecting the embryo.[101] Many members of the deaf community do not consider deafness to a be a disability, instead recognizing it as a cultural identity.[102] Consequently, many want their children to share in their culture. Therefore, the burden on the court would lie in the establishment of what is considered to be a diminishment of a future life. While it is not to say that there should be no regulation on the use of genetic modification in embryos, the extent to which genetic modification technology should be regulated on the basis of the diminishment argument is beyond the scope of this article. However, complete restriction of access to the technology would have to be found unconstitutional and in violation of the Due Process Clause of the Fourteenth Amendment.[103]

D. Safety Concerns

A concern that the FDA and states may have with genetic modification technology is the safety of the treatment. There were concerns about the research and testing of vaccines, antibiotics, organ transplantation, blood transfusions, and even in vitro fertilization until recently.[104] Safety concerns will always exist at the forefront of pioneering new medical, biological, and reproductive technologies. As always, there is never a safety guarantee when testing new reproductive technologies, but speculative safety concerns have never stood in the way of biological and medical progress in the past.[105] Therefore, safety concerns should not be substantive enough to halt research and testing of genetic modification technologies now.

Conclusion

While the technological advancement of reproductive technology like genetic modification has outpaced the development of the regulatory bodies and laws that should

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[100] Tandice Ossareh, *Would You Like Blue Eyes With That? A Fundamental Right to Genetic Modification of Embryos,* 117, Columbia L. Rev. 3, (2017).

[101] *Id.*

[102] M. Spriggs, *Lesbian Couple Create a Child Who is Deaf like Them,* 28 J. Med. Ethics 283, (2002).

[103] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[104] Nicole Baffi, Comment, The Good, the Bad, and the Healthy: How Spindle-Chromosomal Complex Transfer Can Improve the Future, 74 Alb. L. Rev. 361, 379 (2010/2011).

[105] *Id.* at 379 n.93

be overseeing and regulating its usage, if and when the an individual's right to genetic modification is challenged, the Court should find that one has a fundamental right to the genetic modification of their embryos. Procreative and parental rights have been historically established and protected by the court. Additionally, the Due Process Clause of the Fourteenth Amendment establishes a legal framework that legitimizes the fundamental right to genetically modified embryos. While a few questions about ethical usage of the treatment may linger, this article finds no reason substantive enough for the imposition of a ban or restriction on the use of the technology. While the ability to re-write genetic code in the human genome and make decisions about any human characteristic is unfathomably power, it is easy to focus on the negative uses of the technology. However, it is important not to forget that genetic modification has the power to help individuals have healthy children and choose to start a family in a way that is meaningful to them and they should have the right to do so.

A Call for the Implementation of Comprehensive Data Privacy Federal Legislation

Gabriela Landolfo

Introduction

Several months prior to the 2016 U.S. presidential election, Cambridge Analytica, a British political consulting firm and supporter of the Trump campaign, harvested data from eighty-seven million American Facebook profiles. Cambridge Analytica subsequently utilized these profiles to create targeted advertisements that attempted to manipulate political opinions.[1] Alexander Nix, the CEO of Cambridge Analytica, Steve Bannon, the head of Trump's campaign, and former Vice President of Cambridge Analytica Aleksandr Kogan collaborated to develop a personality quiz advertised and accessed via Facebook.[2] The "thisisyourdigitallife" quiz enabled Cambridge Analytica to collect data from not only users who took the personality quiz, but also from the friends of the users who took the quiz. [3]

Following the receipt of this data, Nix, Bannon, and Kogan utilized Facebook's "Dark Post" feature to create personalized advertisements that targeted the 87 million illegally harvested profiles to exploited political biases and manipulated allegiances prior to the election. [4] Dark Post is a Facebook feature that allows external parties to create advertisements personalized for each individual user.[5] These customized advertisements thus target and manipulate the political opinions and loyalties of each user.[6]

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[1] Ikhlaq ur Rehman, *Facebook-Cambridge Analytica data harvesting: What you need to know*, Libraries at University of Nebraska-Lincoln (e-journal), 4 (2019), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=5833&context=libphilprac

[2] Id.

[3] Id.

[4] Id. at 6

[5] Id.

[6] Id.

Ultimately, Cambridge Analytica's unfettered access to millions of Facebook profiles revealed a lack of legal responsibility for social media companies to protect user data. Facebook's privacy policy, for example, states that their "systems automatically process content and communications you and others provide."[7] Thus, the policy does not include a clause necessitating consent prior to the dissemination of user data. Therefore, Cambridge Analytica's harvest of the Facebook profiles was conducted in accordance with Facebook's privacy policy.[8] Contrarily, Facebook users argued that Cambridge Analytica's collection of their data violated constitutional rights to privacy.

Ultimately, the Cambridge Analytica scandal revealed the gravity of both public ignorance of social media company abuse of user privacy rights and legislative inaction in response to that abuse. Thus, the question of the necessity to both implement data privacy rights and enforce adherence to those rights not only remains relevant, but critical to the protection of individual and national security. Therefore, the lack of comprehensive data privacy legislation in the U.S. jeopardizes the safety of digital personal data.

The testimony of Facebook CEO Mark Zuckerberg to the House of Representatives Committee on Energy and Commerce in April of 2018, provided after the the scandal, demonstrates that the lack of comprehensive data privacy legislation enables social media companies to both assume ownership over data posted on their platforms and exploit that data pursuant to business interests.[9] In his testimony, Zuckerberg claimed that although users own their individual content, a photo posted and shared with social media friends becomes the property of the user and all those with whom the post was shared, including Facebook Executives who control the platform.[10]

Zuckerberg's testimony regarding published content ownership parallels practices used by government agencies, such as police departments, to assert the authority to utilize information posted on social media or sent via text or phone message as incriminating evidence. Government agencies claim this authority on the basis that published content on social media or other internet platforms no longer maintains a "reasonable expectation to privacy"[11] *Katz v. United States*, (1967). Although the Fourth Amendment of the Constitution

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[7] Facebook Data Policy (Mar. 30, 2020), https://www.facebook.com/privacy/explanation

[8] Id.

[9] Facebook: Transparency and Use of Consumer Data: Hearing before the H. Comm. on Energy and Commerce, 115th Cong. (93) (statement of Mark Zuckerberg, CEO of Facebook).

[10] Id.

[11] Katz v. United States, 389 U.S. 374, 389 (1967).

guarantees this reasonable expectation of privacy,[12] hidden cell phone carrier policies and the obscurities of social media content ownership often negate the expectation of privacy in court.[13]

Therefore, this review responds to the demand for comprehensive internet data privacy legislation by first providing background of both the government and private company approach to protecting internet data privacy. Although the government and private companies recognize users' "reasonable expectation of privacy,"[14] both utilize invasive legislation such as the Stored Communications Act[15] and ambiguous clauses of wireless carrier contracts to invalidate user rights to privacy. Second, the review notes that although successful protections for some groups and sectors of internet data exist, significant legislative gaps remain to support government and internet data company partnerships. Third, the review endeavors to analyze the role of the National Security Agency in the regulation of social media companies' use of user data.

Finally, the review proposes that the U.S. adopt a comprehensive model of data privacy regulation based on two pioneer data privacy legislative bills passed in 2018. The review will first propose that the U.S. adopt the proportionality principle and the controller and processor provisions of the European Union's General Data Protection Regulation legislation[16] to create a framework for internet user protections amidst the increasing influence of technology. Similarly, the review also examines the California Consumer Privacy Act to determine its efficacy at the state level and potentiality of efficacy if implemented at the federal level.[17]

Ultimately, the lack of data privacy for internet users presents a significant gap in the protection of individual rights. Therefore, the U.S. should adopt and implement a hybrid of the European Union's General Data Protection Regulation legislation and the California Consumer Privacy Act that outlines both consumers' rights to personal data privacy and restrictions on internet platforms and third-party exploitations of user data.

I. Background

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

[13] Carpenter v. United States, 585 U.S. 1, 3 (2017).

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

[15] Justin P. Murphy, Adrian Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, Richmond Journal of Law & Technology, 11-12 (2013) http://jolt.richmond.edu/jolt-archive/v19i3/article11.pdf (pg. 11-12)

[16] General Data Protection Regulation, 95/45 EC, § 4-6

[17] California Consumer Privacy Act, 375 CA § 1798, 100 (2018).

A. Review of the Courts' Approach to Data Privacy in the United States

Criminal judicial proceedings allow for the collection of data posted on social media as incriminating evidence. Police departments and other governmental agencies operate specialized investigative divisions that search email, text, and social media platforms to aid prosecution teams during trial.[18] Furthermore, unlawful police searches of cell phone or social media data receive good faith protection under the Stored Communications Act[19]; thus, police often search the cell phones of detained suspects without a warrant.

i. Social Essence of Social Media as Justification for the Negation of the Fourth Amendment

First, prosecutors often emphasize the social and public essence of social media platforms to negate defendants' expectations of privacy and Fourth Amendment rights. In *United States v. Meregildo*[20], the government obtained incriminating evidence from a Facebook post and used the evidence to convict the defendant in trial, although the defendant shared the post only with his Facebook "friends."[21] The friends with whom the post was shared subsequently surrendered the post to the government.[22] Thus, the defendant argued that the government seizure of his Facebook post private among his Facebook friends violated his Fourth Amendment rights.[23] In turn, the Court ruled that "The government may access them [postings] through a cooperating witness who is a "friend" without violating the Fourth Amendment…The Defendant's legitimate expectation of privacy ended when he disseminated posts to his "friends" because those "friends" were free to use the information however they wanted."[24]

Therfore, *Meregildo* established that user data posted and shared via a social media platform is the property of the poster, the users with whom the post was shared, and the executives of the company who control the platform.[25] This precedent thus concurs with Zuckerberg's testimony that joint ownership of data occurs as a result of the sharing or posting of that data on an internet platform.[26]

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[18] Murphy, Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues* (7)

[19] Stored Communications Act 18 U.S.C. § 2701 (1986).

[20] United States v. Meregildo, 833 F. Supp. 2d 523 (S.D.N.Y 2012).

[21] Murphy, Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues* (523)

[22] Id. at 524

[23] Id. at 527

[24] Id. at 531

[25] 833 F. Supp. 2d at 523

[26] Facebook: Transparency and Use of Consumer Data: Hearing before the H. Comm. on Energy and Commerce, 115th Cong. (93) (statement of Mark Zuckerberg, CEO of Facebook).

ii. The Constitutionality of the SCA and its Rationalization of Warrantless Searches

As it is a non-habitual occurrence for the social media friends of a defendant to share incriminating evidence with government agencies, courts often issue subpoenas for social media companies to present incriminating evidence in court regardless of the privacy settings of the defendant's profile.[27] The Stored Communications Act (SCA) grants the government this specific subpoena power without requiring a warrant and "governs [the] ability of governmental entities to compel service providers, such as Twitter and Facebook, to produce content and non-content customer records in certain circumstances."[28] For example, *United States v. Warshak*,[29] established that the subpoena of 27,000 of Warshak's private emails is protected by the agents acting in good faith under the SCA. The appellate court ruled that the original ruling be upheld.[30]

Juxtaposed to the majority opinion of the appellate court, Circuit Judge Keith Boggs rejected the constitutionality of the SCA in *Warshak* noting in his dissenting opinion, "We today declare these statutes unconstitutional insofar as they permit the government to obtain such emails without a warrant"[31]. Also, Keith in *Warshak*c opined that email exerts a "pervasiveness" and obligation in society that is thus necessary for "self-expression."[32] Therefore, the Fourth Amendment, "the right of people to be secure in their persons,"[33] or the right to self-expression, should expand its protection over email as it has become instrumental to self-expression.

Furthermore, the SCA (1986) fails to provide updated guidelines for email and social media usage.[34] Thus, the power of the SCA should not be utilized to incriminate a defendant based on the interpretation of outdated guidelines regarding progressive technological developments, such as social media platforms and email.[35]

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[27] Justin P. Murphy, Adrian Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, Richmond Journal of Law & Technology, 9 (2013) http://jolt.richmond.edu/jolt-archive/v19i3/article11.pdf

[28] Id. at 11-12

[29] United States v. Warshak, 631 F. 3d 274 (2010).

[30] Id.

[31] Id.

[32] Justin P. Murphy, Adrian Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, Richmond Journal of Law & Technology, 9 (2013) http://jolt.richmond.edu/jolt-archive/v19i3/article11.pdf

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

[34] Id.

[35] Id.

iii. The Pervasiveness of Social Media and Internet technology as Grounds for Increased Constitutional Protections under the Fourth Amendment

Ten years following the *Warshak* decision, the pervasiveness of social media equals or supersedes that of email in American society. Accordingly, data published on social media may also be considered an "essential means to self-expression,"[36] and thus should be offered special protections under the Fourth Amendment.

However, *People v. Harris*[37] denied the pervasiveness of social media and its implications for self-expression to justify the subpoena of incriminating Tweets. Coincident with the decision of *Meregildo*, the defendant lost his reasonable expectation of privacy when he posted this data on Twitter.[38] Ultimately, both *Harris* and *Meregildo* emphasize that the purpose of social media platforms includes sharing information socially and publicly. Subsequently, these decisions opine that incriminating evidence posted on these social, public platforms cannot be protected under the Fourth Amendment and thus may be subpoenaed in trial.[39]

Additionally, the prosecution for each aforementioned case nullifies the defendant's reasonable expectation of privacy guaranteed by the Fourth Amendment. Accordingly, the Court in *Carpenter v. United States*,[40] ruled that the defendant surrendered his reasonable expectation of privacy of his phone messages after signing a contract with his wireless carrier. The prosecution demonstrated that in order for a cell phone to perform any its functions, the cell phone must connect with a cell site.[41] These cell sites include a set of radio antennas that obtain cell site location information (CSLI) each time a cell phone performs one of its functions and connects with the cell site.[42] Thus, wireless carriers retain a time-stamped record of both the function and location of cell phones via CSLI. Although cell sites and CSLI remain largely unknown to the general public, wireless carrier contracts, which list information regarding cell sites and CSLI, invalidate the reasonable expectation of privacy over personal phone messages and data for all cell phone users engaged in wireless carrier contracts.

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[36] Id.
[37] People v. Harris, 72 2d 16, 17, 838, 877 (1978).
[38] Id.
[39] Id.
[40] Carpenter v. United States, 138 S. Ct. 2206, 2208, 2212 (2018).
[41] Id.
[42] Id.

Therefore, the prosecution against Carpenter noted that "an individual's expectation of privacy is one that society is prepared to recognize as reasonable," pursuant to the precedent set by *Katz v. United States*.[43] Thus, as Carpenter willingly surrendered his reasonable expectation of privacy after signing his contract with the wireless carrier, the right to privacy over his phone messages cannot be recognized or exercised.[44] Although cell phones may also qualify as a "means of self-expression and self-identification"[45] coincident with the *Warshak*, *Meregildo*, and *Harris* decisions, their data remains contractually non-private and thus subject to warrantless search and seizure. Therefore, the SCA upholds its constitutionality.

Finally, the Court in *Riley v. California*[46] justified warrantless police searches of cell phones based on "exigent circumstances." Upon Riley's arrest for traffic violations and unlicensed weapons possession, law enforcement officials seized and searched the contents of Riley's cell phone.[47] This search yielded incriminating evidence linking Riley to both a gang and a recent shooting; this evidence thus threatened to increase Riley's sentence. Therefore, the defendant, in accordance with *Warshak,* argued for a recognition of the pervasiveness of cell phone data distinctive from the data contained in physical records.[48] Despite defense advocacy for increased cell phone data protection, the Court ruled that "although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases."[49] Exigent circumstances, such as mortal danger or imminent destruction of evidence, validate the authority of law enforcement to conduct a warrantless search. In that event, such searches should be held contrary to both Fourth Amendment right and the reasonable expectation of privacy.

In conclusion, the *Warshak*, *Meregildo*, *Harris*, *Carpenter*, and *Riley* decisions reinforce warrantless searches of cell phones, emails, and social media data based on good faith actions protected under the SCA. These decisions' having provided license for these searches of personal data on a wide scale not only denies traditional notions of the Fourth Amendment

[43] Katz v. United States, 389 U.S. 347 (1967).
[44] Id.
[45] Warshak, 631 F. 3d at 274
[46] Riley v. California, 573 U.S. 373 (2014).
[47] Id.
[48] Id.
[49] Id. at 377

rights of those contractually bound by wireless carriers or internet providers, but also ignores the necessity for expanded Constitutional protections of internet data warranted by the increasing pervasiveness of internet technology in society.

B. A Review of Private Companies' Approach to Data Privacy

Private companies, in the absence of comprehensive data privacy law, establish ambiguous and insubstantial privacy policies that present a façade of user data protections while enabling social media leadership to utilize and exploit user data pursuant to company interests. As social media companies compose the largest sector of private companies invested in internet data, this review focuses on the social media company approach to data privacy.

Although all major social media companies establish and maintain privacy policies to protect and inform their users, ambiguous language obscures the potential implications of sharing or posting personal data via their public platforms. For example, Mark Zuckerberg's testimony following the Cambridge Analytica scandal revealed his unwillingness to change Facebook's stance on privacy.[50] When prompted to speak about the suggestion to transform Facebook into a more privacy-protective platform, Zuckerberg responded, "we have changed a lot of the way that our platform works so that way developers cannot get access to as much information."[51] Although Zuckerberg notes that Facebook intends to change external privacy policies regarding data exchanges among outside developers, Facebook has not altered internal privacy policies to provide increased protection for users.[52]

Similarly, when asked if he would "commit to changing all user default settings to minimize to the greatest extent possible the collection in use of users' data,"[53] Zuckerberg responded that he was unable to speak to this issue in the time allotted.[54] Ultimately, this testimony demonstrated that although social media companies are inclined to amend external privacy policies with third-parties, they are unwilling to change internal privacy policies to curb the unnecessary collection of user data.

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[50] Facebook: Transparency and Use of Consumer Data: Hearing before the H. Comm. on Energy and Commerce, 115th Cong. (24) (statement of Mark Zuckerberg, CEO of Facebook)

[51] Id.

[52] Id.

[53] Id.

[54] Id.

Additionally, while the legal status of ownership of data posted on social media platforms remains ambiguous, it is crucial to the future of both private company and judicial approaches to questions of data privacy. Regarding a photo taken by a user and posted on a social media platform, Zuckerberg testified that this photo becomes the property of both the user and the friends with whom the photo was shared.[55] This joint ownership blurs the concept of the reasonable expectation of privacy guaranteed by the Fourth Amendment.[56] That concept is tied to the perspective of a single individual; Zuckerberg's statement stretches the concept beyond its original framework. As a result, the government has persuaded the courts to justify warrantless searches and seizures of potentially incriminating evidence posted on social media.

To conclude, social media companies prioritize their internal regulatory powers and commercial interests to collect and disseminate user data over the privacy and protection of their users. Thus, social media companies remain unwilling to change internal privacy policies regardless of data breaches. As the law and company policies presently stand, data posted on the platforms becomes jointly owned by the publisher of the data the friends with whom the post was shared, and the company. Therefore, social media companies' approach to data privacy eliminates individual ownership of content to further the personal interests of the company.

II. Consequences of Gaps in Current Data Privacy Legislation

Amidst the growing prevalence of social media, the absence of a comprehensive federal law establishing both user rights to data privacy and the responsibility of social media companies to maintain those rights threatens Fourth Amendment rights to privacy. Although laws protecting some forms of sensitive internet data—such as finance, health, and the information collected on internet users under the age of twelve—exist and help to establish standards for data privacy, major legislative gaps remain. These gaps, created by a symbiotic government-private business relationship, enable mass data collections and consequently increase the vulnerability of sensitive data to cyber security threats.

Part A: Identification of Legislative Gaps Among Existing Data Protection Laws

i. Gaps in Health Data Privacy Legislation

[55] Id. at 93

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

Healthcare records and patient medical histories represent a sensitive, and thus vulnerable category of internet data subject to hacking and breaches as the prevalence of electronic medical records increases. Therefore, the Health Insurance Portability and Accountability Act (HIPAA) of 1996 endeavors to establish national guidelines to protect patient privacy and sensitive medical data.[57] Today, HIPAA functions as the chief legislation on medical data privacy. Under HIPAA, patient medical records cannot be disclosed to other parties without the direct consent from the subject of the data.[58] Furthermore, the Privacy Rule, HIPAA's central focus, identifies "covered entities"[59] and subjects these entities to specific privacy standards that strive to protect sensitive patient information.[60] According to the Privacy Rule, covered entities include, healthcare providers, health plans, healthcare clearinghouses, and business associates.[61]

Although HIPAA provides a comprehensive framework for medical data privacy, loopholes remain that violate Fourth Amendment privacy rights. In *Acara v. Banks*, Acara filed suit against Dr. Banks because he disclosed her medical records without direct consent.[62] Although Banks violated Acara's entitlement to privacy guaranteed by HIPAA's Privacy Rule[63], the Court affirmed that "HIPAA has no express provision creating a private cause of action, and therefore we must determine if such is implied with the statute."[64] In its ruling, the Court emphasized HIPAA's lack of "private cause of action,"[65] the ability of a private plaintiff to present an action against a respondent based on public statutes, the Constitution, or federal common law.[66] Although courts possess the authority to judicially establish an implied private cause of action, this Court cited the enforcement of HIPAA as limited to the Secretary of Health and Human Services[67], and subsequently yielded its power

[57] Health Insurance Portability and Accountability Act, 42 USC § 2713 (1996)
[58] Id.
[59] Id. at § 2721
[60] Id.
[61] Id.
[62] Acara v. Banks, 470 F. 3d 569, 570 (2006).
[63] Id. at § 2713
[64] Id. at 571
[65] Id. at 570
[66] Caroline Newcombe, *Implied Private Right of Action: Definition, and Factors to Determine Whether a Private Right of Action Will Be Implied from a Federal Statute*, Loyola University Chicago Law Journal, 120 (2017) https://www.luc.edu/media/lucedu/law/students/publications/llj/pdfs/vol-49/9_Newcombe%20(117-147).pdf
[67] Acara, 470 F. 3d at 571

to create implied private cause of action. Therefore, the Court granted the appellee's request to dismiss the complaint.[68]

Furthermore, the decision notes that the limitation of HIPAA regulations to the Secretary of Health and Human Services suggests a Congressional intention to exclude private entities from enforcing HIPAA privacy standards concurrent with *Agee v. United States*[69] and *Poli v. Mountain Valleys Health Centers*.[70] Consequently, this decision holds that individuals, or private entities, cannot claim HIPAA privacy rights or violations: "HIPAA does not contain any express language conferring privacy rights upon a specific class of individuals. Instead, it focuses on regulating persons that have access to individually identifiable medical information and who conduct certain electronic health care transactions."[71] In essence, HIPAA controls the conduct of healthcare providers and insurers who handle patients' protected information; the patients themselves, consequently, have few rights. Ultimately, HIPAA fails to grant guaranteed privacy rights to individual patients, and rather relies on the good faith of medical data possessors to admit to HIPAA violations. Therefore, patients acting as private, individual entities possess few claims to privacy of their medical records.

ii. Gaps in Financial Data Privacy Legislation

The data breaches of prominent U.S. corporations such as Target and eBay facilitated the enactment of the Consumer Financial Protection Act (CFPA) as Title X of the Dodd Frank Act of 2010.[72] Furthermore, the Consumer Financial Protection Bureau (CFPB) constitutes the central feature of the CFPA.[73] The CFPB maintains jurisdiction over ensuring the preclusion of "unfair, deceptive, or abusive acts or practices (UDAAP),"[74] within market practice, policy, and data security. The CFPA, working in collaboration with the Federal Trade Commission (FTC), endeavors to implement regulatory, enforcement, and supervision programs in response to cybersecurity threats.[75] Also, the CFPA identifies

[68] Id.

[69] Agee v. United States, 04-1575C Fed. Cl. (2007).

[70] Poli v. Mountain Valleys Health Centers, 2:05-2015-GEB-KJM E.D. Cal. (2006).

[71] Id.

[72] Steven P. Mulligan, *Data Protection Law: An Overview*, Congressional Research Service, 35-36 (2019) https://fas.org/sgp/crs/misc/R45631.pdf

[73] Id.

[74] Prohibiting Unfair, Deceptive, or Abusive Acts, 12 U.S. Code § 5531 (2010)

[75] Johnathan G. Cedarbaum, Elijah Alper, *The Consumer Financial Protection Bureau as a Privacy and Data Security Regulator*, Fintech Law Report, 4 (2014) file:///Users/gabrielalandolfo/Downloads/fintech-law-report-IP-strategies-competitive-marketplace-2014.pdf

entities subject to CFPB jurisdiction of UDAAP as providers of consumer or financial services.

Despite the efforts of the FTC and CFPB to expand financial data protections, UDAAP, parallel to the shortcomings of HIPAA, does not provide a private right to action.[76] In *McCray v. Bank of America*,[77] the Court ruled that because the CFPB does not guarantee a private right of action, McCray cannot claim violation of her personal financial data. Furthermore, the Court held that "BOA [Bank of America] did investigate McCray's concerns and provided a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer."[78] Thus, this ruling, in accordance with HIPAA privacy precedent, asserts that in the absence of a private right of action, justice for violations of financial data privacy relies on the good faith of the "servicer" to claim responsibility and accept penalties for the unauthorized data disclosure.[79] Ultimately, individuals acting as private entities cannot pursue a private right of action to file a complaint regarding a financial data breach, and consequently the statutes whose ostensible purpose is to protect the consumer do not in fact afford an individual an enforceable right to privacy.

iii. Gaps in Data Privacy Legislation for Children Under the Age of Twelve

Websites target users under twelve-years-old and exploit their data to enhance business strategy and create personalized, manipulative advertisements. The vulnerability of children on the Internet thus fostered the proposition and adoption of the Children's Online Privacy Protection Act (COPPA) of 1998.[80] COPPA endeavors to limit collection of data collection about children twelve and under via obligating websites to "post a complete privacy policy, notify parents directly about their information collection practices, and get verifiable parental consent before collecting personal information from their children—or sharing it with others."[81] Therefore, COPPA aims to increase protections for children on the Internet through direct parental involvement.

Although COPPA presents these responsibilities as obligatory for all websites, COPPA does not afford citizens the power to enforce these mandates.[82] Compliance surveys

[76] Maddox v. Citifinancial Mortgage Co., 5:18 Va Dir. Ct. 1915 (2018)
[77] McCray v. Bank of America, 2446 D. Md 2, 24 (2017).
[78] Id.
[79] Id.
[80] Children's Online Privacy Protection Act, 15 U.S. § 6502 (2002)
[81] Id. at 2
[82] Id.

demonstrate that only half of 144 websites investigated uphold the site owners' obligations.[83] Moreover, COPPA fails to include a disciplinary or retributive mechanism to maintain accountability among the websites owners who neglect their obligation to include a privacy policy and receive parental consent for child users.[84] Therefore, COPPA fails to provide comprehensive Internet safety for children twelve and under due to the lack of disciplinary action for websites in violation of their obligations.

The Court's decision in *Nickelodeon Consumer Privacy Litigation*[85] demonstrated COPPA's inability to ensure website compliance and shattered the illusion of Internet safety for young children. The data breach at issue in this case rests on the unauthorized use of Internet cookies, a small text file that allows websites to remember a user's browsing history data.[86] The Court also noted the importance of the distinction between first party cookies, those used directly by the website, and third party cookies originating from search engines and advertisement-based websites such as Google.[87] Fryar filed a claim against Viacom, the owner of Nickelodeon, pursuant to a violation of Nickelodeon's privacy policy statement which reads: "HEY GROWN-UPS: We don't collect ANY personal information about your kids. Which means we couldn't share it even if we wanted to."[88] However, Fryar argued that Viacom via Nickelodeon collected data on her children that was not in keeping with their privacy policy statement and subsequently in violation of privacy guaranteed by COPPA.[89]

In response, the respondent argued that although COPPA regulates websites owners' collection of data on children, COPPA does not include a policy of preemption for state law regulation of deceitful tactics utilized to obtain internet data on children.[90] Thus, the respondent asserted that "COPPA does not preempt the plaintiff's state-law claim for intrusion upon seclusion." [91] Therefore, COPPA affords parents no power to ensure the privacy of their children's data on the Internet or preclude deceitful tactics to violate their privacy.

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[83] Id. at 3
[84] Id.
[85] Nickelodeon Consumer Privacy Litigation, 827 F. 3d 262, 267 (3d. Cir. 2016).
[86] Id. at 268
[87] Id.
[88] Id. at 269
[89] Id.
[90] Id. at 292
[91] Id. at 293

The Court dismissed the complaint against Viacom on the grounds that the COPPA does not preclude the exploitation of internet cookies because COPPA does not consider internet cookies to be "personally identifiable information" [92] that deserve privacy protections under the law.[93] Therefore, *Nickelodeon* established the unregulated authority of websites to collect data on children twelve and under via the exploitation of static digital identifiers, such as Internet cookies.

Part B: Determinants of Legislative Gaps in Data Privacy Laws

Significant legislative gaps regarding data privacy for health, finance, and children twelve and under threaten the security of sensitive data systems. Although statutes such as HIPAA, CFPA, and COPPA present a framework of data privacy security, each statute lacks a private right to action, a critical legal principle that allows private parties to individually claim privacy violations of the aforementioned statutes. Therefore, individual consumers do not possess the right to sue for privacy violations arising from collection of their sensitive data without an explicit provision for a private right to action. Multinational corporations and the National Security Agency (NSA) represent two major determinants of the legislative gaps that negate individual rights to privacy. The influence of these actors thus affects the continued lack of provisions for a private right of action in statutes pertaining to data privacy.

i: Influence of Multinational Corporations on Data Privacy Legislation

The Court's ruling in *Nyabwa v. Facebook* [94] confirmed the truism that constitutional guarantees apply to governments, not multinational corporations such as Facebook. *Nyabwa* thus facilitated increased exploitative marketing strategies and data abuse by corporations unconstrained by constitutional rights and not subject to a private right of action from injured consumers.

Moreover, cases such as *Nickelodeon Privacy Litigation* exposed that companies such as Nickelodeon were exempt from legal retributive action by denying private right of action to individual consumers. Similarly, the Consumer Bill of Rights, drafted by the Obama Administration in 2012, aimed to provide a framework of consumer privacy while granting the ability to respect that privacy to the discretion of the business.[95]

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[92] Children's Online Privacy Protection Act, 15 U.S. § 6502 (2002)

[93] Id. at § 6502, 295

[94] Nyabwa v. Facebook, 2:17-CV-24 S.D. Tex. 2 (2018).

[95] *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, The White House Archives, 9 (2012) https://obamawhitehouse.archives.gov/sites/default/files/privacy-final.pdf

Although the Consumer Bill of Rights advocates for increased privacy rights for consumers, the privacy guaranteed by the bill depends upon the risk of unauthorized data disclosure.[96] Therefore, potentially sensitive data deemed by the government to not be at risk for privacy violation would not receive additional privacy or security rights. Additionally, certain businesses receive exemptions from obligatory privacy regulations under this Bill as these companies are not deemed to pose a risk for data disclosure.[97]

Furthermore, the Consumer Bill of Rights includes guidelines for disciplinary action against companies who have violated consumer privacy rights.[98] These retributive measures include fines for the corporation in violated based on the number of days over which the violation occurred.[99] For example, a company who illegally harvests data from one million users in the span of one day would be subject to $35,000 in fines.[100] However, these retributive mechanisms come into effect eighteen months following the creation of the business and its subsequent agreement to uphold the Consumer Bill of Rights.[101] Thus, businesses cannot be held accountable for gross data privacy violations throughout the first year and a half of its existence.

Although not yet adopted by Congress, the Consumer Bill of Rights would preempt state law, and thus nullify comprehensive data privacy regulations that provide extensive data privacy and security guarantees for consumers.[102] Ultimately, this legislation exemplifies the government-corporation relationship that continues to prioritize economic and political motives above consumer rights to comprehensive data privacy legislation.

ii. Influence of the National Security Agency on Data Privacy Legislation

In May of 2013, Edward Snowden, an employee of defense contractor Booz Allen Hamilton, successfully stole 1.7 million documents containing secret NSA data pertaining to a myriad of confidential investigations. Those investigations, in turn, were conducted via exploitation of Internet technology.[103] Snowden thus distributed information on the

[96] Id. at 10
[97] Id.
[98] Id. at 23
[99] Id.
[100] Id.
[101] Id.
[102] Id.
[103] Joseph Verble, *The NSA and Edward Snowden: Surveillance in the 21st Century*, ACM, 14-15 (2014) http://delivery.acm.org/10.1145/2690000/2684101/p14verble.pdf?ip=161.253.2.242&id=2684101&acc=ACTIVE%20SERVICE&key=7777116298C9657D%2E9364A56981DA9955%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35&__acm__=1576077395_c2031a7ed73f524a360ac0025e26dda6

investigations regarding civilian and foreign target surveillance to several news agencies in effort to "inform the public as to that which is done in their name and that which is done against them."[104] Snowden's revelations of NSA investigations and the Internet technology utilized to harvest information from civilians exhibited the necessity for implementation of comprehensive legislation on data privacy that protects citizens from both foreign and domestic surveillance.

U.S. intelligence agencies possess direct and complete access to the data published on social media and other influential Internet platforms via the government program PRISM.[105] PRISM represents a code for a tool utilized by the NSA to collect data on ordinary, non-threatening U.S. civilians.[106] Although the NSA originally developed PRISM to serve as a surveillance tool for potential foreign terrorist threats, PRISM's power expanded to include unfettered access to Google, Microsoft, Apple, Facebook, Yahoo, YouTube, and Skype. [107] Furthermore, the NSA utilizes fiber optic cables and malware to conduct "upstream data collection,"[108] a tool which allows the NSA to observe "online viewing behaviors and keystrokes."[109] Although PRISM appears to be a wholesale violation of Fourth Amendment privacy rights, U.S. intelligence agencies' investigations conducted via PRISM receive Constitutional protection on the grounds that wireless carrier contracts and the public factor of Internet platforms eliminate the public's reasonable expectation of privacy.

Furthermore, public opinion regarding data privacy and the powers of the NSA and other U.S. intelligence agencies changed following the terrorist attacks of 9/11.[110] An increased emphasis on national security in the post-9/11 U.S. created a sentiment of solidarity that won not only justification, but also encouragement for increased NSA domestic surveillance.[111] Consequently, the influence of post-9/11 nationalism and solidarity

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[104] Id. at 15

[105] Elizabeth Stoycheff, *Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, Journalism and Mass Communication Quarterly, 3 (2016) https://pdfs.semanticscholar.org/c27a/ffa679229183749fa2a70b20359530814f8c.pdf?ga=2.138778931.12301 53134.1576078512-502501426.1576078512

[106] Id.

[107] Id.

[108] Id. at 4

[109] Id.

[110] Id.

[111] Id.

in the U.S. facilitated significant increases in NSA authority that diminished Fourth Amendment privacy rights.

III. The Call for US Implementation of a GDPR-CCPA Hybrid

Obscure wireless carrier contracts and social media ownership policies nullify Fourth Amendment rights to a reasonable expectation of privacy. Similarly, Congressional preemptions of state laws, and the absence of a private right of action under HIPAA, CFPA, and COPPA deprive consumers of the right to file suit against violators of data privacy under both state law and these statutes. Therefore, existing legislation fails to comprehensively protect American consumer data due to policy loopholes benefiting corporations while increasing the vulnerability of online personal data. Increasing dependence on internet technology and data systems multiplied with a rising vulnerability of that data increases susceptibility to potential, devastating data breaches. Ultimately, these gaps necessitate comprehensive legislation to establish data privacy as a fundamental American right.

Two models of comprehensive data legislation should be analyzed, adapted if needed, and implemented to improve data privacy protection in the U.S. First, the European Union's General Data Protection Regulation (GDPR) establishes online data privacy as a basic right, and subsequently imposes strict guidelines and obligations on data analytics and collection.[112] Second, the California Consumer Privacy Act (CCPA) affords comprehensive online data protections for California residents.[113] The CCPA demonstrates that data privacy rights can be provided to American citizens at both the state and federal levels.[114]

Part A: Analysis of the European Union's General Data Protection Regulation Laws

In April of 2016, the European Parliament adopted the General Data Protection Regulations (GDPR) to establish protection for the processing of personal data as a fundamental right.[115] Contrary to U.S. legislation, the GDPR elects to focus on the "processing" of data rather than the event of an unauthorized data disclosure.[116] The focus on data processing allows regulating authorities to more easily preempt a major data breach or an abuse of company data collecting privileges.

[112] General Data Protection Regulation, 95/45 EC, § 4-6 (2018).
[113] California Consumer Privacy Act, 375 CA § 1798, 100 (2018).
[114] Id.
[115] 95/45 EC at § 4-6
[116] Id.

Also, the distinction between the subjects of personal data and the processing of personal data exemplify the "principles of proportionality."[117] These principles acknowledge the integral functions that digital data serve in politics, economics, and judicial proceedings. Therefore, rather than establishing a data censorship that would likely hinder societal progress, the principles strive to censor the exploitative, manipulative mechanisms of data processing.

Therefore, the GDPR endeavors to curb the power of internet platforms to create targeted, manipulative advertisements. Holistically, the GDPR includes eleven chapters addressing various aspects of data collection and exchange.[118] However, the GDPR centers on the rights of the data subject and the responsibilities of the controller and processor of the data.[119]

i. Rights of the Data Subject

The chapter addressing the right of the data subject presents five subheadings including, transparency, information and access to personal data, rectification and erasure, right to object, and restrictions.[120] The first and second sections present the obligation for transparency, requiring controllers of data to provide relevant information and any additional information requested by the data subject regarding the processing of the data.[121] The third section grants the right for incomplete data to be rectified or completed.[122] Furthermore, the subject of the data maintains the right to erase personal data in the event that the data was unlawfully collected or the subject retracted his or her consent to data processing procedures.[123]

Additionally, the fourth heading allows consumers to object to data processing. Thus, the controller cannot continue to process this data, unless he or she can demonstrate "compelling legal grounds for the processing which override the interests, rights, and freedoms of the data subject or for the establishment, exercise or deference of legal claims."[124] Finally, the GDPR notes that website owners may ignore data processing

[117] Id.
[118] Id. at Ch. 3 § 1-3
[119] Id.
[120] Id. at § 1-5
[121] Id. at Art. XII
[122] Id. at Art. XVI
[123] Id. at Art. XVII
[124] Id. at Art. XXI

regulations throughout judicial proceedings or in the event of a threat to public or national security.[125]

ii. Controller and Processor

The second chapter outlines the responsibilities of the controller and processor via five subheadings addressing general obligations, security of personal data, data protection impact assessment and prior consultation, data protection officer, and codes of conduct.[126]

The first of the five subsections obligates controllers of data to implement "technical and organization measures" that comply with guidelines of the GDPR.[127] Similarly, the processors of data, under the authority of the controllers, utilize the appropriate data processing methods that are compliant with GDPR requirements.[128] The second and third sections necessitate a focus on security measures through the data collection processes.[129] Section four obligates the appointment of a data protection officer to ensure the accountability among controllers to uphold GDPR guidelines.[130] Finally, the fifth section requires the adoption of codes of conduct to ensure that the features of the GDPR are both adopted and applied in practice.[131]

Part B: Opposition to the European Union's General Data Protection Regulations

The GDPR emphasis on the regulation of data processing juxtaposed to the protection of personal data illustrates a significant achievement towards accomplishing comprehensive data privacy. However, dissenting opinions argue that GDPR poses negative implications for the future of European epidemiology and will facilitate the cementation of monopolies as a result of large compliance costs.

As epidemiology and public health rely on statistics collected via patient information, new GDPR restrictions on data processing will complicate statistical analysis for health research. Under the GDPR, data subjects must provide consent prior to the dissemination of their data.[132] Therefore, future epidemiological and health research may require direct consent from individual patients to pursue research goals.[133]

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[125] Id. at Art. XXIII
[126] Id. at Ch. 4 § 1-5
[127] Id. at Art. XIV
[128] Id. at Art. XVIII
[129] Id. at Art. XXXII
[130] Id. at Art. XXXVII
[131] Id. at Art. XL
[132] Id. at Ch. 3 § 1-3
[133] Id.

Additionally, the GDPR imposes compliance costs as well as up to 20,000,000-euro (approximately $22,003,760) fines in the event of a violation.[134] Moreover, the cost burden may facilitate the creation of monopolies, economic structures which would undermine the current European consumer culture.

Part C: Creation and Implementation of Comparable Legislation in the U.S. at the Federal Level

The California Consumer Privacy Act (CCPA) of 2018[135] exemplifies obtainable data privacy legislation both implemented and enforced successfully. This legislation also implicates a silent demand for comparable comprehensive data privacy legislation at the federal level.

The CCPA principally identifies privacy as an "inalienable"[136] right of all Americans and thus should be legally protected and publicly enforced. Furthermore, the CCPA recognizes that the ability for individual consumers to control the use and sale of personal information as fundamental to the right of privacy.[137]

Also, the CCPA outlines the rights of Californians in respect to the right of privacy including, the right to know what information is being collected, sold or disclosed, the right to object to the sale of personal information, the right to access personal information, and the right to obtain equal service and price for internet services.[138]

Comparable to GDPR principles of proportionality, the CCPA acknowledges the importance of implementing a proportionality principle that respects both consumer privacy and a prosperous economy. Accordingly, the CCPA notes that "it is possible for businesses to both respect consumers' privacy and provide a high level of transparency to their business practices."[139] Ultimately, both the GDPR and the CCPA strike a balance between ensuring economic success and respecting consumer privacy rights.

A law implemented at the federal level should strive to maintain a similar equilibrium between creating comprehensive protections for consumer privacy and enabling economic growth. U.S. lawmakers should establish and adopt the GDPR's contractual relationship between controllers and processors of data. Moreover, federal legislation should align with

[134] Id. at Art. LXXXIII
[135] California Consumer Privacy Act, 375 CA § 1798, 100 (2018).
[136] Id.
[137] Id.
[138] Id.
[139] Id.

state legislation to cement data privacy as an "inalienable right."[140] Also, federal legislation should improve upon state statutes to provide transparency regarding how and why internet platforms disseminate user data.

Conclusion

The lack of comprehensive data privacy legislation in the U.S. reflects Congressional preemptions. Those preemptions result in nullification of consumer users' reasonable expectation of privacy regarding online data and the exclusion of their right to maintain a private right to action. First and third-party cookies also serve to aid multinational corporations and the NSA in surveillance and marketing strategies. This leaves data privacy in the U.S. in a precarious position, a position caught between following the progressive lead of the European Union and continuing to neglect consumer privacy. Therefore, recognizing the lack of data privacy rights and understanding how this vulnerability affects one's economic and political position will provide the best possible chance to enact legislation such as exists in California and Europe to prevent continued threats to American Internet consumers.

[140] 375 CA at § 1798, 100 (2018)

U.S. Withdrawal from the JCPOA and What It Means for Concentration of Power in the Hands of the Executive

Eriketi Mytilinaiou

Introduction: The Joint Comprehensive Plan of Action (JCPOA) and U.S. Withdrawal

The JCPOA is an agreement reached between the United States, Russia, China, the European Union, Germany, France, the United Kingdom and Iran on July 20, 2015,[1] with the objective to contain and delay the development of Iran's nuclear program in exchange for lifting sanctions on the country.[2] The agreement also aimed to ensure that any development of Iran's nuclear program would be for peaceful purposes.[3] The JCPOA marked a significant step forward for the international community's efforts against nuclear proliferation. However, the United States under the direction of the Trump administration, withdrew from its JCPOA commitments on May 8, 2018.[4]

The negotiations surrounding the JCPOA were surrounded by partisan discourse, and the JCPOA ultimately was not passed in the form of an Article II treaty ratified by

[1] The Joint Comprehensive Plan of Action (JCPOA) at a Glance, https://www.armscontrol.org/factsheets/JCPOA-at-a-glance (last visited Jan. 5, 2019).

[2] Memorandum from the President on Preparing for Implementation of the Joint Comprehensive Plan of Action of July 14, 2015 (JCPOA) to the Secretary of State, the Secretary of the Treasury, the Secretary of Commerce, and the Energy (Oct. 18, 2015) (on file with the White House).

[3] Press Release, U.S. Department of the Treasury, Statement Relating to the Joint Comprehensive Plan of Action "Adoption Day" (Oct, 18, 2015).

[4] Press Release, President Trump, Remarks by President Trump on the Joint Comprehensive Plan of Action (May 8, 2018) (on file with the White House).

Congress.[5] Rather, the JCPOA became a "political commitment"[6] made by the Obama administration, which is not binding under U.S. or international law. Using the definition of political commitment of Curtis A. Bradley and Jack L. Goldsmith and the JCPOA as a case study, this article will explore the domestic and international legal framework of agreement withdrawal provisions.[7] Through this lens, I will argue that regardless of the merit of President Trump's decision, it was within his authority to withdraw from the agreement without violating domestic or international law.

Furthermore, the case study of the JCPOA indicates that the President can both bring the U.S. into an international agreement as well as release the U.S. from its obligations under such an agreement without consulting Congress. In other circumstances, U.S. Presidents have even been able to withdraw from Article II treaties without consulting Congress. For example, Jimmy Carter withdrew from the 1954 Mutual Defense Treaty in 1979[8] while George W. Bush unilaterally withdrew from the Anti-Ballistic Missile Treaty in 2002.[9]

In view of the foregoing, this paper will argue that there is an increasing concentration of power in the hands of the executive with regard to international agreements. Such conduct comes in direct violation of the international agreement making principle of *Pacta sunt servanda*, which indicates that all international negotiations must be carried out in good faith and "are as obligatory upon nations as private contracts are binding upon individuals and to be kept with the most scrupulous good faith."[10] The United States' consistent pattern of violating this principle has harmed its international credibility as a reliable and good-faith negotiator, and continued diplomatic conduct in this manner will alienate allies and potential negotiating counterparts, jeopardizing the country's international standing.

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[5] Julie Hirschfeld Davis, *Lobbying Fight Over Iran Nuclear Deal Centers on Democrats,* N.Y. Times, Aug. 17, 2015, https://www.nytimes.com/2015/08/18/world/middleeast/lobbying-fight-over-iran-nuclear-deal-centers-on-democrats.html.

[6] Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law,* 73 Harvard L.R. 1201, 1217 (2018) (discussing intricacies of political commitments).

[7] id.

[8] Goldwater v. Carter, 444 U.S. 996, 1002 (1979).

[9] U.S. Withdraws From ABM Treaty; Global Response Muted, https://www.armscontrol.org/act/2002-07/news/us-withdraws-abm-treaty-global-response-muted (last visited Jan. 5, 2019).

[10] Hans Wehberg, *Pacta Sunt Servanda*, 53 The American Journal of International Law, 775, 785-86 (1959) (discusses the fundamental ideas underlying the principle).

I. Forms of International Agreement Making

A. Five legally binding international agreement mechanisms

The US Constitution only provides for one form of international agreements, Article II treaties.[11] The article states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," preventing the President from acceding to treaties unilaterally.[12] Article II treaties are binding in the US mainly based on the Supremacy Clause of the Constitution, which states that treaties, like statutes, are considered "the supreme law of the land."[13]

However, starting in the 1790s, the U.S. government began to create other forms of international agreements outside the scope of Article II. This gradual change began with the 1792 Postal Act, which authorized the Postmaster General to enter into international agreements regarding the exchange of mail.[14] The first example of an "Executive Agreement," an agreement arising from the executive branch, was negotiated by the Adams administration in 1799 and "settled demands against the Dutch Government by American citizens who lost their cargo when Dutch privateers overtook the schooner *Wilmington Packet*."[15] The Supreme Court clarified the President's authority to enter into executive agreements more than 200 years later in *Am. Ins. Ass'n v. Garamendi,* which explained that the "President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."[16] The Court explained that, while Executive Agreements are not authorized by the Constitution, "the practice goes back over 200 years, and has received congressional acquiescence throughout its history."[17]

While executive agreements have been used to enter international agreements for over two centuries, the practice only became prevalent in the mid-20th century. Curtis Bradley, a professor of law and public policy studies at Duke University, and Jack Goldsmith, a professor of law at Harvard University, determined that between 1789 and 1839, the vast majority of international agreements (69%) took the form of Article II Treaties.[18] A

[11] U.S. CONST. art. II, §2.
[12] id.
[13] U.S. CONST. art. II, §6.
[14] Postal Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.
[15] Am. Ins. Ass'n v. Garamendi, 539 U. S. 396 (2003).
[16] id.
[17] id.
[18] Bradley & Goldsmith, *supra* note 6, at 1210, (discussing international agreements by type).

significant decrease took place between 1889 and 1939, where only 36% of international agreements were Article II treaties.[19] The figure dropped to 5.6% between 1939 and 1989, occurring at the same time as a significant rise in executive agreements (11,698, compared to 917 between 1889 and 1939), indicating the current trend of entering non-treaty international agreements rather than Article II treaties.[20]

Today, Article II treaties have significantly declined in prominence.[21] Between 1990 and 2012, only 6.2% of international agreements took the form of a treaty.[22] During the Obama administration, 4.75 treaties were submitted to the Senate per year, a figure far below the historical average of 15.3 treaties per year.[23] Because of this decline in treaties, almost "94% of binding international agreements made by the United States are made without meaningful interbranch deliberation and are thus vehicles for unilateral presidential lawmaking."[24]

Currently, there are five available mechanisms through which a U.S. President can enter into international agreement. An Article II Treaty remains the form entailing the greatest congressional involvement and contribution. The next closest form to a treaty is an "ex post congressional-executive agreement in which Congress by statute approves an international agreement previously negotiated by the President"[25] This type of agreement is similar to a treaty because both chambers of Congress (not just the Senate, as is the case with Article II) have the authority to "review the deal made by the President and decide whether or not to approve it."[26]

A President can also form an "ex ante congressional-executive agreement in which Congress authorizes the President by statute to make and conclude an international agreement."[27] 80-85%[28] of international agreements made by the United States today are in this form. Under this type of agreement, "Congress provides the President with general advance authorization to make an agreement (or many agreements), that the President in his

[19] id.
[20] id.
[21] id.
[22] id.
[23] id. at 1211
[24] id. at 1213
[25] id. at 1207
[26] id.
[27] id.
[28] id. at 1213

or her broad discretion can negotiate, conclude, and ratify without ever returning to Congress for its review, much less approval."[29] An example of such advance authorization is the Mutual Defense Assistance Act of 1949.[30] The Act "states that the President shall 'conclude agreements . . . to effectuate the policies and purposes of this Act' which include providing various forms of military assistance to support 'individual and collective self-defense.'"[31] Advance authorizations for many ex ante congressional-executive agreements are "vague and enacted many years before the agreement"[32] allowing for *de jure* as opposed to *de facto* Congressional involvement and input. Ex-ante and ex-post congressional agreements are ratified by both houses of Congress in the form of a statute and are binding under U.S. law.[33]

Another form of international agreement is "an executive agreement pursuant to treaty which is made by the President based on an authorization from an existing treaty."[34] This lesser-used type of agreement requires less authorization in comparison to treaties, ex post and ex ante congressional-executive agreements. While the category in which the Paris Agreement fits has remained a debate, some scholars have argued that it was an example of an executive agreement pursuant to treaty,[35] specifically pursuant to the United Nations Framework Convention on Climate Change (UNFCCC)[36] which received the consent of the Senate and was ratified by the President in 1992.[37] Such agreements make up around 1-3% of total US international agreements and do not involve significant collaboration between the executive and legislative branches.[38] This type of agreement is also binding under U.S. law.

The last form of an international agreement is a "sole executive agreement made by the President on his or her own constitutional authority"[39] without the consent of the legislature. The legitimacy of such agreements is mainly derived from the authority bestowed

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[29] id.
[30] Mutual Defense Assistance Act of 1949, 81 P.L. 329, 63 Stat. 714, 81 Cong. Ch. 626 (Oct. 6, 1949)
[31] Bradley & Goldsmith, *supra* note 6, at 1213 (discussing ex ante congressional-executive agreement).
[32] id. at 1207
[33] id. at 1207
[34] id. at 1207
[35] U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).
[36] 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992).
[37] Bradley & Goldsmith, *supra* note 6, at 1249 (discussing the legal nature of the Paris Agreement).
[38] id. at 1214
[39] id. at 1208

upon a president under Article II of the US Constitution.[40] This type of agreement constitutes around 5-10% of total US agreements.[41] This type of agreement can cause the most controversy out of the ones discussed so far, given that Congress can argue that it has been concluded in defiance of the limits to the powers of the presidency.[42] Self-executing executive agreements (no additional legislation must be implemented in order for provisions of such agreement to be judicially enforceable within the U.S.) are "superior to U.S. state law and inferior to the Constitution."[43] In contrast, non-self-executing executive agreements have limited legal status within the U.S., but legislation passed to implement or ratify these agreements is binding under U.S. law.

B. Non-binding political commitments

All aforementioned types of international agreements available to a U.S. President are in some degree binding under either or both domestic and international law. However, another category of international agreements has become especially prevalent in recent years, further concentrating power in the hands of the executive. This type of agreement is referred to as a "political commitment," which usually takes the form of a written agreement "between the President or one of the President's subordinates and a foreign nation or foreign agency."[44] These types of agreements are distinct from the other five types of agreements discussed thus far because they do not impose any obligation under international law and or consequences for nations which violate them.[45] They are "nonlegally binding [agreements] between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature."[46] Duncan Hollis, an associate professor at Temple University James E. Beasley School of Law and attorney-advisor in the U.S. State Department and Joshua Newcomer, a clerk to the Honorable Carolyn Dineen King of the United States Court of Appeals for the Fifth Circuit argue that "States can choose to create agreements that are legally binding"[47] with both legal and political force, such as the five

[40] id. at 1208
[41] id. at 1214
[42] id. at 1259
[43] Stephen P. Mulligan, Congressional Research Service, Summary, 2018, https://fas.org/sgp/crs/misc/RL32528.pdf.
[44] Bradley & Goldsmith, *supra* note 6, at 1218 (discussing non-binding political commitments).
[45] id. at 1218
[46] Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution,* 49 Virginia Journal of International Law. 507, 517 (2008) (defining political commitments).
[47] id. at 518 (discussing the binding nature of different forms of agreements).

categories discussed previously. However, states can also pursue agreements which "rely only on aspects of the political sphere that exist independent of the law (i.e. agreements having an exclusively political force)."[48] Political commitments cannot by nature have any legal force, and their breach can only produce political consequences as opposed to legal ones.[49]

In general, political commitments fall into one of three categories of formality. The lowest level of formality would be an oral agreement.[50] For example, the Prime Minister of Denmark and Finland settled a dispute over the construction of a bridge over the Great Belt water channel through a telephone communication.[51] Exchanging letters or making commitments at the government agency level are examples of a medium level of formality. The most formal level includes extensive, signed written agreements made by heads of state.[52] For example, the Helsinki Final Act (Helsinki Accords)[53] was signed by U.S. President Gerald Ford and another thirty-four heads of state on August 1, 1976.[54] The greater the level of formality "the greater it engages a state's credibility with respect to future behavior under the deal."[55]

Normativity and precision are two key indicators of different levels of commitment reflected in the content of political commitment agreements. Normativity refers to "whether the political commitment involves a promise of result, effort, or intention."[56] Precision can take many forms, each reflecting different levels of commitment. For example, principles are ambiguous in contrast to rules, which are more concrete and contribute to a stronger framework of accountability.[57] Agreements with "high normativity and high precision send the strongest signal of expected future behavior."[58]

The organization of political commitments also reflects the strength of the commitment it entails. Some political commitments do not have organizational content outlining future communications and are one-time commitments.[59] Others can be organized

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[48] id.
[49] id.
[50] id. at 529 (discussing the concept of formality for political commitments).
[51] id. at 527 (discussing different forms of political commitments).
[52] id.
[53] The Final Act of the Conference on Security and Cooperation in Europe, 73 DEP'T ST. BULL. 323 (1975)
[54] Hollis & Newcomer, *supra* note 46, at 528 (discussing different forms of political commitments).
[55] id. at 529 (discussing the concept of formality for political commitments).
[56] id. at 530 (discussing the content of political commitments).
[57] id. at 531
[58] id. at 532
[59] id. at 533 (discussing the organization of political commitments).

through the establishment of "a bilateral relationship," as was the case with the NATO-Russia Founding Act,[60] or "a multilateral regime within which participating states agree to discuss and cooperate on a common problem or project."[61] While political commitments lack the legally binding element of other forms of international agreements, they can credibly convey promises of future behavior by states as "was the case for the U.S. commitments in the Atlantic Charter[62] and, more recently, the Global Aids Fund[63]."[64] Political commitments emerging from long-term and formal as opposed to fast and informal processes, provide a stronger indication of a nation's intention to abide by the agreement's provisions. For example, the Helsinki Final Act (Helsinki Accords) was a result of two-year long negotiations.[65]

The constitutional basis for political commitments mainly lies in the President's power to conduct diplomacy,[66] "since at bottom a political commitment is like diplomatic speech backed by a personal pledge of the executive official who made it."[67] Article III of the Constitution set out the judicial branches' jurisdiction over "all cases, in Law and Equity."[68] Whether the courts have jurisdiction over political commitments remains debated because such agreements are not the same as statutes or treaties, which fall under the jurisdiction of the Court under Article III of the Constitution.[69]

II. What is the JCPOA and what category of agreement does it fall under?

A. What is the JCPOA?

[60] Founding Act on Mutual Relations, Cooperation and Security, NATO-Russia, May 27, 1997, 36 I.L.M 1006

[61] Hollis & Newcomer, *supra* note 46, at 533 (discussing the organization of political commitments).

[62] Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603.

[63] The Global Fund to Fight AIDS, Tuberculosis and Malaria, The Framework Document of the Global Fund to Fight AIDS, Tuberculosis and Malaria, at https://www.theglobalfund.org/media/6019/core_globalfund_framework_en.pdf (last visited Jan 26, 2020).

[64] Hollis & Newcomer, *supra* note 46, at 541 (discussing the credibility of political commitments).

[65] id. at 541

[66] U.S. CONST. art. III, §2.

[67] Bradley & Goldsmith, *supra* note 6, at 1218 (discussing non-binding political commitments).

[68] U.S. CONST. art. III, §2.

[69] U.S. CONST. art. III, §2.

The JCPOA is an agreement reached by Iran, the E3 (U.S., China, Russia), and EU3 (France, Germany, UK) on July 14, 2015.[70] The agreement outlined specific restrictions to be imposed on Iran's nuclear program in exchange for the other countries lifting sanctions on Iran (as well as the lifting of UN sanctions). Specifically, Article 2 outlined the phasing out of IR-1 centrifuges for ten years, limited uranium enrichment capacity at the Natanz nuclear facility to 5060 IR-1 and ordered that excess centrifuges would be stored and monitored by the International Atomic Energy Agency (IAEA).[71] Article 3[72] stated that any enrichment research and development (R&D) would only be permissible if it did not result in the accumulation of enriched uranium. Article 4[73] prevented further production of IR-1 centrifuges for eight years. Article 5[74] prevented uranium enrichment in all Iranian nuclear facilities for fifteen years (except Natanz, where enrichment only up to 3.67% would be allowed). Article 10[75] and 12[76] stated that for 15 years Iran would not accumulate any heavy-water or conduct spent fuel reprocessing and did not intend to do so even after the 15-year mandatory time frame.

In exchange for complying with the restrictions placed on the nuclear program, Iran would benefit from easing of sanctions. The UN Security Council passed Resolution 2231 on July 20, 2015, which was the UN's endorsement of the JCPOA and terminated all previous resolutions implementing sanctions on Iran.[77] JCPOA Article 18 states, "UNSC will terminate all provisions of previous UN Security Council resolutions on the Iranian nuclear issue - 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015)."[78] Article 19[79] and 21[80] outline the termination of sanctions by the European Union and the United States, and Annex II[81] provides details.

The agreement also includes a Dispute Resolution Mechanism (also referred to as Joint Commission Mechanism).[82] Through this mechanism the E3/EU3 could refer any

[70] Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 98 (2016) [hereinafter JCPOA].
[71] id. at art. 2
[72] id. at art. 3
[73] id. at art. 4
[74] id. at art. 5
[75] id. at art. 10
[76] id. at art. 12
[77] S. C. Res. 2231 (July 20, 2015).
[78] Joint Comprehensive Plan of Action, art. 18, July 14, 2015, 55 ILM 98, 108 (2016) [hereinafter JCPOA].
[79] id. at art. 19
[80] id. at art. 21
[81] id. at annex II
[82] id. at art. 36-37

issue regarding noncompliance by Iran to the Joint Commission (JC). The Joint Commission Mechanism works as follows: the JC has fifteen days to resolve the issue which has been reported, this period that can only be extended by consensus.[83] After the JC considers the issue, any participant that remained unsatisfied with its proposed resolution or conclusion can refer the issue further to the signatories' Ministers of Foreign Affairs, who would have fifteen days to resolve the issue, with an extension of time only granted by consensus. Following JC consideration and during or instead of the Ministerial review, either the complaining party or the one whose performance is questioned has the ability to request that an Advisory Board consisting of three members (one appointed by each participant in the dispute and an additional independent member) consider the issue.[84] The board is responsible for providing a non-binding opinion within fifteen days.[85] After the board issues an opinion, the JC has five days to consider it. If the issue remains unresolved, it can then be considered as grounds by the complaining party to cease performing its commitments under the agreement.[86] The issue is then taken to the United Nations Security Council, which will vote on whether the members will continue ceasing sanctions on Iran. If the UNSC resolution does not take place within thirty days of notification, old UNSC resolutions outlining sanctions will be reimposed unless otherwise agreed by the UNSC.[87] The agreement provides that reinstatement of sanctions would be sufficient grounds for Iran to cease performing its commitments under the agreement.[88]

In the U.S., the JCPOA was put into effect through Executive Order 13716 on January 16, 2016.[89] President Obama introduced the Executive Order by stating that the JCPOA marked "a fundamental shift in circumstances with respect to Iran's nuclear program,"[90] warranting the lifting of sanctions previously imposed by the U.S. on the basis of a national emergency declared in response to Iran's policies including its ballistic missile and nuclear program. President Obama further stated that:

> In order to give effect to the United States commitments with respect to sanctions described in section 4 of Annex II and section 17.4 of Annex V of

[83] id. at art. 36
[84] id. at art. 36
[85] id. at art. 36
[86] id.
[87] id. at art. 37
[88] id.
[89] Exec. Order No. 13716, 3 CFR 13716 (2016).
[90] id.

> the JCPOA, I am revoking Executive Orders 13574 of May 23, 2011, 13590 of November 20, 2011, 13622 of July 30, 2012, and 13645 of June 3, 2013, and amending Executive Order 13628 of October 9, 2012, by revoking sections 5 through 7 and section 15. In addition, in section 3 of this order, I am taking steps with respect to the national emergency declared in Executive Order 12957 of March 15, 1995, to provide implementation authorities for aspects of certain statutory sanctions that are outside the scope of the U.S. commitment to lift nuclear-related sanctions under the JCPOA.[91]

The lifting of the aforementioned sanctions were not intended to "limit the applicability of waiver determinations or any renewals thereof issued by the Secretary of State, or licenses issued by the Secretary of the Treasury, to give effect to sanctions commitments described in sections 17.1–17.3 and 17.5 of Annex V of the JCPOA"[92] or affect Executive Order 12957,[93] which remained in place along with other executive orders issued in furtherance of the national emergency declared in the aforementioned executive order in 1995. These executive orders remained in place despite the JCPOA because reasons behind their implementation persisted regardless of improvements in countering nuclear proliferation. In a statement released in July 14, 2015, President Obama clarified that the U.S. would "maintain [its] own sanctions related to Iran's support for terrorism, its ballistic missile program, and its human rights violations."[94]

When President Trump came into office in January 2017, U.S. policy towards Iran and consequently the JCPOA shifted. President Trump claimed that Iran "supports terrorism and exports violence, bloodshed and chaos across the Middle East. That is why we must put an end to Iran's continued aggression and nuclear ambitions. They have not lived up to the spirit of their agreement."[95] In a statement released by the White House on January 12, 2018, a senior administration official stated that the U.S. will not continue to participate in the JCPOA unless amendments were made.[96] For example, the JCPOA would have to address Iran's ballistic missiles program in order to remain viable.[97] Given that the

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[91] id.

[92] id.

[93] Exec. Order No. 12957, 60 FR 14615 (1995).

[94] Statement by President Barack Obama (July 14, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/statement-president-iran

[95] Trump expected to decertify Iran nuclear deal, official says, https://www.reuters.com/article/us-iran-nuclear-usa/trump-expected-to-decertify-iran-nuclear-deal-official-says-idUSKBN1CA2ID (last accessed Jan. 5. 2019)

[96] Press Release, President Trump Background Press Call on Iran Sanctions (Jan 12, 2018) (on file with the White House).

[97] id.

aforementioned amendments did not come into fruition, President Trump announced the U.S. withdrawal from the JCPOA on May 8, 2018.[98]

B. What category does the JCPOA fall under?

The JCPOA is a "political commitment" not binding under U.S. or international law.[99] The incentives set forth in the agreement were meant to ensure Iran's compliance. For political reasons, Congress attempted to intervene with President Obama's efforts at reaching the deal by passing H.R. 1191, the Iran Nuclear Agreement Review Act of 2015 (INARA).[100] Under this bill, the President would have to certify that Iran is fully complying with the agreement and has not taken any covert action which would advance its nuclear weapons program.[101] Apart from this element codified in domestic law, the bill did not prevent the agreement from taking effect. In accordance with the provisions of INARA, a resolution of disapproval was debated by Congress and a procedural vote took place in the Senate on September 10, 2015. In order for the Senate to end the debate regarding the deal it required 60 votes. With a 58-42 result the resolution of disapproval did not come into fruition.[102] President Obama voted for UNSC Res. 2231 endorsing the JCPOA.[103] As mentioned previously, President Obama issued Executive Order 13716 of January 16, 2016 in order to put in place the necessary framework for U.S. compliance.

III. The legality of withdrawal from the JCPOA and the extent to which treaty status could have prevented it

A. To what extent was it within the President's legal jurisdiction to withdraw from the JCPOA under U.S. law?

Given the legal category of agreement under which the JCPOA falls, "a successor President is not bound by a previous President's political commitment under either domestic

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[98] Press Release, President Trump, Remarks by President Trump on the Joint Comprehensive Plan of Action (May 8, 2018) (on file with the White House).

[99] Stephen P. Mulligan, Congressional Research Service, Summary, 2018 https://fas.org/sgp/crs/row/R44761.pdf.

[100] IRAN NUCLEAR AGREEMENT REVIEW ACT OF 2015, 114 P.L. 17, 129 Stat. 201, 2015 Enacted H.R. 1191, 114 Enacted H.R. 1191 (May 22, 2015).

[101] id.

[102] Stephen P. Mulligan, Congressional Research Service, Summary, 2018. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00267 & https://www.congress.gov/114/crec/2015/09/17/CREC-2015-09-17-pt1-PgS6774-2.pdf &https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00266

[103] S. C. Res. 2231 (July 20, 2015).

or international law and can thus legally disregard it at will."[104] U.S. presidents "have the authority to terminate sole executive agreements and political commitments, since those agreements are made by Presidents based on their own constitutional authority."[105] Legislative Attorney Stephen P. Mulligan has concurred with the aforementioned analysis stating that "when the President has independent authority to enter into an executive agreement, the President may also independently terminate the agreement without congressional or senatorial approval."[106]

Therefore, subsequent presidents are well within their constitutional right to amend or revoke previous executive orders, in the same way Obama did through Executive Order 13716. There have been many instances where executive orders have been revoked by succeeding presidents. For example, in July 2007 President George W. Bush issued Executive Order 13440[107] to reinterpret the Geneva Convention in order to limit CIA compliance with the convention's provisions for the treatment of al-Qaeda and Taliban detainees. President Obama revoked this order with EO 13491[108] in January 2009.

Further, President Trump was legally justified in his decision to reimpose sanctions under multiple pieces of legislation. The National Emergencies Act (NEA)[109] and the International Emergency Economic Powers Act (IEEPA)[110] authorize the President to declare a national emergency and outline his powers under such circumstance, including the ability to impose sanctions on foreign nations or entities. President Clinton's Executive Order 12957[111] first declared a national emergency with regard to Iran, and the declaration has been renewed every year since as required by statute. President Trump's Executive Order 13846[112] reimposing sanctions on Iran cited all the aforementioned.

The Iran Sanctions Act of 1996 (ISA) as amended was aimed at imposing "sanctions on persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources."[113] The Iran

[104] Bradley & Goldsmith, *supra* note 6, at 1218 (discussing non-binding political commitments).
[105] id. at 1225 (discussing the nonbinding nature of political commitments).
[106] Stephen P. Mulligan, Congressional Research Service 6, 2018.
[107] Exec. Order No. 13440, 72 FR 40707 (2007).
[108] Exec. Order No. 13491, 74 FR 4893 (2009).
[109] National Emergencies Act, 50 U.S.C. §§ 1601-1651.
[110] International Emergency Economic Powers Act of 1977, 50 U.S.C. 1701. § 202(a).
[111] Exec. Order No. 12957, 60 FR 14615 (1995).
[112] Exec. Order No. 13846, 83 FR 38939 (2018).
[113] Iran and Lybia Sanctions Act of 1996, H.R. 3107, 104th Cong. (1996)

Threat Reduction and Syria Human Rights Act[114] of 2012 (Public Law 112-158) (TRA) was aimed at preventing Iran from acquiring nuclear weapons by "expanding economic sanctions against Iran."[115] In addition, EO 13846 also cited the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010[116] and the Iran Freedom and Counter-Proliferation Act of 2012.[117] Legislation analyzed provides that reimposition of sanctions was based on already existing legislation and was justified given the President's belief that Iran poses an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[118]

In addition, the Iran Nuclear Agreement Review Act (INARA) outlined a mechanism of oversight which facilitated the withdrawal. The requirements outlined in INARA must be certified by the President to Congress every 90 days. If the President does not provide the certification that Iran is complying with the agreement, the INARA allows Congress to re-impose U.S. sanctions lifted pursuant to the JCPOA.[119] President Trump did not provide this certification in October 2018. In January 2018 he announced that "the United States will not again waive sanctions in order to stay in the Iran nuclear deal"[120] and that he intended to withdraw if the JCPOA was not renegotiated. Given that presidents independently enter into political commitments and can therefore independently withdraw from them, considering precedent of presidents implementing executive orders to revoke or amend previously implemented ones, as well as the legal framework analyzed, withdrawal from the JCPOA and reimposition of sanctions was legally justified under U.S. law.

B. To what extent is the U.S.'s decision to withdraw from the JCPOA justified based on international law?

Considering that UNSC resolutions are not strictly binding under international law, the U.S.'s decision to withdraw from the JCPOA cannot be considered unjustified. The full

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[114] Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701-8795.

[115] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111-195) (22 U.S.C. 8501 et seq.), as amended (CISADA), - (§§ 8501-8511).

[116] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. §8501.

[117] Iran Freedom and Counter-Proliferation Act of 2012 (subtitle D of title XII of Public Law 112-239) (22 U.S.C. 8801 et seq.) (IFCA).

[118] International Emergency Economic Powers Act of 1977, 50 U.S.C. 1701. § 202(a).

[119] Iran Nuclear Agreement Review Act of 2015, P.L. 114-117

[120] President Donald Trump, Statement by the President on the Iran Nuclear Deal (2018), located at https://www.whitehouse.gov/briefings-statements/statement-president-iran-nuclear-deal/

text of the agreement was included within UNSC Res. 2231, which was voted by the UN Security Council in 2015. According to Articles 25 and 48 of the UN Charter[121] any UNSC resolution is binding under international law. However, the International Court of Justice (ICJ) has not interpreted all UNSC resolutions as binding under international law. Whether a resolution is considered binding or nonbinding is based on its precise language. For example, UNSC Res. 2231 "[c]alls upon all Members States . . . to take such actions as may be appropriate to support the implementation of the JCPOA, including by . . . refraining from actions that undermine implementation of commitments under the JCPOA[.]"[122] The binding nature of "calls upon" has been debated in academic terms as well as in practice at the ICJ. James D. Fry, an assistant professor of law at the University of Hong Kong Faculty of Law has stated that "there are approximately equal numbers of commentators who indicate that it requires mandatory action and who indicate that it is merely recommendatory."[123] He argues that there is no way to definitively answer whether this phrase signals mandatory or recommendatory action for states.[124]

Commentators have stated that in cases where the ICJ has determined the phrase is binding have been influenced by the case's political context.[125] For example, in 1970, UNSC Res. 276[126] declaring South African presence in South West Africa (now known as Namibia) illegal. The resolution also called upon UN Member States to avoid having any dealings with the South African Government that would go against the resolution. The ICJ's advisory opinion[127] on the "legal consequences for states of South Africa in Namibia notwithstanding Security Council Resolution 276"[128] was requested by the UNSC on July 29, 1970.[129] The advisory opinion stated that South Africa's presence in Namibia was illegal and argued South Africa was obligated to withdraw. The "calls upon" phrase within UNSC Res. 276 was found to be binding. However, commentators such as Legislative Attorney Stephen P. Mulligan

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[121] U.N. Charter art. 25 & 48.

[122] S. C. Res. 2231 (July 20, 2015).

[123] James D. Fry, *Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implication,* 29 Michigan Journal of International Law. 197, 229 (2008) (discussing the significance of the phrase "calls upon" in UNSC Resolutions).

[124] id.

[125] Legal consequences for states of South Africa in Namibia notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J. & Stephen P. Mulligan, "Withdrawal from the Iran Nuclear Deal: Legal Authorities and Implications," Congressional Research Service 2, 2018.

[126] S. C. Res. 276 (Jan. 30, 1970).

[127] Legal consequences for states of South Africa in Namibia notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J., accessed at https://www.icj-cij.org/en/case/53

[128] id.

[129] id.

have stated that the historical context of apartheid was what determined the binding nature of the resolution, rather than its precise language.[130]

Given the ambiguous nature of this phrase and the multiple interpretations by legal scholars and the ICJ, it cannot be argued that UN resolutions are definitively binding. Precedent illustrated through the above examples suggests that whether the phrase is binding depends on the particulars of each case. The JCPOA is an unsigned document outlining "voluntary"[131] measures which are not binding under international law. Therefore, the U.S.'s decision to withdraw from the agreement is justified under international law.

C. If the JCPOA was an Article II Treaty, would that have influenced President Trump's ability to withdraw?

There has been disagreement amongst academics as to whether President Trump wouldn't have withdrawn from the JCPOA if it had been an Article II treaty. Thomas Jefferson's argument in his "Manual of Parliamentary Practice for the Use of the Senate of the United States"[132] is that treaties are the supreme law of the land and therefore cannot be repealed without congressional action. He states that "Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded."[133] This line of argument suggests that if the JCPOA had been an Article II Treaty instead of a political commitment, withdrawal would have been a more complicated process requiring congressional input.

Another argument supporting the proposition that President Trump wouldn't have withdrawn from the JCPOA if it had been an Article II treaty relates to 'self-executing' and 'non-self-executing'[134] treaties. Self-executing treaties "automatically have effect as domestic law" [135] as opposed to non-self-executing treaties which "constitute international law commitments" [136] but "do not themselves function as binding federal law." [137] The Supremacy Clause of the constitution states that treaties, like statutes are considered "the

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[130] Stephen P. Mulligan, "Withdrawal from the Iran Nuclear Deal: Legal Authorities and Implications," Congressional Research Service 2, 2018.

[131] Joint Comprehensive Plan of Action, art. 18, July 14, 2015, 55 ILM 98, 108 (2016).

[132] Thomas Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States (1801)

[133] id.

[134] US Senator Ted Cruz, *Limits on Treaty Power*, 93 Harvard L.R. Forum. 93 (2014) (discussing different types of treaties).

[135] Medellin v. Texas, 552 U.S. 491, 504 (2008).

[136] id.

[137] id.

supreme law of the land."[138] The implication of this argument is that if the JCPOA had been a "self-executing" treaty then the same extensive procedure would be required to amend or terminate it, as it would a statute. *Clinton v. City of New York*[139] clarified that a President cannot unilaterally repeal a statute. Only the legislative branch (i.e. Congress) "through bicameralism and presentment or a veto override, can do that."[140] If the JCPOA had been a "self-executing treaty," it would have been harder for the President to withdraw, assuming that treaties are subject to the same limitations on the executive as statutes.

However, while the US Constitution clearly outlines the necessary procedure to create an Article II Treaty, it does not set forth a specific termination method:

> The text of the U.S. Constitution does not specifically address which actors in the United States have the authority to act on behalf of the United States in terminating a treaty. Treaty termination since the Founding has been effectuated by statute, by subsequent treaty, by presidential action along with the Senate, or by unilateral presidential action. Since the early twentieth century, however, Presidents have come to dominate treaty termination just as they have the making and interpretation of treaties.[141]

Precedent suggests that if the JCPOA had been an Article II Treaty this would not have necessarily prevented the President from unilaterally withdrawing. More specifically, when Jimmy Carter gave notice of U.S. withdrawal from the 1954 Mutual Defense Treaty with Taiwan Sen. Barry Goldwater (R-Ariz.) protested and the question went to the Supreme Court. *Goldwater v. Carter*[142] reached the Supreme Court where Chief Justice Burger, Justice Stewart and Justice Stevens agreed with Justice Rehnquist's statement that "the basic question presented by the petitioners in this case is 'political,' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[143] The decision also clarified that:

> differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political, rather than legal, considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and

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[138] U.S. CONST. art. II, §6.

[139] 524 U.S. 417 (1998)

[140] Bradley & Goldsmith, *supra* note 6, at 1222 (discussing the nonbinding nature of political commitments).

[141] id. at 1224

[142] Goldwater v. Carter, 444 U.S. 996, 1002 (1979).

[143] id. at 1002

> Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups, or even individual Members, of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.[144]

This conclusion illustrates that the Supreme Court deems unilateral presidential withdrawal from an Article II treaty a 'political' and not a 'legal' question. Therefore, while the merits of withdrawal might be debatable, the legal justification behind such an action is not questioned.

Furthermore, when George W. Bush unilaterally withdrew from the Anti-Ballistic Missile Treaty in 2002 there was no formal protest from Congress as a whole but by 32 members of Congress who filed a lawsuit against the President. [145] The lawsuit was dismissed by U.S. District Judge John Bates. Basing the ruling on *Goldwater v. Carter*, the Court concluded that "the issue raised by these congressmen is a nonjusticiable political question. Therefore, defendants' motion to dismiss or, in the alternative, for summary judgment is granted, and plaintiffs' motion for summary judgment is denied."[146] These cases illustrate that the Supreme Court has not ruled unilateral presidential withdrawal from Article II treaties unconstitutional. While the merits of such a decision might be questionable, interpretation of the law by the Supreme Court has clarified that it is not illegal for a president to unilaterally withdraw from an Article II treaty.

Conclusion

Over time, presidents have not been constrained by the legal nature of the agreement from which they wish to withdraw. Regardless of whether it is a political commitment or an Article II treaty, presidents have been able to withdraw from international agreements without consulting the legislative branch without being in violation of U.S. law. *Goldwater v. Carter* and *Kucinich v. Bush* determined that unilateral treaty termination by the executive is a political question. The holdings of these cases indicate that if the JCPOA had been an Article II treaty, it would not have significantly influenced the President's ability to withdraw.

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[144] id. at 997

[145] U.S. Withdraws From ABM Treaty; Global Response Muted, https://www.armscontrol.org/act/2002-07/news/us-withdraws-abm-treaty-global-response-muted (last visited Jan. 5, 2019).

[146] Kucinich v. Bush, 236 U.S. (I tried to cite this but there is no abbreviation for the US District Court for the District of Columbia in Bluebook in BT 2.1 Federal Courts).

The domestic and international legal framework around international agreements and specifically political commitments suggests it is within the jurisdiction of the President to unilaterally withdraw from the JCPOA. President Obama was able to enter into the agreement without consulting Congress, and President Trump was able to withdraw in the same manner. However, while legislation does not prevent withdrawal from occurring, it is important that in the future, good faith negotiation principles are employed in order to ensure that the credibility of agreements regarding critical national interests is safeguarded. The previously mentioned legal principle of *Pacta Sunt Servanda* "provides a basis for obligation in treaties that does not exist for political commitments."[147] However, given the importance of U.S. political commitments like the JCPOA as well as the fact that they have largely replaced Article II treaties, good faith negotiation principles will be crucial if these commitments are to hold any credibility in the future. In order to maintain the U.S.'s geopolitical dominance it is imperative that political calculations of particular administrations do not interfere with the country's position as a reliable and consistent negotiating partner in the long-run.

The executive branch was able to conclude and terminate an agreement with far-reaching implications crucial to U.S. national interests without any form of congressional consultation. Such conduct severely weakens the U.S.'s credibility as a negotiating partner and diminishes its effectiveness at controlling nuclear proliferation and other matters which implicate U.S. interests as well as the country's geopolitical standing. The JCPOA is a specific case reflecting a wider trend of increasing power concentration in the hands of the executive. Given that courts have repeatedly refused to adjudicate the extent of a President's powers in regard to withdrawing from international agreements, it is the responsibility of Congress and the executive branch to create a framework which entails a greater level of accountability. Such a framework would likely include implementing legislation requiring greater cooperation of the legislative and executive branch of government, as well as a specific mechanism addressing restrictions on agreement withdrawal procedures. Such a framework is imperative in order to safeguard the credibility of the nation as a negotiating partner as well as the interests served by a particular agreement.

[147] Hollis & Newcomer, *supra* note 46, at 541(discussing the principle of *pacta sunt servanda*).

The Implementation of the Brown v. Board Supreme Court Case Decision and the "Separate but Equal" Statute in the Context of Modern Public High School Systems

Anusha Chinthalapale

Introduction

In 1954, the Supreme Court historically ruled in favor of integrating all public schools[1], a decision secured by the equal protection clause in the Fourteenth Amendment[2] and the *Oliver Brown v. Board of Education of Topeka (I)*[3] decision. Although the clause itself has been in place since 1868, it was only applied to educational opportunity when segregation was ruled unconstitutional. Despite the ruling, school segregation remains prevalent in school districts all over the country but now presents itself as either *de facto* or *de jure*. While *de facto* segregation refers to racial discrimination that is not mandated by law, *de jure* segregation is racial discrimination enforced by law.[4] *De jure* segregation was ruled unconstitutional by law through the *Brown v. Board (I)*[5] decision but increasingly presents itself as state-legislated residential and socioeconomic discrimination.[6]

This article argues that the modern public education system is more reminiscent of *Homer A. Plessy v. John H. Ferguson* and the "separate but equal"[7] statute, rather than the

[1] *Oliver Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) (concerning the integration of all public facilities, including schools)

[2] U.S. Const. amend. XIV, § 2

[3] May be referenced as (I) and (II) throughout the article to distinguish the cases from one another.

[4] Sean F. Reardon, *School Segregation and Racial Academic Achievement Gaps*., (2016) vol. 2: The Russell Sage Foundation Journal of the Social Sciences, no. 5., pg. 48-51

[5] *Id.* at 483

[6] J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 16 W. Res. L. Rev. 478 (1965)

[7] *Id.*

establishment of mandatory school integration set forth by *Brown v. Board (I)*, and provides legal recommendations to realign our current system with the historic ruling.

Part I

Despite the Court's decision to integrate schools all over the country, the "separate but equal" decision[8] still plays a large part in determining the quality of education a child has access to. This decision, set forth by *Plessy v. Ferguson*[9], happened several decades before *Brown*[10] subsequently overruled it. Historically, due to systematic racism and large income disparities, students of color have faced larger barriers--like a lower amount of opportunity, the school-to-prison pipeline, and a lack of available resources--than white students.[11] Our evolving political culture has led to an influx of diversity in the American electorate, but modern-day segregation continues to play a large role in the effectiveness of public education systems throughout the country.

A. Procedural Background

With discussion about segregation come debates about education, employment, and housing. Red-lining, property values, the school-to-prison pipeline, standardized testing, and college or workforce readiness play a large role in how school boundaries are determined. Redlining is a discriminatory practice in real estate, typically involving mortgage lenders that refuse to lend money or extend credit to borrowers in certain areas of town[12]. According to the Forum on Public Policy, "The school to prison pipeline refers to this growing pattern of tracking students out of educational institutions, primarily via ―zero tolerance‖ policies, and, directly and/or indirectly, into the juvenile and adult criminal justice systems."[13] Despite common misconception, the distribution of county funding for different school districts is not contingent on the median income of the area. Schools in higher income and lower income neighborhoods receive the same amount of funding; schools in higher income areas fare better because of active Parent-Teacher Association (PTA) chapters, and access to higher quality resources.[14] Due to years of systemic racism within the workforce, most

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[8] *Homer A. Plessy v. John H. Ferguson*, 163 U.S. 537 (1896)

[9] *Id.* at 537

[10] *Id.* at 483

[11] Chauncee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases through a Structural Racism Framework* 36 Fordham Urb. L.J. 1009 (2009)

[12] Meru El Muad'Dib, *The Effects of the Doctrine of Discovery,* 18 (2019)

[13] Nancy A. Heitzeg, *Education Or Incarceration: Zero Tolerance Policies And The School To Prison Pipeline* 1-3 (Forum on Public Policy) (2009)

[14] *See* Jerry Rosiek et. al., *Resegregation as Curriculum: The Meaning of the New Racial Segregation in U.S. Public Schools* 75-79 Richard Delgado et. al. 5 (2015)

white neighborhoods are also often associated with higher incomes[15], so upon examining school boundary lines within a county, it is not uncommon to see an achievement gap between the whiter, richer schools and the lower income, majority-minority schools. A majority-minority area refers to a jurisdiction within which one or more racial and/or ethnic minorities (relative to the whole country's population) make up a majority of the local population.[16]

Integrated school districts lead to a higher rate of cultural exchange and diversity and have been proven to boost test scores and college readiness.[17] According to the US Department of Education, schools with higher rates of diversity have higher graduation and employment rates.[18] Starting from kindergarten, there is a definitive innovation gap between students in a diverse school and students who are not.[19] For the sake of this paper, a racially diverse environment refers to one in which there is approximately 20% of each major race represented in a space.[20]

B. Relevant Statutory and Judicial Law

During the Jim Crow era, spanning from the end of the reconstruction era in 1877 to the beginning of the civil rights movement in 1950, separating people by race for using public facilities was protected under the "Separate but Equal" statute.[21] Homer Adolph Plessy, who described himself as "7/8th Caucasian, 1/8th African", bought a train ticket and upon boarding, took a vacant seat in a "Whites Only" car. After being asked to move, Plessy refused, resulting in his arrest on the grounds that he had violated Louisiana's Withdraw Car Act[22] of 1890. Justice Brown responded that the Separate Car Act was intended to preserve

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[15] Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult, Race and Social Problems* 6 (4), December 2014. Retrieved from The Economic Policy Institute.

[16] Maureen A. Craig et. al., *Majority No More: The Influence of Neighborhood Racial Diversity and Salient National Population Changes on Whites' Perceptions of Racial Discrimination*, The Russell Sage Foundation Journal of the Social Sciences 4 (5) 141-143 (August 2018)

[17] Alfred G. Hess et. al., *Who Benefits from Desegregation Now?*, The Journal of Negro Education 57 (4) 536-551 (1988) (JSTOR)

[18] Office of Planning, Evaluation, and Policy Development under U.S. Department of Education, Advancing Diversity and Inclusion in Higher Education 20-25 (2016)

[19] Digest of Education Statistics, 2018. National Center for Education Statistics (NCES); Washington, D.C.: United States Department of Education. 2018. Available from: https://nces.ed.gov/programs/digest/d18/tables/dt18_220.40.asp

[20] Patrick Simon, *The Measurement of Racial Discrimination: The Policy Use of Statistics,* International Social Science Journal 57 (183) (May 2005). Retrieved from Himmelfarb Health Sciences Library.

[21] *Id.* at 537

[22] La. Legis. Assemb., Withdraw Car Act, no. 111 (1890). Repealed 1954.

"public peace and good order" and was therefore a "reasonable" exercise of the legislature's police power. Police power in this context refers to the permissible scope of federal or state legislation so far as it may affect the rights of an individual when those rights conflict with the promotion and maintenance of the health, safety, morals, and general welfare of the public.[23] Plessy's arrest questioned the scope of the Fourteenth Amendment and whether or not there was a difference in quality in terms of the "Whites Only" and "Colored Only" train cars. The case in question would reach notoriety, as *Plessy v. Ferguson*,[24] due to the ruling in favor of upholding the "separate but equal" statute.

Ultimately, the reasoning behind the decision stemmed from the belief that although people are separated by race, the quality of the experience was equal. Since Plessy had no evidence of difference in train quality between the "Whites Only" and "Colored Only" cars, the Fuller court sided with Ferguson and claimed the Fourteenth Amendment did not apply in this particular scenario. Justice Henry Brown, on behalf of the majority, stated:

> "The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."[25]

The majority opinion held that people of color were equal to white people 'civically and politically' but not 'socially'. During the time in which *Plessy v. Ferguson*[26] was argued, segregation was not explicitly outlawed in the Constitution which, under the Tenth Amendment, gave state legislatures the authority to allow segregation or not.[27] Essentially, since segregation wasn't explicitly mentioned in the Constitution, the federal government had the authority to claim that people of color were equal to white people in the eyes of the law. Despite that, because segregation was still widely practiced, the two groups were not allowed the same privileges, opportunity, and achievement as each other.

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[23] *Homer A. Plessy v. John H. Ferguson*, 163 U.S. 537 (1896) (Brown, H. concurring opinion).
[24] *Id.* at 537
[25] *Id.* at 537 (conc. opinion)
[26] *Id.* at 537
[27] U.S. Const. amend. X

Plessy v. Ferguson[28] was cited as precedent for cases concerning school integration many times before it was overturned. In *Cumming v. Richmond County Board of Education*,[29] Richmond county was set to close one African-American high school and convert it into four elementary schools, effectively closing one of the three African-American high schools in the area. J.W. Cumming, the plaintiff, argued that the board of education could not levy taxes to support a high school system that only supported white students. The court ultimately sided with the board on the grounds that the plaintiff failed to specify what parts of the Fourteenth Amendment the board had violated. The court found that although the board did allocate some amount of the funds to a white, all boys denominational school, since the county didn't explicitly establish a public high school for white boys, it didn't violate any aspect of the Fourteenth Amendment. This case raised the same questions about the scope of the Fourteenth Amendment that *Plessy v. Ferguson* did. Ultimately, the majority held that "the education of the people in schools maintained by state taxation is a matter belonging to the respective states."[30]

After the *Cumming v. Richmond County Board of Education*[31] decision, *Gong Lum v. Rice* posed a similar constitutional question.[32] Both decisions derived from the legal precedent set by *Plessy v. Ferguson*.[33] In this case, Gong Lum, a taxpayer who resided in the Rosedale school district and was a native-born American with Chinese ancestry, was notified that his nine-year-old daughter would no longer be admitted into her current all-white school because "she was of Chinese descent, and not a member of the white or Caucasian race."[34] Using *Cumming v. Richmond County Board of Education*[35] as precedent, the court ruled in favor of Rice on the grounds that Lum's daughter was of "the Mongolian or yellow race" and could not be admitted into a white school. Due to the preservation of the "separate but equal" statute under *Plessy v. Ferguson*,[36] the court also held that the quality of education Lum's daughter would receive at the all-white school would be equal to the one she would receive from the colored-only school.

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[28] *Id.* at 537
[29] *J.W. Cumming, et. al. v. Richmond* 175 U.S. 528 (1899)
[30] *J.W. Cumming, et. al. v. Richmond* 175 U.S. 528 (1899) (Harlan, J.M. concurring opinion)
[31] *Id.* at 528
[32] *Gong Lum, et. al. v. Rice et. al.* 275 U.S. 78 (1927)
[33] *Id.* at 537
[34] *Gong Lum, et. al. v. Rice, et. al.* 275 U.S. 78 (1927) (Taft, W. concurring opinion)
[35] *Id.* at 528
[36] *Id.* at 537

Before the historic *Brown v. Board (I)*[37] case, there were two notable cases which attempted to overturn *Plessy v. Ferguson*[38] as it applied to educational opportunity.[39] In *McLaurin v. Oklahoma State Regents for Higher Education*[40], the plaintiff had been denied admission into the University of Oklahoma based solely off his race. While lower courts voted in favor of the defendant, a three-judge federal court asserted supremacy and overturned the prior decisions, ruling in favor of the plaintiff. The majority held that the University of Oklahoma had a constitutional duty, in reference to the equal protection clause, to provide the plaintiff with the same education offered to students of any other race. Ultimately, Oklahoma amended their law to allow the plaintiff to gain admission to the university. However he was required to sit in a "colored-only" section in class and a similarly designated table at lunch. Although he had access to an equal education, he was still separated because of the color of his skin.

McLaurin v. Oklahoma State Regents for Higher Education[41] was not the only case to gain notoriety for its loophole-filled resolution. In 1946, *Sweatt v. Painter*[42] was set to become the case to overturn Plessy *v. Ferguson*.[43] Similar to *McLaurin*,[44] *Sweatt*[45] was automatically denied admission into the all-white University of Texas Law School because of his race. The Supreme Court ruled unanimously in favor of the plaintiff and claimed that the "law school for Negroes," which was set to open in 1947, would have been largely unequal to the University of Texas Law school in terms of faculty, course variety, library facilities, and reputation. The court's decision, although successful in commenting on unequal treatment or conditions in public institutions which separated their patrons by race, still continued to uphold *Plessy v. Ferguson*.[46]

Holding

Brown v. Board (I) is often credited for integrating schools and completely transforming the modern public education system. The 1950s Americana has gained palpable

[37] *Id.* at 483 {concerning the integration of all public facilities, including schools}
[38] *Id.* at 537
[39] Russo, Charles J. et. al., Brown v. Board of Education at 40: A Legal History of Equal Educational Opportunities in American Public Education, The Journal of Negro Education 63 (3) 297 (1994).
[40] *McLaurin v. Oklahoma State Regents* 339 U.S. 637 (1950)
[41] *Id.* at 637
[42] *Heman Marion Sweatt v. Theophilus Shickel Painter* 339 U.S. 629 (1950)
[43] *Id.* at 537
[44] *Id.* at 637
[45] *Id.* at 629
[46] *Id.* at 537

notoriety for its harsh segregationist policies and traditionalist system. During this time, it was common for African-American students to be denied admission into certain public schools because of laws permitting public schools to be racially segregated. Cases like *Cummings v. Richmond County Board of Education*[47] and *Gong Lum v. Rice*[48] argued that school segregation based on race was in violation of the equal protection clause of the Fourteenth Amendment, and were ultimately denied relief in lower courts because of the precedent *Plessy v. Ferguson*[49] had established: racially segregated public facilities were legal as long as the standards were equal across race. *Brown v. Board (I)*[50] was the product of five separate class action lawsuits brought forth by the NAACP in Delaware, Washington, D.C., Virginia, Kansas, and South Carolina. When referencing *Brown v. Board (I)*,[51] the citation is most usually referring to the case of Oliver Brown in Kansas, who filed his lawsuit because his daughter was denied admission into a white elementary school in Topeka. The case raised two legal questions: (1) what the scope of the Fourteenth amendment is, and (2) if the segregation of a public good, like schooling, is constitutional.

Ultimately, the court unanimously found that separate was inherently unequal, effectively overturning *Plessy v. Ferguson* and the subsequent "separate but equal" statute. The scope of the fourteenth amendment was determined to include equal educational opportunities and its constitutionality extended to any means to achieve that. Delivering on the behalf of the majority opinion, Chief Justice Earl Warren wrote,

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[52]

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[47] *Id.* at 528
[48] *Id.* at 78
[49] *Id.* at 537
[50] *Id.* at 483 {concerning the integration of all public facilities, including schools}
[51] *Id.*
[52] *Brown v. Board* 347 U.S. 483 (1954) {concerning the integration of all public facilities, including schools}(Warren, E. concurring opinion)

The issue that America's modern public education system faces does not rest in the hands of the first *Brown v. Board(I)*[53] decision, but rather, the second. *Brown v. Board (II)*[54] centered on the implementation process for school integration. The Court held that all schools must obey the *Brown (I)*[55] decision to desegregate, but not immediately; federal courts were to oversee local desegregation. The issue with this holding laid in its vagueness. The lack of specification led to issues highlighted best in *Griffin v. School Board of Prince Edward County*[56]. Ten years after the *Brown (II)*[57] decision was made, Prince Edward County schools in Virginia had yet to segregate due to the lax enforcement of the decision at the time. After receiving an order to desegregate from a federal appeals court, the board withheld funds from their schools, causing the schools to close. After closure, the board helped white students relocate to private schools, while black children had to move to different counties to receive an education. The *Griffin*[58] case ruled this practice unconstitutional, forcing the schools to finally desegregate. After the unanimous *Brown v. Board (I)*[59] decision, there was significant resistance among the public, especially in the south where there was a higher concentration of African-American students. In the relatively progressive parts of the country, New England and California, the bussing of children from one school to another with the sole purpose of diversification, became especially prevalent and was met with similar opposition as integration efforts in the south.

The Warren Court ultimately delivered the decision that the process of integration would be left up to the states. Eventually, this decision would lead to the continuation of residential and socioeconomic discrimination under the guise of low diversity levels. In the current American public education system, these low diversity levels have been classified as de facto and de jure segregation.

C. Overview

The legal foundations for the integrated American public education system will be evaluated. *Brown v. Board (I)*[60] is heavily credited for modern education policies, but the influx of segregated school districts, the lack of equal education opportunity, and the results of the

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[53] *Id.*
[54] *Brown v. Board* 349 U. S. 301 (1954) {concerning the implementation of integrated public facilities}
[55] Id. at 483 {concerning the integration of all public facilities, including schools}
[56] *Cocheyse J. Griffin v. School Board of Prince Edward County* 377 U.S. 218 (1964)
[57] *Id.* at 301{concerning the implementation of integrated public facilities}
[58] *Id.* at 218
[59] *Id.* at 483 {concerning the integration of all public facilities, including schools}
[60] *Id.* at 483 {concerning the integration of all public facilities, including schools}

school-to-prison pipeline suggest otherwise. This article will draw heavily from historic precedent, constitutional definitions, and a critical perspective of the evolution of the American school system. Finally, the article will assert that the modern public education system is more reminiscent of *Plessy v. Ferguson*[61] and the "separate but equal" statute, rather than the establishment of mandatory school integration set forth by *Brown v. Board.* [62]

Part II

De facto segregation has been more prominent in American sociopolitical culture than de jure segregation, most likely because the interpretation of the fourteenth amendment after *Brown v. Board (I)*[63] barred the most obvious ways to implement de jure segregation, like actively labeling schools and other public facilities as "White Only" or "Colored Only," and enforcing separation of people based on race, to implement the latter. De jure segregation persists in modern education systems but presents itself as residential and socioeconomic discrimination. Schools located within segregated neighborhoods usually have the most socioeconomically disadvantaged children in attendance.[64] Although red-lining, a practice used during the Jim Crow era to bar black families from living in historically white neighborhoods, was banned over fifty years ago,[65] the lasting impacts of it still exist for prospective minority homeowners.[66]

The Franklin Delano Roosevelt administration of the early thirties established the Federal Housing Administration, as a sequel to the National Housing Act of 1934[67]. As a result, government surveyors were asked to grade 239 major city neighborhoods to determine habitability. [68] Criterion included the level of credit risk, ethnic and racial background, socioeconomic class, and levels of literacy[69]. The term "red-lining" comes from how topographers would group different neighborhoods: green for the best neighborhoods, blue for desirable ones, yellow for areas on warning, and red for hazardous zones. Since local lenders encouraged practice in mainly blue and green areas, neighborhoods that were

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[61] *Id.* at 537

[62] *Id.* at 483 {concerning the integration of all public facilities, including schools}

[63] *Id.*

[64] *Id.* Rothstein

[65] Fair Housing Act, Sec. 800., 42 U.S.C. 3601, 1970

[66] Daniel Aaronson et. al., *The Effects of the 1930s HOLC "Redlining" Maps,* Working Paper 2-3 Federal Reserve Bank of Chicago 12 (2017).

[67] National Housing Act, H.R. 9620, Pub.L. 73–479, 48 Stat. 1246 (1934)

[68] *Id.*

[69] Tracy Jan, *Redlining was banned 50 years ago. It's still hurting minorities today.*, Washington Post, March 28, 2018.

classified as high risk, or red-lined, were often denied capital investments which could have greatly improved housing and economic opportunity for residents.[70]

A 2018 study by the National Community Reinvestment Coalition[71] found that the neighborhoods deemed hazardous, or "red" zones in the 1930s, were made up of predominantly African-American, Jewish, Catholic, and immigrant communities. While the trends remain similar to the 30s, fluctuations in minority populations and efforts to curb redlining leaves the American housing market more divided than ever, citing 67% of hazardous zones as being inhabited by Latinx and African-American communities. 91% of the communities that were classified as green zones in the 1930s, still remain middle to upper class neighborhoods, with 85% of them being predominantly white[72].

The economic and educational development of a neighborhood is heavily contingent on residential segregation based on socioeconomic discrimination. The quality of education at any public school relies largely on the development of the community around it, and a common hypothesis states that communities with a higher median household income are more likely to have a higher academic achievement rate than schools in low-income areas.[73] Academic achievement is represented by the completion of educational benchmarks, most often referring to receiving a high school diploma.[74]

The difference between the rates of academic achievement in whiter, higher-income schools and majority-minority, low-income schools is often referred to as the achievement gap. The lack of educational resources at the latter schools and abundance of them at the former schools is referred to as the opportunity gap. Both gaps play a large role in barring education from being equitable to all students, regardless of race or socioeconomic class.

Individual predictors of low achievement prove to stem from a lack of access to resources necessary for children to succeed. The correlation coefficient between marginalized youth--communities with lower literacy rates, first-generation immigrants, lack of access to affordable healthcare, lack of access to adequate housing, and those that are low-

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[70] Bruce Mitchell et. al., *HOLC "Redlining" Maps: The Persistent Structure Of Segregation And Economic Inequality*, March 2018. Retrieved from The National Community Reinvestment Coalition.

[71] *Id.*

[72] *Id.* Jan

[73] Nikki L. Aikens & Oscar Barbarin, *Socioeconomic Differences in Reading Trajectories: The Contribution of Family, Neighborhood, and School Contexts.*, 100 Journal of Educational Psychology 235–251 (2008).

[74] Various Authors, Resources in Education, pub. Department of Health, Education, and Welfare, National Institute of Education (1999) Accessed through Google Books.

income--and rates of academic achievement are quite high[75]. For example, without access to adequate housing, students don't have the option for quiet places to study and tend to move frequently, changing schools, teachers, and curriculums along with their housing situation. Children with immigrant parents, or children who are immigrants themselves, are less likely to read frequently when young, stunting speech and vocabulary growth during critical years[76].

Individual access to resources and community access to resources have proven to be two very different worlds. While individual access to resources refer to goods mainly offered in the private sector, such as healthcare and housing, community access refers to goods and resources provided by the federal government. Schools are often funded by local property taxes, therefore, it is not unusual to see an increase in educational resources available with an increase in median household income of the surrounding community, and a decrease in educational resources with a decrease in median income. While it is the average value of properties in the area that determine the amount of property taxes paid, it is true that people with higher incomes are more likely to live on these expensive properties. For example, while higher-income communities have the option to fund an after-school care program, the need for such a program is low, whereas in lower-income communities, where the need for such program is high, resources are too scarce to even properly fund supplies for school itself, much less an after-school care facility[77].

The achievement gap is not the only issue plaguing at-risk students. The school-to-prison pipeline, which refers to racially marginalized students receiving harsher punishments because of a systemic lack of access to resources, is a pathway most African-American and Latinx youth in underfunded public schools tend to follow. Perhaps the best example of this theory in practice lies within the healthcare industry; a lack of access to affordable healthcare results in higher rates of student absenteeism, which can often prompt the arrest of both the parent and the child on the grounds of the violation of compulsory education laws.[78] Such a pattern does not fade with adulthood; black men and women are 300% more likely to be arrested than white men and women for non-violent crimes.[79] The introduction of a juvenile

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[75] Pallavi Amitava Banerjee et. al., *A Systematic Review of Factors Linked to Poor Academic Performance of Disadvantaged Students in Science and Maths in Schools,* Cogent Education 3 (1) (2016)

[76] *Id.* Rothstein

[77] *America after 3PM: After-school Programs in Demand*, After School Alliance (October 2014)

[78] Every Student Succeeds Act, 20 U.S.C.ch. 28 § 1001 et seq. 20 U.S.C. ch. 70, 114th Cong.

[79] Report of The Sentencing Project to the United Nations Special Rapporteur on *Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, The Sentencing Project (2018)

system within majority-minority schools set children of color, specifically black and Hispanic children, up for a lifetime of prison stints and probation.

The US Government Accountability Office conducted a study in 2016 due to literature showing low-income and minority students do not have as many educational opportunities as their richer and whiter equivalents. The same report also highlighted the fact that majority-minority schools were far less likely to offer advanced science, technology, engineering, and math courses and far more likely to flunk or suspend students for disciplinary violations, than their suburban counterparts[80]. Ultimately, the analysis found that these economic and racially segregated schools have lower graduation rates, and widened the achievement gap between them and socioeconomically and racially privileged students.[81]

A. Case Study

The aforementioned situations are most consistent with de jure segregated school districts. Some school districts, notably Montgomery County Public Schools (MCPS) in Maryland, experience similar shortcomings within their education systems, even when funding is not based on local property values, thus creating one of the most progressive cases of de facto segregation in the country.

Montgomery County is a contradiction in and of itself; while it remains one of the most populous, affluent, and diverse counties in the entire country,[82] the racial and class demographics are what contributes largely to de facto segregation. The division in the severity of segregation can be discerned simply by splitting the county in two and analyzing the discrepancies in median household income, race, and the level of academic achievement in both sections.

Section one, dubbed 'upcounty', includes ten high schools in seven cities and is home to two of the most diverse towns in the entire country: [83] Germantown and Gaithersburg. Both majority-minority towns, or areas where racial minorities outnumber the Caucasian population, happen to house five of the most underperforming schools in the county. Seneca Valley High School, located within the confines of Germantown, consists of 81% students of color, and 66% of students who qualify for free and reduced meals

[80] Jacqueline M. Nowicki, *K-12 EDUCATION: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, pub. Government Accountability Office (2016)

[81] *Id.*

[82] Leah Hendey et. al., *Racial Inequities in Montgomery County*, Washington Area Research Initiative (2017).

[83] Adam McCann, *Most & Least Ethnically Diverse Cities in the U.S.*, Wallethub (2019).

(FARMs).[84] The dropout rate is 7.6%, the suspension rate is at 4.7%, while the graduation rate remains closer to 80%.[85] Similarly, at Gaithersburg High School, located within the confines of Gaithersburg as one of the poorest schools in the county, consists of 84% students of color and 71% of students who qualify for FARMs. The dropout rate here is 15%, while the suspension rate is 4.1%.[86]

While these numbers stick out in the grand scheme of things, upcounty itself has extreme socioeconomic and racial diversity; in Gaithersburg, homes tend to cost between $80,000 and $491,000, while there remains a steady 20% representation of every major ethnic group.[87] Other schools in the area include Northwest High School[88] and Clarksburg High School,[89] both of which have FARMs rates closer to 50% and graduation rates above 96%. The biggest concern lies in the achievement gap; at the schools where FARMs rates and racial diversity is high, i.e. upcounty schools, the percent of students meeting the Maryland benchmark for college readiness is below 50%, and the graduation rates have a tendency to stagnate below the Montgomery County average.

Starkly opposed to the demographics of upcounty, downcounty fosters an environment where segregation rears its ugly head more often. Downcounty is just as diverse as upcounty, but because the geography of the area is so tightly knit, the idea of consortiums and clusters play a large role in the public education scene. The richer parts of downcounty, more influenced by lawyers, judges, and powerful political players, due to its close proximity to Washington, D.C., houses six prominent high schools within Bethesda, Potomac, and Chevy Chase--all areas with a median household income above $150,000, and all areas within the top ten most affluent cities in the entire country.[90] Despite the unmatched wealth of these three cities, their proximity to the nation's capital is rivaled only by Silver Spring, another majority-minority city with intense socioeconomic diversity.

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[84] Only students from low-income households receive access to FARMs.

[85] Montgomery County Board of Education, Seneca Valley High School #104 396-397, Regulatory Accountability (2017)

[86] Montgomery County Board of Education, Gaithersburg High School #551 374-375, Regulatory Accountability (2017)

[87] City of Gaithersburg, Demographics (2010). Accessed from https://www.gaithersburgmd.gov/about-us/demographics

[88] Montgomery County Board of Education, Northwest High School #246 384-385, Regulatory Accountability (2017)

[89] Montgomery County Board of Education, Clarksburg High School #249 366-367, Regulatory Accountability (2017)

[90] Vincent Del Giudice, *America's 100 Richest Places*, Bloomberg (2017)

As an unincorporated area, Silver Spring's boundaries are not officially defined, which means that the public education designation process cannot solely rely on a child's zip code. The public education designation process refers to that by which a student is assigned to an elementary, middle, and high school based on their residential zip code. For this reason, the city adopted a consortium model, where students living within the unofficial boundaries of the east and west parts of Silver Spring have the opportunity to rank the schools they wish to attend. Each school has different academic opportunities, specialty programs, and resource students can utilize to achieve college readiness.[91]

With the understanding of Montgomery County's demographics in mind, segregationist tendencies are not a surprise; the boundary lines have not drastically changed since the Jim Crow era, and along with that, racial and socioeconomic diversity remained dormant in some cities and exploded in others. Schools like Whitman High School[92] in Potomac and Bethesda-Chevy Chase High School[93] (B-CC) in Chevy Chase, have students coming from households with a median income of $250,000 and have access to better tutors, college counselors, scholarship resources, internships, and career counselors than schools with a lower median income of $75,000 like Springbrook[94] and Kennedy,[95] located within the northeast and downcounty consortiums respectively. Students at Whitman and B-CC are more likely to have access to lawyers, politicians, and other white-collar resources because their parents are more likely to have those careers in the first place. This phenomenon leads to parents spending more time volunteering at their children's high school, as career counselors, tutors, and internship directors.[96]

It is natural to assume that schools in richer areas receive more funding solely because of property value correlated budgeting, but according to the MCPS finance division, school funding is distributed according to four key principles: (1) Consistency, (2)

[91] Montgomery County Public Schools, Division of Consortia Choice and Application Program Services (2020). Accessed from: https://www.montgomeryschoolsmd.org/departments/schoolchoice/

[92] Montgomery County Board of Education, Walter Whitman High School #427 406-407, Regulatory Accountability (2017)

[93] Montgomery County Board of Education, Bethesda Chevy Chase High School #406 358-359, Regulatory Accountability (2017)

[94] Montgomery County Board of Education, Springbrook High School #798 400-401, Regulatory Accountability (2017)

[95] Montgomery County Board of Education, John F. Kennedy High School #815 378-379, Regulatory Accountability (2017)

[96] Manpower Vol.1, United States. Department of Labor, 18 (1969)

Differentiation, (3) Flexibility, and (4) Transparency.[97] Using these key principles is supposed to allocate funds equally, yet the operating budget only accounts for available *public* funds while disregarding *private* ones.

The funds allocated for each school are exactly equal, but not equitable. While schools in higher income areas can afford to have an active PTA branch raising money for the school, schools in lower-income areas cannot. This leads to negligent school budgeting and forces schools in low-income areas to stretch what little money they have to fund education, supplies, and extracurricular activities. As aforementioned, the amount of funding relies heavily on the incorporation of specialty programs offered within the school; even the possibility of this is endearing to many students, and because of the overwhelming demand to be a part of the program, many schools turn to application based admission. Such is true even for International Baccalaureate (IB) programs open to students from any part of the county, and because of the high rates of diversity MCPS has achieved within their student body, it's not uncommon for the admissions process to seem like it favors one type of student over another. This conjecture was tested heavily through *Rosenfeld v. Montgomery County Public Schools*[98] in 1999. In *Rosenfeld*, the plaintiffs filed a racial discrimination case against MCPS on the grounds that they believed their son was denied entry into what was then the only IB program at Richard Montgomery High School in Rockville, because he was white. They claimed that the IB program needed to reach a certain quota of students of color before accepting any more white students, and that ultimately barred the admissions team from permitting highly qualified white students over lower-achieving students of color. Thus, the ethics of racial quotas brings about the constitutional question of whether affirmative action oversteps the boundaries of the fourteenth amendment and the equal protection clause.

Montgomery County remains one of the best examples of de facto segregation in practice: seldom changed boundary lines lead to socioeconomic and racial fracturing which then translate into lower academic achievement and educational opportunity.

B. Brown v. Board in Public School Policy

[97] *Supporting our Students-Investing in our Future*, MCPS Budget Allocation (2020), https://www.montgomeryschoolsmd.org/budget-101/index.html.

[98] *Rosenfeld v. Montgomery County Public Schools* 41 F. Supp. 2d 581 (D. Md. 1999)

The *Brown v. Board (I)*[99] decision is supposed to be taken into account when adjusting policy for public education. The precedent the case set can be discerned in cases like *Meredith v. Jefferson County Public Schools*,[100] where integration efforts first began during the twenty-first century. In order to ensure schools were integrating after the Jim Crow era, many school districts adopted racial quotas in their manifesto; each school should have at least a certain percentage of students of color and the rest of them can be white. In the case of Jefferson County, however, students were given a choice of schools, similar to how a consortium might work, but there were often more students than there was space for accommodation. In such a case, student enrollment and admission was decided on the basis of residency, institutional capacity, along with race; no school was permitted to have a population of black students outside of 15-50% of the entire population. While parents sued the school district on the grounds of violations of the Fourteenth Amendment's equal protection clause, established and protected by *Brown v. Board (I)*,[101] district courts ruled in favor of the defendants, citing the decision in *Grutter v. Bollinger*[102] which stated that "race based classifications must be directed towards a compelling government interest and must be narrowly tailored to that interest."[103] Since Jefferson County had an interest to integrate schools and increase diversity through black students, the decision held that the quota was constitutional.

Once the case reached the Supreme Court, the narrative around the issue had changed. Under a strict scrutiny[104] framework, the court found that while *Grutter*[105] referred to private, higher education institutions, Jefferson County was still a ward of the state, which provided public schooling for primary and secondary school students, and the plan did not involve individual consideration of the residential area each school was located in. In addition, the notion of diversity was limited to two groups and disregarded other ethnicities. Thusly, the court ruled 5-4 in favor of the plaintiffs, while Chief Justice John Roberts wrote in a plurality opinion, "The way to stop discrimination on the basis of race is to stop

[99] *Id.* at 483 {concerning the integration of all public facilities, including schools}
[100] *Meredith v. Jefferson County Public Schools* 551 US 701 (2007)
[101] *Id.* at 483 {concerning the integration of all public facilities, including schools}
[102] *Grutter v. Bollinger* 539 U.S. 306 (2003)
[103] *Grutter v. Bollinger* 539 U.S. 306 (2003) (Ginsburg, R.B., concurring opinion)
[104] Stephen A. Siegal, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, *in* The American Journal of Legal History 48 (4) 355-407 (Oxford University Press ed., 2006). Ref. 355
[105] *Id.* at 306

discriminating on the basis of race."[106]

An example of *Brown v. Board (II)*[107] as a precedent in modern public education policy is *Parents Involved in Community Schools v. Seattle School District No.1*,[108] which refers to another case of racial quotas in public schools to ensure integration and diversity. With a consortium model, similar to the one in *Meredith*,[109] the Seattle school district created a rule in that if any one student body did not accurately reflect the racial makeup of the entire district--approximately 60% white, and 40% students of color--the school in question would favor white or non-white students depending on which race would bring the balance closer to the goal. Ultimately, the Roberts court filed a 5-4 majority opinion in favor of *Parents*, and poignantly wrote the reason for such a decision, "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[110] While he held the minority opinion, Justice Kennedy stressed that public schools considering race to ensure equal educational opportunity is not inherently unconstitutional, even if the District's use of race in this particular case, was.

Where a historical case can be used as a precedent, it's bound to be used as a deterrent as well. In *Missouri v. Jenkins*,[111] the Kansas City, Missouri School District (KCMSD), the same district with heavy de jure segregation presently, unwittingly found itself combating segregation in 1989 at the hand of court directives. Kansas City is only 46% residents of color, yet the inner-city is primarily constructed of majority-minority communities, so in order to attract white students from the suburbs to the public school in inner-city, the city raise property taxes on inner-city communities, pushing lower income, families of color out of the area and pulling richer, white families into it. The method of gentrification was used in order to increase diversity and cross-cultural exchange between different students in all schools, which was an implied principle in the *Brown v. Board (II)*[112] decision. Despite the rampant property tax increases, the majority held that local governments levying their own taxes were plainly judicial acts protected under the tenth

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[106] *Meredith v. Jefferson County Public Schools* 551 US 701 (2007) (Roberts, J. concurring opinion)

[107] *Id.* at 483 {concerning the implementation of integrated public facilities}

[108] *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 (2007)

[109] *Id.* at 701

[110] *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 (2007) (Kennedy, A., dissenting opinion)

[111] *Missouri v. Jenkins* 515 U.S. 70 (1995)

[112] *Id.* at 483 {concerning the implementation of integrated public facilities}

amendment.[113]

Red-lining[114] which occurred after the *Brown v. Board (II)*[115] decision may have promoted residential discrimination, but despite the layout of the city, each one was still required to abide by the principles set forth by the historical court case. Thus, with the rise of residential discrimination, came the rise of bussing to ensure diversity in every school. In *United States v. Unified School District No. 500*,[116] it was observed that students of color had to go out of their way to ensure racial diversity in schools by being bussed to schools far from their neighborhoods. While white students had the opportunity to stay in their local, neighborhood schools, students of color were often being bussed to whiter schools to achieve the diversity quotas put forth by the city council. The court ruled in favor of the *United States*, stating that *Brown v. Board (II)*[117] ordered the desegregation of schools by any means necessary. The term "any means necessary" in this context, could be applied to bussing students across the district.

There was a vast transformation in the public education scene, both in policy and practice, between the sixties and the seventies, yet the components have hit stagnation into the twenty-first century. Seemingly medieval ideas, like bussing, are still heavily debated in public and progressive arenas, like the one Montgomery County seems to provide. Referencing the case of MCPS, and reframing the geography, Albert Einstein HS[118] and Montgomery Blair HS, [119] both located within the confines of Silver Spring, are approximately 15 minutes away from Walter Johnson HS and B-CC HS, both located within the Bethesda-Potomac-Chevy Chase trifecta, respectively. While the two high schools in Silver Spring are majority-minority schools, Walter Johnson and B-CC HS both stand in stark difference to the latter, with both schools educating an approximately 63% white student body. Thus the question that arises concerns the lack of diversity in one area with an influx of it in another that is barely five miles down the road.

Part III

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[113] *Id.* at U.S. Const. amend. X

[114] *Id.* at. 57-56

[115] *Id.*

[116] *U.S. v. Unified School Dist. No. 500* United States Court of Appeals, Tenth circ. 610 F.2d 688 (1979)

[117] *Id.* at 483 {concerning the implementation of integrated public facilities}

[118] Montgomery County Board of Education, Albert Einstein High School #789 372-373, Regulatory Accountability (2017)

[119] Montgomery County Board of Education, Montgomery Blair High School #757 360-361, Regulatory Accountability (2017)

Despite the required integration under the *Brown v. Board* decision, it becomes evident that decreased academic achievement and a lack of educational opportunity at schools where people of color represent more of the student body than white students is fairly reminiscent of the separate but equal statute under *Plessy v. Ferguson.*[120] Understandably, the two groups of students are seldom separated on the basis of race, but there lies an undeniable pattern of harsh punishments, a lack of educational and career opportunities, and stagnation in test scores and overall academic achievement within schools that identify as a majority-minority environment.

There is yet to be a solution in public education systems that redefines what school integration means in the modern context. On the one hand, any school district can argue they have diversity in their schools because it is required by federal mandate set after *Brown v. Board (I)*[121]. *Brown v. Board (II)*[122] establishes the jurisdiction of lower courts, stating that these district courts had to oversee and ensure that integration was implemented. The idea of integration is narrowly defined as a setting in which people with similar needs are joined into equal participation or membership of an institution. Simply put, integration means that there is not a homogenous group of people admitted into an institution.

There are a couple possibilities to ensure that every school can reap the benefits of integration and heavy diversity, without overstepping common concerns parents in school districts may have. The most common way school districts deal with a lack of diversity in some schools and an influx of it in others, is by vast redistricting, a method adopted by many tight knit counties suffering from de facto segregation.[123] Despite the commonality of such a solution, parents in counties that have adopted the technique, come out to the board of education meetings in droves to oppose it. There are three main reasons why parents are deterred from sending their children to a more diverse school in the county and can be identified as (1) bussing or longer bus rides, (2) the decline of property values, and (3) overcrowding and deteriorating infrastructure; the process of school integration easily debunks all three concerns.[124]

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[120] *Id.* at 537

[121] *Id.* at 483 {concerning the integration of public facilities}

[122] *Id.* at 483 {concerning the implementation of integrated public facilities}

[123] William M. Gordon, *The Implementation of Desegregation Plans Since Brown*, The Journal off Negro Education 63 (3) 310-322 (1994)

[124] Thandeka K. Chapman, *Is Integration a Dream Deferred? Students of Color in Majority White Suburban Schools*, *in* The Journal of Negro Education 83 (3) 311-326 (2014) ref. 318-320

Rezoning has been dubbed as a distraction from a larger issue which circumvents the fact that too many schools in low-income, majority-minority areas are struggling. Because rezoning only focuses on bringing higher income, white students to schools in neighborhoods that have been redlined, the families that actually live inside the "red-zones" are still stuck in a perpetual cycle. The issue is not necessarily moving people from one school to another, but rather ensuring all schools, regardless of the area it is located in, have equal opportunity offered at their respective institutions to give every student a fair access to resources and an overall fair chance to succeed.

Other solutions include the use of housing vouchers to relocate low-income families to wealthier neighborhoods. Unfortunately, the introduction of this policy proposal disregards the families in these communities who have identified closely with their local neighborhood, redlined or not. The last alternate, and most viable, solution, is equitable funding based on the property values of the residential area around each school.

Theoretically, schools located in higher-income neighborhoods often have active PTA branches which raise an average amount of $400,000 for each school every year. For example, the PTA within the Forest Hills community in Queens, NY, raised $1.4 million one year in addition to the budget supplied by the school district. In stark contrast, the PTA in Mott Haven, NY, only twenty minutes north, raised zero dollars in addition to the baseline district-supplied budget.[125] The school in Forest Hills is more likely to have access to resources and opportunities for their students because of that extra money, while the school in Mott Haven will struggle to get by.

By increasing the baseline district-supplied budget at schools in lower-income areas with nonexistent PTAs, and decreasing the baseline district-supplied budget at schools in higher-income areas with active PTAs, all schools have the monetary opportunity to offer their students the same level of academic opportunity. It isn't uncommon to see a rise in segregation in places where the cost of living has rapidly increased in the past decade. A steep economic incline like that is sure to push out low-income communities of color and pull in business development and investors. The problem of segregation rises when school boundary lines do not change during this demographic upturn. This leads to a concentration of a homogenous group of people attending the same school and receiving the same

[125] Reema Amin et. al., *Find out how much your school's PTA raises (or doesn't)*, ChalkBeatNYC (2019)

academic opportunity as each other, while communities not even five minutes away from them, struggle at their local schools.

It is not enough to just redistrict every couple years. Diversifying the experience of one child may not help the other. Each school should be supplied equitable funds to sustain both educational opportunities and achievements. Without offering every child the same chance to succeed, schools in red-lined communities have lower opportunities offered, while schools in blue-lined areas have an abundance of them. Such a practice is reminiscent of the "separate but equal" statute established in *Plessy v. Ferguson.*[126]

Brown v. Board (II)[127] offered leniency on integration techniques, but it was required that "The courts will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." [128] According to the Warren court, it was made explicitly clear that every establishment was to meet certain standards to ensure that the quality of resources were not based on one's race.

The fact of the matter stands. A student's zip code should not determine the quality of education they have access to. Montgomery County's story presents a multitude of problems, but in its discussions, hearings, and prominent diversity, there stands a viable solution. A solution that stands by the *Brown v. Board* decisions and ensures equal academic opportunity for every public-school student.

[126] *Id.* at 537
[127] *Id.* at 483 {concerning the implementation of integrated public facilities}
[128] *Id.* at. 483 {concerning the implementation of integrated public facilities}

Rethinking the Legal Obligation of Facebook to Regulate Political Advertisements Shared on its Platform

Courtney Lange

Introduction

In recent months, social media companies have been subjected to heightened criticism for the publication and propagation of misinformation. Concerns over Russian interference in the 2016 presidential election through fake news published on Facebook brought this issue to the forefront of the national agenda - with a specific focus on political advertisements.[1] In response to growing pressure, in October of 2019, Twitter announced that it would be banning the publication of all political and issue advertisements on its website.[2] In a tweet defending the decision, Twitter CEO Jack Dorsey stated that "While internet advertising is incredibly powerful and very effective for commercial advertisers, that power brings significant risks to politics, where it can be used to influence votes to affect the lives of millions."[3] In reaction to the increased media attention on the topic, Snapchat publicly announced that they already have a policy in place that requires the fact-checking of all political ads prior to publication.[4] While Twitter has taken a hard stance and Snapchat has created an alternative approach, Facebook has chosen to remain neutral in the publication of this type of information. In a speech by Facebook CEO Mark Zuckerberg on November

[1] Greg Miller & Adam Entous, *Declassified Report Says Putin 'Ordered' Effort to Undermine Faith in U.S. Election to Help Trump.* The Washington Post (Jan 6, 2017), https://www.washingtonpost.com/world/national-security/intelligence-chiefs-expected-in-new-york-to-brief-trump-on-russian-hacking/2017/01/06/5f591416-d41a-11e6-9cb0-54ab630851e8_story.html (last visited Jan. 2, 2020).

[2] Rachel Lerman, *Twitter Bans Political Ads Ahead of 2020 Election.* AP News (Oct. 30 2019), https://apnews.com/63057938a5b64d3592f800de19f443bc (last visited Jan. 2, 2020).

[3] *Id.*

[4] *Snapchat Says That it Will Fact-Check Political Ads.* BBC News (Nov. 19, 2019), https://www.bbc.com/news/technology-50475296 (last visited Jan. 2, 2020).

17, 2019 at Georgetown University, he asserted that despite increased pressure, Facebook will continue to not fact-check or ban political advertisements, stating that such action would be a violation of freedom of expression.[5] Facebook's overarching stance is that it is up to the American people to discern whether information is credible or not.[6]

The lack of federal guidance on the matter concerning platforms has encouraged politicians and political action committees (PACs) to take advantage of Facebook's policy and test the boundaries of the protocol.[7] While Facebook refused to take down an ad that made unsubstantiated claims about former Vice President Joe Biden's involvement with Ukraine, the company did remove an ad that falsely stated that Senator Lindsey Graham supports the Green New Deal.[8] The difference: the ad about former Vice President Joe Biden was created by a political candidate, whereas the ad about Senator Graham was made by a PAC.[9] Although Facebook previously indicated that they will fact-check political advertisements made by PACs but not by politicians, it is important to note that the advertisement was removed after people had already seen it - not prior to publication.[10] This prompts the question of whether or not Facebook can be held accountable for propagating misinformation, especially when a false ad slips through the fact-checking process they have in place, as seen in the case of the false ad involving Senator Graham.[11] Yet, since its enactment in 1996, Section 230 of the Communications Decency Act has been used as an immunity shield in the publication of content for social media companies on the basis that they are simply platforms, and thus are not responsible for what is shared on it by third parties.[12]

With the increased number of candidates utilizing these widely unregulated advertisements on social media as a way to gain traction in the polls, questioning how social

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[5] Politico Staff, *Facebook v. Twitter on Political Ads: What Zuckerberg Said, How Dorsey Responded*. Politico (Oct. 30, 2019), https://www.politico.com/news/2019/10/30/facebook-twitter-political-ads-062297(last visited Jan. 2, 2020).

[6] *Id.*

[7] Emily Stewart, *Facebook's Political Ads Policy is Predictably a Disaster*. Vox Media (Occt. 30, 2019), https://www.vox.com/recode/2019/10/30/20939830/facebook-false-ads-california-adriel-hampton-elizabeth-warren-aoc (last visited Jan. 2, 2020).

[8] *Facebook Says it Took Down False Ad About Sen. Lindsey Graham.* CNBC (Oct. 27, 2019), https://www.cnbc.com/2019/10/28/facebook-says-it-took-down-false-ad-about-sen-lindsey-graham.html (last visited Jan. 2, 2020).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Communications Decency Act. 47 U.S.C. § 230 (2011).

media dictates the voting patterns of citizens is crucial.[13] Facebook should be a particular focus in this conversation because although the company claims to be a neutral platform, like many other social media companies, it dictates the type of advertisements that a user sees.[14] Specifically, Facebook has a feature that micro-targets the audience that the advertisement reaches - aiming to hit voters in specific neighborhoods, and demographics.[15] Furthermore, Facebook's policy allowing advertisers to handpick the users that view their ad has allowed the rise in what is called "dark advertising."[16] This refers to a phenomena where a candidate alters their message and campaign promises depending on the group that the ad is targeting - sometimes producing opposite messages in an effort to gain support.[17] Additionally, the process for choosing which ads the company wants to publish also draws the concern of some critics, as candidates purchase Facebook advertisements through a digital system that rates ads on their "engagement" level - how likely they are to gauge the interest of users.[18] Thus, as the New York Times points out, "ads that are more emotionally charged," and consequently ones with a greater shock factor, are more likely to get published at the forefront of a page by Facebook, discounting whether they make claims that are true or not.[19] Thus, while Facebook justifies its stance on the regulation of political ads as a protection of a political candidate's First Amendment right, microtargeting advertisements begs the question of whether the company is truly allowing open access to information.

Due to the rise of social media as an information hub and news outlet in recent years, this article will argue that Facebook and other social media platforms be required to fact-check political ads shared on their sites. Though the Communications Decency Act has historically waived the liability of social media platforms for the content shared on their sites, the applicability of the Act to Facebook needs to be reexamined. As Facebook has attempted

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[13] Mike Isaac, *Why Everyone is Angry at Facebook Over its Political Ads Policy*. The New York Times (Nov. 22, 2019), https://www.nytimes.com/2019/11/22/technology/campaigns-pressure-facebook-political-ads.html (last visited Jan 2, 2020).

[14] Matthew Rosenberg & Kevin Rose, *Trump Campaign Floods Web With Ads, Raking in Cash as Democrats Struggle*. The New York Times (Oct. 20, 2019), https://www.nytimes.com/2019/10/20/us/elections/trump-campaign-ads-democrats.html (last visited Jan. 2, 2019).

[15] Nancy Scola, *Facebook Considering Limits on Targeted Campaign Ads*. Politico (Nov. 7, 2019) https://www.politico.com/news/2019/11/07/facebook-targeted-campaign-ad-limits-067550 (last visited Jan 2, 2020).

[16] Julia Carrie Wong, *'It Might Work too Well': the Dark Art of Political Advertising Online*. The Guardian (Mar. 3, 2018), https://www.theguardian.com/technology/2018/mar/19/facebook-political-ads-social-media-history-online-democracy (last visited Jan 2, 2020).

[17] *Id.*

[18] Rosenberg & Rose, *supra* note 14.

[19] *Id.*

to regulate the content shared on its site, it should be treated as a publisher instead of a platform. This article will ultimately suggest that legislative guidance needs to be implemented to address the transparency of advertisements, the obligation of social media companies to prevent the spread of misinformation through these advertisements, and the extent to which Section 230 can be used as a liability shield in the publication of advertisements. Consequently, in an increasingly digital world, it is crucial to question and restructure the legal responsibility of sites such as Facebook for the information that is published on it.

I. US Legal Precedent

A. Campaign Finance Law

In the 1976 decision Buckley *v. Valeo*, the Court not only notably created reporting requirements for campaign contributions over a certain amount, but also established a distinction between advertisements centered around an issue area and advertisements that reference specific candidates.[20] Consequently, this precedent has been incorporated into campaign finance law."[21] Accordingly, advertisements targeting specific candidates or elections are further defined as expressed advocacy by the FEC, whereas advertisements that discuss policy in general are defined as issue advocacy.[22] Typically, campaign finance law regulates express advocacy by setting limits for how much a campaign can spend and requiring a disclosure indicating where the ad originated.[23] Thus, issue ads that do not mention candidates fall outside the jurisdiction of campaign finance law.[24]

While political ads are regulated under the Bipartisan Campaign Reform Act (BCRA), which requires broadcasters to create a public database that discloses information about political advertising prices and purchases, this provision does not extend to online ads on social media website, as established in 11 CFR 110.11(a).[25] Advertisements from PACs, parties, and candidates are viewed as public communications by the FEC, thus they are

[20] *Buckley v. Valeo,* 424 U.S. 1 424, 424 (1975).

[21] R. Sam Garrett, Cong. Research Serv., CRS In Focus IF10758, *Online Political Advertising: Disclaimers and Policy Issues, 1 (2017),* https://fas.org/sgp/crs/misc/IF10758.pdf.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] R. Sam Garrett, Cong. Research Serv., R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, 19 (2018), https://fas.org/sgp/crs/misc/R41542.pdf.

required to issue disclaimers for all ads that they publish.[26] Despite this, the FEC found that Facebook was exempt from disclaimer requirements on the grounds that space constraints for the advertisements that limited the amount of characters in each ad.[27] While the advertisements were limited to 160 characters at the time, the website has undergone significant change since then - with Facebook's advertisements no longer being character restricted.[28] Nevertheless, Zuckerberg recently said that Facebook will adopt a policy requiring political ads to include disclaimers.[29] However, the company has yet to release an outline of how the policy will be carried out and what constitutes a political ad that necessitates a disclaimer.[30] Furthermore, while discussion about updating provisions regarding disclaimers have occurred, such as the 2011 FEC Advanced Notice of Proposed Rulemaking (ANPRM) forum, no new rules have been enacted.[31] Most recently, on November 16, 2017, the FEC held a vote to draft new internet-disclaimer rules in the realm of paid advertising, but the commission has yet to adopt these revised rules.[32]

B. The Restriction of the First Amendment in the Context of Defamation

While Facebook claims that the regulation of political ads would be an infringement upon freedom of expression/freedom of speech granted in the U.S. Constitution,[33] the rights granted by the First Amendment are not absolute.[34] Specifically, in the 2010 case of *United States v. Stevens*, the Supreme Court affirmed that the content of speech can be regulated in instances of "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct."[35] While the Court in this case implied that it is not probable that they would be adding more restrictions to the First Amendment in the context of speech, as seen

[26] FEC, *Advertising and Disclaimers.* FEC, https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/ (last visited Jan. 2, 2020).

[27] Donie O'Sullivan, *Facebook Sought Exception From Political Ad Disclaimer Rules in 2011.* CNN Business (Sept. 27, 2017), https://money.cnn.com/2017/09/27/technology/business/facebook-political-ad-rules/index.html (last visited Jan. 2, 2020).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Garrett, *supra* note 25, at 20.

[32] *Id.*

[33] Politico Staff, *supra* note 5.

[34] *Government Restraing of Content of Expression.* Justia US Law, https://law.justia.com/constitution/us/amendment-01/16-government-restraint-of-content-of-expression.html (last visited Jan. 2, 2020).

[35] *United States v. Stevens,* 559 U.S. 460, 460 (2010).

in their refusal to add a category in this case, the Court "did not entirely rule out the possibility that other forms of unprotected speech exist."[36]

When discussing misinformation, as it can be propagated in unchecked advertisements, the 1964 case of *Times v. Sullivan* sets precedent for restricting speech in regard to defamation. The Court was tasked with determining whether a paid published advertisement criticizing civil rights demonstrations in the South which contained false information constituted defamation.[37] The Court found that while the criticism of a protest is covered under the realm of free speech, the type of speech "...forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[38] The test created in *Times* requires speech to contain "actual malice" and to be expressed with a "reckless disregard for the truth."[39] Furthermore, it is important to note that *Times* only cover information that is factually untrue and involves public figures, and does not apply to the speech that denotes an opinion - stating that "erroneous statement is inevitable in free debate, and. . .it must be protected if the freedoms of expression are to have the 'breathing space' that they' need. . .to survive."'[40] In other words, the Court has distinguished between a statement of opinion and a statement that is factually untrue. In the 1979 decision *Herbert v. Lando*, the burden of proof for actual malice in defamation cases was further clarified.[41] In an effort to gather evidence that actual malice existed, Herbert attempted to obtain materials related to the editing process of the alleged defamatory articles that had been published about him.[42] However, Lando refused to provide Herbert with the documents, stating that the First Amendment shielded them from investigations into the editorial process.[43] The Court held that defendants could not prevent a plaintiff from uncovering information on the "editorial process or the state of mind" of the individuals involved in alleged libel.[44] Such a shield would affect a plaintiff's ability to acquire evidence in a suit and thus is unconstitutional.[45]

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[36] Kathleen Ann Ruane, Cong. Research Serv., CRS Report for Congress 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment* (2014), https://fas.org/sgp/crs/misc/95-815.pdf.

[37] New York Times Co. v. Sullivan, 376 U.S. 254, 255 (1964).

[38] *Id* at 277.

[39] *Id* at 255.

[40] *Id.* at 272.

[41] *Herbert v. Lando,* 441 U.S. 153, 153 (1979).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

Consequently, this case has proved to be important, as it has further established boundaries in the publication process for the press.

However, the Court's rulings on defamation cases since have been inconsistent; there is a discrepancy as to what constitutes actual malice and a blatant disregard for the truth in the publishing of misinformation.[46] This was particularly prominent in *Fong v. Merena,* decided by the Supreme Court of Hawaii in 1982.[47] The plaintiff, Fong, who was running for reelection in the State House of Representatives, filed suit against Merena for the creation of a sign - stating that Fong voted yes to pensions when she did not.[48] Fong was ultimately unable to prove that the defendant knowingly published misinformation - stating that "[I]t has not been clearly and convincingly shown that in making the publication, Merena believed that it was false."[49] This case ultimately serves as an example of the difficulty of meeting the standard of "actual malice" that was established in *Times*.

In the context of Facebook, and the internet in general, it is important to note that defamatory information reaches a greater audience, at a far more rapid pace than broadcast media ever has.[50] Consequently, defamation is arguably more dangerous than ever with the rise of the internet as an information hub.

C. Content Liability Shields

In common-law principles, the publisher of a defamatory statement is held to the same standard of liability as the original creator of the statement.[51] This is rooted in the idea that a publisher has editorial control over what is produced.[52] This standard is generally applied to newspapers, magazines, and books and was upheld in *Times*.[53] However, cases against online platforms fall under the realm of jurisdiction of Section 230 of the

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[46] Douglas E. Lee, *Libel and Slander.* Middle Tennessee State University, https://www.mtsu.edu/first-amendment/article/997/libel-and-slander (last visited Jan. 2, 2020).

[47] *Fong v. Merena,* 655 P.2d 875 (Haw. 1982)

[48] *Id.*

[49] *Id.* at 877

[50] Nicole Martin, *How Social Media Has Changed How We Consume News.* Forbes (Nov. 30, 2018) https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/#412acb0c3c3c (last visited Jan 3, 2020).

[51] David Ardia, *Primer on Immunity -- and Liability -- for Third-Party Content Under Section 230 of Communications Decency Act.* Digital Media Law Project (Dec. 16, 2007), http://www.dmlp.org/blog/2007/primer-immunity-and-liability-third-party-content-under-section-230-communications-decency (last visited Jan 2. 2020).

[52] Brian J. Davis, *Comment: Untangling the Publisher versus Information Content Provider Paradox of 47 U.S.C. 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits against Internet Service Providers.* New Mexico Law Review (Winter 2002), http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1618&context=nmlr (last visited Jan 2, 2020).

[53] *Times, supra* note 37.

Communications Decency Act instead.[54] Consequently, in cases such as *Cubby v. CompuServe, Inc.* that dealt with defamatory content posted online, platforms have been shielded from liability for the content shared by a third-party on their platform. [55]

The Communications Decency Act has distinguished between a content provider and a service provider to describe the role of companies in the publication of information online.[56] Accordingly, a service provider is defined as a company that "passively displays content that is entirely created by third parties."[57] Thus the standard that is generally examined is whether or not a party "materially contributed" to the content that was posted.[58] However, an information content provider is an entity that essentially creates the content itself - whether it be "'responsible, in whole or in part' for creating or developing."[59] Applying this to the case of Facebook, an ad has to first be approved by the company to be published on its site and the company regulates who can view that ad.[60] Despite this, according to US law, Facebook lacks editorial control and thus is a service provider.[61]

D. Establishment and Scope of the Communications Decency Act Regarding Defamation

In 1985, the Supreme Court ruled that Congress has the authority to regulate the internet, under the Commerce Clause.[62] Following, the 1995 ruling in *Stratton-Oakmont, Inc. v. Prodigy Services Co.* found that the investment banking firm Prodigy could be held liable for libelous statements shared on its website on the grounds that the company held "editorial control."[63] This looked hopeful for the prohibition of publication of misinformation on online platforms.[64] However, cases filed against social media companies for defamatory content have not been as successful since the establishment of Section 230 of the Communications Decency Act. In reaction *Stratton-Oakmont, Inc. v. Prodigy Services Co.,* Congress enacted Section 230 of the Communications Decency Act in 1996 as the federal

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[54] Ardia, *supra* note 51.

[55] *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

[56] *Immunity for Online Publishers Under the Communications Decency Act.* Digital Media Law Project, http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act (last visited Jan. 2, 2020).

[57] *Id.*

[58] Kathleen Ann Ruane, Cong. Research Serv., *How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act*, 2 (2018), https://fas.org/sgp/crs/misc/LSB10082.pdf.

[59] Communications Decency Act, *supra* note 12.

[60] Ruane, *supra* note 58.

[61] *Id.*

[62] U.S. Const. art. III, § 8, cl. 3.

[63] *Stratton Oakmont, Inc. v. Prodigy Services Co.,* 1995 WL 323710, 5 (N.Y. Supr. Ct. 1995).

[64] *Id.*

government's first attempt at regulating speech on the internet.[65] Specifically, 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."[66] The theme of this provision of the law is that "interactive service providers" are not liable for the information shared on their website because they are platforms.[67] Yet, as outlined in §230(c)(2)(A), moderation of content in the name of prevention of the transmission of dangerous information does not disqualify a company from being considered to be a passive displayer of information.[68] Ultimately, since its enactment, Section 230 of the Communications Decency Act has given social media platforms immunity in the case of suits filed against them for content shared on their platform that was created by a third-party.[69]

Specifically regarding defamation, the 1997 case, *Zeran v. America Online, Inc.*, the Fourth Circuit Court of Appeals concluded that online platforms cannot be held liable for defamatory content shared on their website.[70] The decision relied on the distinction between distributors and publishers that was established in Section 230 of the Communications Decency Act.[71] This standard was restated in the 2013 case, *Seaton v. TripAdvisor LLC*, where the Sixth Circuit Court of Appeals concluded that TripAdvisor could not be held accountable for the false and defamatory statements made by a third-party user on its platform, as it passively publishes content.[72] Yet, none of these decisions address advertisements which a platform, like Facebook, must first approve.

While Section 230 of the Communications Decency Act shields many internet companies from liability for content shared, the scope of the Act is not absolute. In the 1997 suit of *Fair Housing v. Roommates.com,* the Ninth Circuit Court of Appeals concluded that Section 230 immunity did not apply to Roommates.com, as the site was not a passive

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[65] Valerie C. Brannon, Cong. Research Serv., Legal Sidebar LSB10306, *Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230,* 2 (2019), https://fas.org/sgp/crs/misc/LSB10306.pdf.

[66] Communications Decency Act. 47 U.S.C. § 230(c)(1).

[67] Brannon, *supra note* 65.

[68] Elliott Harmon, *No, Section 230 Does Not Require Platforms to be "Neutral."* Electronic Frontier Foundation (Apr 12, 2018), https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral (last visited Jan 3, 2020).

[69] Natalie Annette Pagano, *The Indecency of the Communications Decency Act § 230: Unjust Immunity for Monstrous Social Media Platforms.* 511 Pace Law Review (Sept. 2018), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1994&context=plr (last visited Jan. 2, 2020).

[70] Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1129 (E.D. Va. 1997).

[71] *Id.*

[72] Seaton v. TripAdvisor, LLC, 728 F.3d 592, 595 (6th Cir. 2013).

publisher of content.[73] Because the company tailored the distribution of user profiles - dictating what user would see another user's profile, the court deemed the company to be an "internet content provider" as opposed to the "interactive content provider" which would fall under Section 230.[74]

Furthermore, it is important to note that all the aforementioned cases, are federal court of appeals cases, and that there have been no Supreme Court cases that have taken a stance on this issue. Additionally, since the introduction of the Section 230 of the Communications Decency Act in 1996, there has been little guidance given by the legislative branch as to how political advertisements on social media should be regulated. With the lack of a legislative and federal judicial oversight on this matter - there is little precedent addressing the censorship of social media in the publication of political advertisements, and no legal remedy to rectify the publication of advertisements on social media that propagate misinformation.

II. Rethinking the application of the Communications Decency Act to Facebook

A. Applying the 1996 Legislative Intent of the Communications Decency Act to the 21st Century

While the size and scope of the internet has evolved since Congress enacted Section 230 of the Communications Decency Act, the law has remained unchanged.[75] Around the time that the law was enacted, the majority of people acquired news and information about political candidates through broadcast and print media.[76] While the internet was used for political advertising, research from the 1997 and 1998 campaigns in the United Kingdom found that campaigns used the internet as an extension of print and television advertising - such as electronic newspapers and online brochures - that functioned at the same limited

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[73] *Fair Housing Coun. of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008).

[74] *Id.*

[75] Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should be Reinstated Against Internet Service Providers.* Pittsburgh Journal of Technology Law and Policy (2008), https://www.researchgate.net/publication/305875210_The_Communications_Decency_Act_of_1996_Why_230_is_Outdated_and_Publisher_Liability_for_Defamation_Should_be_Reinstated_Against_Internet_Service_Providers (last visited Jan. 3, 2020).

[76] Jason Gainous & K.M. Wagner, Tweeting to Power: *The Social Media Revolution in American Politics.* 9 (2013), https://books.google.com/books?hl=en&lr=&id=cc48BAAAQBAJ&oi=fnd&pg=PR7&dq=evolution+of+social+media+politics&ots=8Oj8n82j&sig=DDQKp40udPOETL78lrB6f77GUNQ#v=onepage&q=evolution%20of%20social%20media%20politics&f=false

interactivity level as the other more common methods used.[77] With the rise of the internet has also come the rise of social media, not only as a social networking device, but as an information source - with 2.4 billion internet users.[78] According to a survey conducted by the Pew Research Center, social media has grown to be the main method people rely on to gain access to news, with approximately 64.5 percent learning about current news from Facebook, Twitter, YouTube, Snapchat and Instagram.[79] Consequently, the survey also found that 50 percent of people who use the internet, find out about breaking news through social media prior to even learning about it on a broadcast news station.[80]

In the years following the establishment of Section 230 of the Communications Decency Act, there has been a tremendous increase in the amount of emphasis put on the internet as a tool in political advertising in each subsequent election cycle.[81] This phenomenon is illustrated in the $1.4 billion that was spent on online political advertising in the 2016 election - approximately eight times more than was spent in 2012.[82] Online advertisements on social media have appeared especially attractive to campaigns as they can be relatively inexpensive to create, publish, and transmit instantly to a wide variety of targeted audiences.[83] Furthermore, studies have demonstrated that with the rise of online access to information - there has also been a decrease in the amount of an article that people actually read. Consequently, short pop-up advertisements can be a powerful tool in elections.[84] Yet, this can also be dangerous, as while social media can be an informational source, it can also aid the spread of misinformation. As a researcher from the Massachusetts Institute of Technology found, "Falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information, and the effects were more pronounced for false political news than for false news about terrorism, natural disasters, science, urban

[77] *Id.*

[78] Nicole Martin, *How Social Media Has Changed How We Consume News.* Forbes (Nov. 30, 2018) https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/#412acb0c3c3c (last visited Jan 3, 2020).

[79] *Id.*

[80] *Id.*

[81] Gainous & Wagner, *supra* note 76.

[82] Ian Vandewalker, *Oversight of Federal Political Advertisements Laws and Regulations.* Brennan Center for Justice (October 24, 2017), https://www.brennancenter.org/our-work/research-reports/oversight-federal-political-advertisement-laws-and-regulations (last visited Jan 3, 2020).

[83] *Id.*

[84] Martin, *supra* note 78.

legends, or financial information."[85] Yet, despite the growing prominence of the use of social media in campaigning and the growing dangers of misinformation, the publishing of online political advertisements remains largely unregulated.[86]

The broad liability shield that was given to online companies in the 1990s by the Communications Decency Act was intended to ensure that the growth of the internet would not be hindered by regulations.[87] Furthermore, it aimed to encourage:

> "...interactive computer services that provide users neutral tools to post content online to police that content without fear through 'good samaritan . . . screening of offensive material,' 47 U.S.C. § 230(c), they would become liable for every single message posted by third parties on their website."[88]

Yet, at the time of the enactment of Section 230, Congress could not have anticipated how the internet would evolve into what it is today. While the law may have been relevant and necessary at the time - it is simply too broad of a shield for the modern age with the expansive power and reach of the internet.

B. The Regulation of Political Advertisements on Social Media vs. on Broadcast Media

Political advertisements published in broadcast media are, like social media ads, not required by law to be fact-checked-the.[89] However, while a television station cannot theoretically control who watches, an advertiser on Facebook can choose specifically who on the platform to target. Thus, the difference between how advertisements are transmitted and displayed on social media in contrast to typical broadcast media calls for further examination of whether fact-checking standards should be put into place. While the political advertisements that appear on television are viewed by every person watching that particular channel, the political advertisements published on Facebook are only able to be seen by a group of users that Facebook allows to be targeted.[90] Though some may argue that the microtargeting on Facebook is similar to the audiences that certain political advertisements reach on television-based viewership of a particular network, the key difference lies in user

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[85] Soroush Vosoughi, et. al., *The Spread of True and False News Online.* American Association for the Advancement of Science (Mar. 9, 2018), https://science.sciencemag.org/content/359/6380/1146 (last visited Jan. 3, 2020).

[86] Garrett, *supra* note 25, at 20.

[87] Pagano, *supra* note 69, at 532.

[88] *Fair Housing, supra* note 73, at 1175.

[89] Wilkinson Barker Knauer, *Political Broadcasting 2020.* 15 Wilkinson Barker Knauer Law (June 2019),https://www.wbklaw.com/uploads/file/Articles-%20News/Political%20Broadcasting(2).pdf (last visited jan 3, 2020).

[90] O'Sullivan, *supra* note 27.

control. A viewer of broadcast media chooses which channel to watch, determining the ads that they see, and more importantly, all viewers of that channel will see the same ads. If we view Facebook like a channel in the social media world, all users of Facebook will not see the same ads, despite the fact of all the users viewing the same metaphorical channel. Therefore, the lack of fact-checking of ads leaves for the possibility for targeting vulnerable users with misinformation. If a user were to rely solely on social media for information about political candidates, the results of an election cycle could be influenced.

C. The Issue with Viewing Facebook as a Neutral Public Forum

Facebook is well within its right to censor and regulate the content published on its platform, not only because it is a private company, but also under its powers outlined within §230(c)(2)(A) of the Communications Decency Act.[91] Thus, the regulation of content in order to protect its community standards should not disqualify the company from receiving the protections granted by Section 230, as this type of moderation is allowed for a neutral platform.[92] However, Facebook does not passively publish content. While Facebook leaves the audience of an advertisement up to the group that pays for the ad, it is not neutral in the process through which the ad gets published. Candidates purchase Facebook advertisements through a digital system that rates ads on how likely they are to be interacted with by a user, Facebook not only enables micro-targeting, but chooses what ads get seen at the forefront of a page.[93] If it were truly neutral, it would not have this policy of choosing which advertisements are published where based on potential to be interacted with. This type of tailoring of content has nothing to do with regulation in the name of the protection of the platform from harmful content that §230(c)(2)(A) permits. Section 230 of the Communications Decency Act should shield companies from liability in publishing only when the platform is neutral.[94] As Facebook has demonstrated that they are not neutral in the political advertisement publishing process, the applicability of Section 230 of the Communications Decency Act in this process should be revisited.

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[91] Elliott Harmon, *No, Section 230 Does Not Require Platforms to be "Neutral."* Electronic Frontier Foundation (Apr 12, 2018), https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral (last visited Jan 3, 2020).

[92] *Id.*

[93] Rosenberg & Rose, *supra* note 14.

[94] Lincoln Caplin, *Should Facebook and Twitter Be Regulated Under the First Amendment?* Wired (Oct. 11, 2017), https://www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment/ (last visited Jan 3, 2020).

While contradictory decisions have been made since, when examining the applicability of Section 230 of the Communications Decency Act in the case of the publication of political advertisement process on Facebook, it is important to revisit the case of *Fair Housing v. Roommates.com*. In the suit, the Fair Housing Councils of San Fernando Valley and San Diego (FHCs) accused Roommates.com of violating the Fair Housing Act (FHA) and the California Fair Employment and Housing Act (FEHA) by sorting user data based on user characteristics such as "sex, sexual orientation, and whether [they] would bring children to a household."[95] Though the lower court found that Roommates.com should be given immunity under the Communications Decency Act, on remand, the lower court held that Roommates violated FHA and FEHA and thus was not immune to liability.[96] It's important to note that the court came to this decision with the concern of the FHA and FEHA. However, it is also imperative to acknowledge that this tailoring of information that a user can see based on demographics answered in a user's profile has been viewed by the Ninth Circuit Court of Appeals to be problematic. Consequently, because this site was a not passive distributor of content, the Communications Decency Act was unable to be applied. While Facebook is not the entity that chooses the target audience, it enables advertisers to access to the users' disclosed characteristics.[97] This calls for exploration as to whether or not enabling this potentially discriminatory process is grounds for disqualification from the liability shield of Section 230 of the Communications Decency Act.

D. Facebook's Inconsistent Regulation of Advertisements

While Facebook has taken a regulatory role in some areas of content, its policies for the regulation of advertisements has been widely inconsistent. To regulate information on the website in a broad sense, Facebook has created a set of Community Standards and Advertising Standards that dictate the type of content that is prohibited from its site - such as hate speech, credible threats or direct attacks on an individual or group.[98] To ensure that content meets these guidelines, Facebook has deployed a variety of mechanisms such as "third-party fact-checkers certified through a non-partisan International Fact-Checking

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[95] *Roommates.com., supra* note 161.

[96] *Id* at 1181.

[97] Facebook, *Ads About Social Issues, Elections, or Politics*. Facebook, https://www.facebook.com/business/help/208949576550051?id=288762101909005 (last visited Jan 3, 2020).

[98] Facebook, *What Types of Things Aren't Allowed on Facebook*. Facebook. https://www.facebook.com/help/212826392083694?helpref=uf_permalink (last visited Jan 3, 2020).

Network."[99] When content is reported, one of the 15,000 content moderators that Facebook employs will review the post to see if it violates any of the Community Standards or Advertising Standards.[100]

However, the most unclear part of Facebook's regulation of advertisements is that Facebook refuses to fact-check advertisements created by political candidates, but fact-checks advertisements produced by PACs and advocacy organizations.[101] Thus, the same false claim could be made by a political candidate and a PAC - but Facebook would only prohibit the publication of the advertisement produced by the PAC. Consequently, this policy has been abused in a notable instance where a California man registered to run for governor solely to protest Facebook's lack of candidate fact-checking policy by running false advertisements.[102] Yet, Facebook claims that they have taken significant steps to stop the spread of misinformation.[103] On their website the company states that Facebook is "Making it as difficult as possible for people posting false news to buy ads on our platform through strict enforcement of our policies."[104] However, while this might be in the context of advertisements in general - there is a lack of measures in place to ensure that advertisements produced by political candidates do not contain false information. While the policy of fact-checking advertisements produced by advocacy groups and PACs is intended to prevent the spread of misinformation - the policy is ultimately incomplete without measures taken to verify the accuracy of information produced in all types of paid political advertisements on the site. Ultimately, as a result of this uneven application of regulation standards and lack of recent legislative guidance on this issue, misinformation through unregulated online political advertisements could influence the course of our democracy.

E. The Communications Decency Act is Not Absolute

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[99] Facebook, *Fact-Checking on Facebook: What Publishers Should Know*. Facebook. https://www.facebook.com/help/publisher/182222309230722 (last visited Jan 3, 2020).

[100] Terry Gross, *For Facebook Content Moderators, Traumatizing Material Is A Job Hazard*. NPR (Jul. 1, 2019), https://www.npr.org/2019/07/01/737498507/for-facebook-content-moderators-traumatizing-material-is-a-job-hazard, (last viewed Jan. 17, 2020).

[101] Facebook, *supra* note 99.

[102] Donnie O'Sullivan, *This man is Running for governor of California so he can run false Facebook ads*. CNN (Oct. 29, 2019), https://www.cnn.com/2019/10/28/tech/facebook-false-ads-california-governor/index.html (last visited Jan. 3, 2020).

[103] Adam Mosseri, *Working to Stop Misinformation and False News*. Facebook (Apr. 6, 2017), https://about.fb.com/news/2017/04/working-to-stop-misinformation-and-false-news/ (last visited Jan 3, 2020).

[104] *Id.*

The federal government has recently taken the first step to narrow the immunity that online platforms have under Section 230 of the Communications Decency Act.[105] To do so, President Trump signed an executive order to pass Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Trafficking Act (SESTA).[106] This ultimately creates a hole in the immunity shield of Section 230, by stating that platforms are responsible for advertisements posted by third parties that elicit prostitution on their websites.[107] While in past incidents, the platform was almost always immune from legal repercussions stemming from content posted by a third party on its cite, these pieces of legislation could mark a turning point in legislation regulating social media platforms.[108] More importantly it sets the precedent that the Section 230 of the Communications Decency Act, is not and should not be treated as absolute. Like laws in other issue areas, it is necessary for the Section 230 of the Communications Decency Act to be questioned as to whether it is relevant enough in its current state to address the 21st century problems that are plaguing the internet.[109]

III. Restructuring the Legal interpretation of Facebook's Responsibility to Regulate Content - a Policy Approach

A. Restructuring Section 230 of the Communications Decency Act and Legislation Pertaining to the Internet: Political Advertisements

As Congress in 1996 could not have anticipated the size and scope of the internet, it is imperative that Section 230 of the Communications Decency Act be restructured to address the problems of the internet in the modern day. In the context of political advertisements specifically, while there is debate as to what should be included in these provisions, it is important that they address three basic prongs: the transparency of advertisements, the obligation of social media companies to prevent the spread of misinformation through these advertisements, and the extent to which Section 230 can be used as a liability shield in the publication of advertisements.

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[105] Mary Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act.* 606 SSRN (Apr. 18, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160055 (Last visited Jan. 3, 2020).

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

To improve the transparency of political advertisements published on online platforms, Congress should adopt The Honest Ads Act.[110] This act aims to prevent the foreign interference that was seen in the 2016 election in the publication of advertisements in future elections.[111] This piece of legislation is centered around:

> "Amending the definition of 'electioneering communication' in the *Bipartisan Campaign Reform Act of 2002*, to include paid internet and digital advertisements…Requiring digital platforms with at least 50,000,000 monthly visitors to maintain a public file of all electioneering communications purchased by a person or group who spends more than $500.00 total on ads published on their platform. This file would contain a digital copy of the advertisement, a description of the audience the advertisement targets, the number of views generated, the dates and times of publication, the rates charged, and the contact information of the purchaser….Requiring online platforms to make all reasonable efforts to ensure that foreign individuals and entities are not purchasing political advertisements in order to influence the American electorate."[112]

By expanding the definition of 'electioneering communication' in the eyes of the FECA to include advertisements published on social media platforms, advertisements across all means would be held to similar regulation standards.[113] Consequently, the FEC would be required to create a new database that contains information about the political advertisements that are being published on social media by candidates and pertaining to policy issues.[114] This expansion of the Federal Elections Campaign Act (FECA) would ultimately change campaign finance law by requiring the regulation of all political advertisements - not just those that are aimed at directly targeting candidates.[115] This creation of a publicly accessible resource that states where the advertisements posted online are coming from would increase the transparency of political advertising and could ultimately help voters make better informed decisions."[116]

Secondly, to prevent the spread of misinformation in future election cycles, it is imperative that Congress produces legislation that requires social media companies that use targeting technology to fact-check political advertisements. As Facebook allows advertisers to target specific demographics, it is necessary that information in those advertisements is

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[110] The Honest Ads Act, H.R. 4077 & S. 1356, 116th Cong. (2019).

[111] Warner Staff, *The Honest Ads Act*. warner.senate.gov (May 2019), https://www.warner.senate.gov/public/index.cfm/the-honest-ads-act (last visited Jan. 3, 2020).

[112] *Id.*

[113] Garrett, *supra* note 21, at 2.

[114] *Id.*

[115] *Id.*

[116] Warner Staff, *supra* note 111.

verified for accuracy to prevent the abuse of more susceptible demographics. Similarly to Facebook in regards to PACs, a third-party fact-checking service should be implemented as a legal requirement in the publication process of all paid political advertisements on sites that use a system that targets specific users. While the task may be difficult due to the volume of political advertisements that are published daily on social media platforms, the current lack of regulation has simply led to an increase in the propagation of misinformation as demonstrated in the 2016 election cycle.[117]

Lastly, it is necessary that the liability shield of Section 230 of the Communications Decency Act be narrowed. In its current state social media platforms are not responsible for the content of advertisements created by a third party on the grounds that the company does not exercise editorial control in the sense that it is unable to alter the content in any way. In the case of Facebook, while the company doesn't directly edit the content of the advertisement that is posted, it is not passive in the process to decide what advertisements get published - as it chooses which ads have the greatest shock factor. This essentially goes beyond the "Good Samaritan" rule that is outlined by Section 230(c)(2)(A) that is intended to give platforms the power to filter out harmful content. Consequently, as this falls beyond the scope of the original legislative intent for the liability shield that has been given to social media platforms, it is necessary for Congress to narrow the immunity granted by Section 230 to not cover instances where publishers are not passive (beyond the considerations of the good Samaritan clause) in the publishing of content.

Conclusion

In the digital age, it is important to constantly postulate what measures should be implemented to stop the spread of misinformation to fit the challenges of the ever-changing modern-day internet. While Section 230 of the Communications Decency Act has been used to provide immunity for social media platforms in the publication for third party content shared on their sites, the applicability of the Act to Facebook needs to be reexamined. As Facebook has attempted to regulate the type of content that is highlighted on its site, beyond the scope of its Community Standards, it should not be viewed as a passive publisher in the publication of political advertisements. To bring Section 230 of the Communications Decency Act into the modern age, it is imperative that Congress narrow and clarify the extent

[117] *Id.*

of its shield of liability. Additionally, to increase the transparency of political ads, Congress should adopt The Honest Ad Act, which expands some of the aspects of campaign finance law to cover advertisements produced online. Lastly, with the rise of social media as a primary news source for most Americans, it is imperative that Facebook and other social media platforms be required to fact-check political ads shared on their sites to prevent the abuse of the ad targeting features. Overall, Facebook and its refusal to fact-check political advertisements serves as a case study for the legal liability that case studies have in the regulation of content.

Labor Relations Issues in Minor League Baseball

John Bennett

Introduction: Problems Faced by Minor League Baseball Players

Since the early twentieth century, Major League Baseball (MLB) received special status from the Supreme Court in *Federal Baseball Club v. National League, Toolson v. New York Yankees* and *Flood v. Kuhn*. These decisions, which exempted MLB from the Sherman Act and other federal antitrust legislation,[1] allowed the MLB to continue to exist without competition and become a major player in entertainment. However, these decisions also disallowed players from enjoying the benefits of a competitive market. While the Kurt Flood Act of 1998 eventually expanded antitrust legislation to apply to Major League athletes, it fails to protect Minor League baseball players, who remain undercompensated by their employers and receive little protection under the labor laws of the United States..

Each Major League Baseball team has between five and seven affiliated Minor League teams who play at a variety of levels in leagues organized by Minor League Baseball (MiLB).[2] While these teams are independently owned and operated, all decisions regarding who plays for each team, their compensation and all managerial decisions, are made by the Major League team.[3] Players in both MLB and MiLB are salaried and paid a consistent monthly rate regardless of how many hours and days they work in a week.[4] MLB sets some guidelines for the compensation of Minor League players, enforcing a $1,100 per month salary for first year players, and allowing players and teams to renegotiate contracts before each season, but they require that a player remain with their first team for the first seven years before being allowed to explore the free market.[5] This means that because minor league players are not compensated for their work during the offseason, a first-year player may

[1] *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922).

[2] Minor League Baseball, *Frequently Asked Questions: The Business of MiLB*, https://www.milb.com/about/faqs-business

[3] *Id.*

[4] *Id.*

[5] *Id.*

make as little as $3,300 for their work in their first season (because they play for as little as three months), requiring other sources of income during the rest of the year.[6] According to some reports, as few as 10% of professional baseball players ever break into the majors.[7] This means that 90% of athletes in MiLB will never receive a major league payday but many spend 10 or more years in a farm system.[8] These are the athletes who require fair compensation, but have been procedurally stripped of any legal protections.

Because of the special exemption provided to the MLB in *Federal Baseball Club* and the deliberate exclusion of minor league baseball players from the Curt Flood Act, Minor League athletes are no longer able to pursue relief based on antitrust litigation and began to pursue relief based on the Fair Labor Standards Act (FLSA), suing for minimum wage and overtime pay under federal labor regulations.[9] However, while litigation on this basis was ongoing, the Save America's Pastime Act (SAPA) was included in The Consolidated Appropriations Act of 2018 and passed into law.[10] This Act explicitly created a loophole in the FLSA for MLB teams, adding language to the FLSA to prevent its overtime provisions from being applied to any baseball players under contract.[11] This amendment leaves little recourse for Minor League athletes, although state law may have some ability to provide relief. Because all teams have annual spring training in either Florida or Arizona[12] and many teams have connections to California within their Minor League systems,[13] laws in these three states may apply to most or all minor league baseball players and allow them to seek recourse under the laws of one of these states.

While it remains to be seen whether California labor law can be successfully applied to MiLB players, a class in California was certified and this certification was upheld in the Ninth Circuit Court.[14] Arguably, California, Florida and Arizona can protect the labor interests of minor league baseball players, by passing legislation protecting career baseball players, including those who never compete at a Major League level.

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[6] *Id.*

[7] Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, Mother Jones (July 2014), https://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income.

[8] *Id.*

[9] *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 924 (9th Cir. 2019).

[10] Consolidated Appropriations Act 2018, Pub. L. No. 115-141 § 2, 132 Stat. 348, 1967 (2018).

[11] *Id.*

[12] *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 923 (9th Cir. 2019).

[13] *Id.* at 923

[14] *Id.* at 950

However, even if California law proves sufficient in protecting minor league players, it remains a second-best solution. It would be easy for any states to enact legislation that removes their labor protection for minor league baseball players and there may be incentive to do so following the passage of the Save America's Pastime Act. Therefore, the federal government should act to protect minor league athletes. The easiest method of doing this would be by amending federal law to make the FLSA apply to minor league players, but that seems unlikely, especially because SAPA was recently passed. Therefore, the most workable solution would be for the Supreme Court to reverse the holding in *Federal Baseball Club*, allowing minor league players to sue under antitrust laws and receive legal protection in that way. Barring this, minor league baseball players may have to take matters into their own hands and seek labor improvements through collective action.

I. Legal Precedent for Major League Baseball's Special Status

A. Antitrust Law and Federal Baseball Club v. National League

The Sherman Act was passed in 1890 to "Protect trade and commerce against unlawful restraints and monopolies," including both criminal and civil penalties for individuals conspiring to create monopolies.[15] Section one, particularly, says:

> Every contract, combination in the form of trust or other-wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.[16]

Furthermore, in section seven, the Sherman Act allowed any harmed party to sue the creator of a monopoly for up to three times the damages suffered as well as covering attorney's fees.[17]

The Sherman Act was first used in baseball litigation in the 1920s in *Federal Baseball Club v. National League*. In the early part of the twentieth century, Major League Baseball consisted of the National League (NL) and a newly founded American League (AL), both of

[15] An act to protect trade and commerce against unlawful restraints and monopolies, Ch. 647, § 1, 26 Stat. 209, 209 (1890)

[16] *Id.*

[17] *Id.* at §7

which were governed by the National Commission.[18] In 1913, the independent Federal League (FL) was founded to compete with the NL and AL.[19] In 1914, the FL began to offer NL and AL players large contracts to poach them away from the established leagues, resulting in the FL emerging as a third major league and successfully competing with the AL and NL until 1915.[20] During this time, the FL sued the NL because of a conspiracy to fix prices using illegal business practices, but the suit was delayed by the trial judge who was worried about the repercussions it could have for baseball.[21]

Because all three leagues suffered severe business losses due to market oversaturation and all but two FL teams operated at a loss in 1915, the FL negotiated an end of its operations and the case became moot.[22] This agreement incorporated several FL teams into the AL and NL and allowed several other owners of FL teams to purchase NL and AL teams.[23] However, the owner of the Baltimore Terrapins didn't receive any compensation from this agreement, leading him to sue the National League under the Sherman Act, claiming that the NL constituted an illegal cartel which suppressed competition.[24] A Maryland trial court found for the plaintiff, awarding him $80,000 in damages, but the appellate court reversed that decision, saying that the contract did not fall under the law.[25] The plaintiff then appealed to the Supreme Court.

The Supreme Court ruled unanimously in favor of the National League, finding that the Sherman Act did not apply in this case because baseball does not constitute interstate commerce.[26] Although the Court recognized that teams traveled from several states to compete, it found that the specific game itself was not interstate commerce because it occurred only in one state.[27] This created an exemption for professional baseball, allowing a league structure which dampens competition. The ruling in *Federal Baseball Club* has been widely criticized by appellate judges and Supreme Court justices alike for being motivated by personal attitudes toward the sport instead of legal reasoning.[28] However, Justice Alito has

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[18] Samuel Alito Jr., *Alito: The Origin of the Baseball Antitrust Exemption*, Society for American Baseball Research (Fall 2009), https://sabr.org/research/alito-origin-baseball-antitrust-exemption.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Federal Baseball Club v. National League*, 259 U.S. 200, 207 (1922).

[25] *Id.* at 208

[26] *Id.* at 209

[27] *Id.*

[28] Alito, *supra* note 18.

supported the reasoning in the decision, saying that the Court considered the movement of players and equipment between states to be incidental to baseball games themselves, which was in line with the judicial philosophy of the time.[29] This is further supported by the ruling in *Hooper v. California* (1895), in which the Court found that insurance, even if sold across state borders, was not interstate commerce, an indication of the contemporary understanding of the commerce clause.[30]

While this decision may have had legitimate legal reasoning given the judicial philosophy of the time, it has far-reaching precedent. Regardless of the original intent of the Court, a modern interpretation of the Commerce Clause would likely regard baseball as interstate commerce.[31] However, the exemption created in *Federal Baseball Club* remains in effect and it continues to allow Major League Baseball to deny labor protections to its athletes. This was best reflected in the decisions in *Toolson v. New York Yankees* and *Flood v. Kuhn*.

B. The Reserve Clause

The reserve clause existed for an extended period of MLB history, governing how players and teams interacted before modern free agency. Players were restricted to working for their first team and other teams within the MLB would not negotiate with that player or offer that player contracts.[32] This allowed teams to control the player market and dictate when players changed teams through trades. The reserve clause disadvantaged players and benefitted teams by preventing players from bargaining for higher pay or accessing the free market. The reserve clause was contested by players in two Supreme Court cases, *Toolson v. New York Yankees* and *Flood v. Kuhn*, both of which challenged the ruling in *Federal Baseball Club* in the process.

First, in 1953, the Court heard *Toolson v. New York Yankees*, the first challenge to *Federal Baseball Club* to reach the Supreme Court. Toolson, a player for the New York Yankees, claimed that the financial foundations for Major League Baseball had shifted enough in the years between *Federal Baseball Club* and *Toolson* that baseball constituted interstate commerce, and on that basis, the reserve clause violated the Sherman Act.[33] In a short *per curium* decision,

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Leonard Koppett, *The Reserve Clause: Key in All Sports is Control of Players Not Under Contract*, The New York Times (September 28, 1975) https://timesmachine.nytimes.com/timesmachine/1975/09/28/105343942.html? pageNumber=213.
[33] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

the Court ruled that because Congress had not acted in the years following *Federal Baseball Club*, it presumed Congress had no intention to include baseball in interstate commerce.[34] Therefore, the Court upheld the previous decision but put the burden on Congress to amend antitrust laws to include professional baseball although Congress had already demonstrated a reluctance to legislate on this issue.[35] In punting on this case, the Court continued to allow the MLB to use the reserve clause and other methods to control the market, as teams agreed to suppress competition to keep their costs low. In the following years, the Court would hear another challenge to the reserve clause before Congress would take action to amend antitrust laws and explicitly include baseball teams.

As for *Flood v. Kuhn*, Curt Flood originally signed with the Cincinnati Reds, who then received the right to him under the reserve clause.[36] After being traded to the St. Louis Cardinals, Flood became a star player and received increasingly large contracts.[37] Then, in 1969, Flood was traded to the Philadelphia Phillies, for whom he did not wish to play.[38] Flood asked the Commissioner of Baseball, Bowie Kuhn, if he could be made a free agent, which would have allowed him to negotiate with any team, not just the Phillies.[39] After Kuhn refused, Flood sued under both antitrust legislation and the 13th Amendment to be allowed to negotiate with multiple teams to receive a competitive salary.[40] In a 5-3 decision, the Court found against Flood.[41]

In *Flood*, the Court decided that Major League Baseball did engage in interstate commerce, specifically because of the development of interstate television and radio contracts which since the ruling in *Federal Baseball Club*.[42] However, the Court found its hands tied, as Justice Blackmun stated, "The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of Federal Baseball."[43] Furthermore, Blackmun claimed that the burden fell on Congress to legislate, as overturning *Federal Baseball Club* would be an overreach of the Court's authority.[44] This

[34] *Id.*
[35] *Id.* at 356
[36] *Flood v. Kuhn*, 407 U.S. 258, 264 (1972).
[37] *Id.*
[38] *Id. at 265*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 285
[42] *Id.* at 282
[43] *Id.* at 283
[44] *Id.* at 284

decision prevented baseball players from using antitrust legislation as a basis for suing Major League Baseball. It was not until 1998 when Congress finally acted to extend antitrust protections to players.[45]

C. Relevant Decisions in Other Sports

Even before the Curt Flood Act of 1998 was passed, the Supreme Court decided cases in other professional sports which undermined the legislation. In 1954, the Court ruled in *United States v. International Boxing Club* that the exception to antitrust laws only applied to baseball, not all organized sports.[46] In *International Boxing Club*, the U.S. sued the International Boxing Club of New York for violating the Sherman Act, justifying this lawsuit by showing that over 25% of the club's proceeds came from other states, meaning that the club engaged in interstate commerce.[47] The Court agreed with the government, finding that "At the time the Government's complaint was filed, no court had ever held that the boxing business was not subject to the antitrust laws."[48] This left baseball in an unusual situation, as *Federal Baseball Club* and *International Boxing Club* combined to create precedent which applied only to baseball, carving out an exception to antitrust laws for baseball teams alone. This means that anything short of a full reversal of *Federal Baseball Club* allows a law to exist which cannot be applied uniformly in all situations, weakening labor protections baseball players, both in the MLB and in the minor leagues. Therefore, the Court left it to Congress to protect all professional baseball players from trusts, while the Court gave athletes in other sports protections. This both creates an inequality between the protections provided to professional baseball players and other professional athletes and makes the law established by *Federal Baseball Club* more arbitrary and harder to legally justify.

Following the decision in *International Boxing Club*, the Court ruled that antitrust laws applied to players in the National Football League (NFL). In *Radovich v. National Football League*, the Court found that the NFL could not blackball players for signing with a new team under a system similar to baseball's reserve clause.[49] Using similar reasoning as in *International Boxing Club*, the Court determined that football constituted interstate commerce and explicitly said "we now specifically limit the rule there established to the facts there involved,

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[45] 15 U.S.C. § 26b (1998).
[46] *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236, 244 (1955).
[47] *Id.* at 241
[48] *Id.* at 242
[49] *Radovich v. National Football League*, 352 U.S. 445, 447 (1957).

i.e., the business of organized professional baseball,"[50] undermining the justification for the law and making the application to baseball even more arbitrary.

Finally, and most importantly, the Court undermined the application of antitrust law on labor disputes in professional sports in 1996 with its ruling in *Brown v. Pro Football*.[51] In this case, the Court prevented the players' union from suing the league under antitrust legislation because it found that applying antitrust laws could be destabilizing to the status quo of labor disputes.[52] The Court found that because the very idea of collective bargaining requires the creation of trusts and contracts, applying antitrust laws to a labor dispute could ultimately hurt labor unions when they attempt to use collective bargaining.[53] Therefore, before the Curt Flood Act was created, the Supreme Court already had weakened the ability of athletes to use antitrust legislation in labor disputes, requiring stronger protections for professional athletes.

D. The Curt Flood Act of 1998

In response to the holding in *Flood v. Kuhn* as well as numerous decisions calling for legislative action, Congress eventually passed a law to specifically allow Major League Baseball players to receive the protections of antitrust laws.[54] This law, titled The Curt Flood Act of 1998, was very specific in its wording:

> The conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.[55]

On its surface, this law corrected the problem faced by Flood and others, who were unable to pursue compensation because of the baseball exception. However, in addition to the difficulty in suing based on antitrust laws created by *Brown*, this law failed to protect all baseball players, instead only offering protections to major league players.[56] This is most clearly demonstrated by subsection (d) of the Curt Flood Act which reads "No court shall

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[50] *Id.* at 451
[51] *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).
[52] *Id.* at 241
[53] *Id.*
[54] 15 U.S.C. § 26b (1998).
[55] *Id.*
[56] *Id.*

rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a)."[57] Since subsection (a) only mentions major league baseball players by name, implying the exclusion of minor league players, the Curt Flood Act fails to benefit the situation of minor league players.[58]

C. Miranda v. Selig

Despite the wording of the Curt Flood Act, minor league athletes tried to receive compensation under antitrust legislation in 2017.[59] A group of minor league baseball players claimed that the uniform contract, which requires players to play for the team that drafted them for seven years before becoming free agents, violated antitrust laws, making a similar argument to the one in *Flood*.[60] However, the Ninth Circuit Court agreed with the trial court in dismissing the case because the Curt Flood Act excluded minor league players.[61] The Supreme Court did not grant *certiorari* in *Miranda*,[62] effectively removing antitrust suits as a method of protecting the labor interests of minor league athletes. This required minor league baseball players to adopt a new strategy.

II. Fair Labor Standards Act and State-level Litigation

A. Fair Labor Standards Act of 1938

The Fair Labor Standards Act (FLSA) was implemented in order to protect employees from unfair labor practices.[63] This law mandates that employers pay a minimum wage and provide overtime pay to all employees, leading to a challenge by a group of minor league baseball players in *Senne et al v. Kansas City Royals*, who claimed that their monthly pay did not meet the minimum wage standard when accounting for the time spent training and overtime for working as many as seven days a week.[64] Because baseball players are paid flat salaries, regardless of their schedule, compensation can fall below the current federal minimum wage

[57] *Id.*
[58] *Id.*
[59] *Miranda v. Selig*, 860 F.3d 1237, 1239 (9th Cir. 2017).
[60] *Id.*
[61] *Id.* at 1240.
[62] *Miranda v. Selig*, 138 S. Ct. 507 (2017).
[63] 29 U.S.C. § 203 (1938)
[64] Order Re Motions to Dismiss and Motions to Transfer at 992, *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp 3d 918 (C.D. Cal 2015) (No. 14-cv-00608-JCS).

of $7.25 per hour.[65] However, *Senne* was not heard in court on federal grounds because the law was amended in 2018 before the case could be heard.[66]

B. Save America's Pastime Act of 2018

In part because of the ongoing litigation surrounding the Fair Labor Standards Act, Congress included the Save America's Pastime Act (SAPA) on page 1967 of the 2018 Omnibus Spending Bill.[67] This one-page act amended the FLSA to exempt

> [A]ny employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 6(a) for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.[68]

This amendment clearly restricts the ability of minor league baseball players to file suit under the FLSA in general, but it has larger implications for minor league players as well. Importantly, the verbiage of this amendment explicitly prevents any overtime claims made by baseball players if they are paid a weekly salary equal to a 40-hour work week at minimum wage.[69] This completely removes any protection for minor league baseball players from FLSA without affecting other professional athletes.

Like the decisions in *Federal Baseball Club* and *Toolson*, this act explicitly and exclusively applies to baseball players, creating an exception for baseball teams. This means that minor league baseball players have far fewer protections than minor league athletes in other sports, such as hockey. Furthermore, this explicit targeting of minor league athletes demonstrates that lawmakers are willing to undermine labor protections in order to maximize the profits of baseball teams. This means that minor league athletes will have to rely entirely on the courts for further protections.

C. Applicability of State Laws

Without FLSA protections, minor league baseball players have no federal legal recourse, especially given the ruling in *Federal Baseball Club*, which prevents antitrust litigation. This leaves state law as the remaining legal recourse, which is enabled by the structure of major

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[65] *Id.*
[66] Consolidated Appropriations Act 2018, Pub. L. No. 115-141 § 2, 132 Stat. 348, 1967 (2018).
[67] Consolidated Appropriations Act 2018, Pub. L. No. 115-141 § 2, 132 Stat. 348, 1967 (2018).
[68] *Id.*
[69] *Id.*

and minor leagues. Because of the spring training system, players on every team, including most or all minor leaguers, must play games in either Arizona or Florida.[70] This means that Florida and Arizona labor laws, which do not contain the federal exception for professional baseball, could be applied to the minor league athletes for work performed in the state. Furthermore, many teams have minor league affiliates in California, among other states, creating the possibility for California labor law to apply to some teams.[71] *Sullivan v. Oracle Corp* demonstrates that California labor law may apply in many of these situations, as the California Supreme Court allowed California labor laws to apply for work performed in the state, even for non-residents.[72]

In *Sullivan*, out-of-state Plaintiffs performed work for a California-based company and were occasionally required to travel into California for work.[73] These plaintiffs claimed that they were not compensated properly for overtime work both in California and outside of the state under the California Labor Code.[74] This case was first heard in federal court, which granted a summary judgement for the defendant, ruling that there was no legal ground for the lawsuit. On appeal, the Ninth Circuit initially reversed the ruling, finding that the California Labor Code applied for the work performed in the state, but then withdrew their decision and asked the California Supreme Court to decide three questions: whether the California Labor Code applies to out-of-state employees working within California, whether violations of the overtime provisions are unlawful, and whether the work done by Plaintiffs from their home states for a California company fall under the California Labor Code.[75]

In response to the first question, the California Supreme Court ruled that the Labor Code applies to all work conducted in California, including work done by residents of other states.[76] The court found this in part because other California laws distinguish between California residents and those of other states, while the California Labor Code does not.[77] Furthermore, the court found that this was in line with federal law, which gives states police powers over any labor which occurs in their borders.[78] Finally, California had a strong reason

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[70] Order Re Motions to Dismiss and Motions to Transfer at 992, *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp 3d 918 (C.D. Cal 2015) (No. 14-cv-00608-JCS).

[71] *Id.*

[72] *Sullivan v. Oracle Corp.,* 51 Cal.4th 1191, 1206 (Cal. 2011).

[73] *Id.* at 1195

[74] *Id.*

[75] *Id.* at 1196.

[76] *Id.* at 1206.

[77] *Id.* at 1197.

[78] *Id.* at 1198.

for applying their law in the interest of "protecting health and safety, expanding the labor market, and preventing the evils associated with overwork," while the home states of the plaintiffs had no conflicting interest in applying their laws.[79] The court found the same for the second question, allowing litigation on this basis.[80]

Regarding the third question, however, the court found that California law could not apply to work done outside of the state, even when done for a company based in California.[81] This creates some possibility for pursuing labor lawsuits in California courts, albeit with some limitations. While this ruling could require that California-based companies, including baseball teams, pay their employees for overtime work done in California, it is strictly limited in its application to work done in California. This means that it could not provide relief for all minor league baseball teams but only ones that play in California. This could provide relief for many athletes who play for teams in California, but there are many teams which do not. Furthermore, the effects of this decision on athletes who play some, but not all, of their games in California is unclear. These issues are addressed by *Senne v. Kansas City Royals*, an ongoing lawsuit attempting to use California law to receive labor damages.

D. Senne v. Kansas City Royals

The plaintiffs in *Senne* began pursuing action before the passage of SAPA under the FLSA.[82] However, after the passage of SAPA, they changed the grounds to state law, specifically those in California, Florida, and Arizona.[83] Initially, several players filed suit against every MLB team on the grounds that "defendants have unlawfully failed to pay them at least minimum wage" seeking injunctive relief and back-pay.[84] Furthermore, these players sought class-action status with California, Arizona and Florida classes.[85]

The district court certified a California class, citing the ruling in *Sullivan*, but denied the certification of Arizona and Florida classes.[86] The court took this action largely because California had established law from *Sullivan v. Oracle*, which would distinguish a California

[79] *Id.* at 1206.
[80] *Id.*
[81] *Id.* at 1209.
[82] *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 924 (9th Cir. 2019).
[83] *Id.* at 925.
[84] *Id.* at 924.
[85] *Id.* at 926.
[86] *Id.*

class from any other class in the United States.[87] However, the court did not find similar state laws in Florida or Arizona and therefore did not grant class actions in those states.[88] On appeal, however, the California class certification was upheld,[89] while the denial of Arizona and Florida classes was overturned.[90] The Ninth Circuit upheld the California class by citing *Sullivan*, establishing that any work conducted in California is subject to California labor laws, even if it is a small proportion of overall work conducted.[91] The Ninth Circuit overturned the denial of Florida and Arizona classes for similar reasons, finding that those states had specific laws which sufficiently separated the classes from each other.[92] For these reasons, all three classes have been certified and litigation is ongoing.[93] While there has not been any ruling in this case yet, the certification of these classes is a promising start for using state law in labor litigation.

E. Limitations of Approach

While *Senne* is a promising start for state law as a method of seeking relief, there are several problems with the approach. First, this method is completely untested, as there have been no rulings beyond the certification of classes. This means that courts may find that the state laws do not actually apply to professional athletes, or there may be further legal and factual issues which plaintiffs face. Secondly, even if this method works completely, it would fail to provide relief for all minor league athletes. Because *Sullivan* only provides for state law to apply for work performed in the state, it's likely that that applications of *Senne*, which is heavily grounded in *Sullivan*, will be limited to work performed in a certain state. This means that even if all three classes are successful in their lawsuits, the injunctions and relief will only apply to work performed in Arizona, California, and Florida. While most players will spend part of their season in one of those three states, the majority of their work is done outside of those states, making it impossible to provide universal relief without almost all states passing similar laws.

Finally, this approach falls short in states with weak labor protections. For instance, Arizona law has no overtime requirements, and therefore, Arizona classes may be unable to

[87] *Id.*
[88] *Id.*
[89] *Id.* at 947.
[90] *Id.* at 937.
[91] *Id.* at 932.
[92] *Id.* at 937.
[93] *Id.*

seek injunctive relief for mandatory overtime work.[94] Furthermore, some states may respond to protect the interests of major league teams, as the federal government already did with SAPA, passing state laws similar to SAPA to undermine the efforts of minor league baseball players.

Therefore, the possibilities created by *Senne* are limited in scope and best case will function as a stopgap measure rather than a permanent solution. Furthermore, it remains to be seen whether *Senne* will establish precedent for using state law for labor relief, and in which states it will be successful. Of course, it is possible that finding for the players in some states will require MLB to expand overtime pay to all players in the interest of standardization, but this is unlikely to happen.

III. Potential Solutions for Minor League Athletes in Antitrust Litigation

A. Overturning Federal Baseball Club

Without significant changes to legislation, it seems unlikely that it will be possible to pursue further actions under the FLSA soon. Since applying state laws to this issue is a partial fix and is unlikely to provide relief to all athletes or to be sustained, that leaves revisiting *Federal Baseball Club*. If *Federal Baseball Club* were overturned, it would benefit minor league baseball players the most. Because minor league baseball players are not unionized, courts may be willing to apply antitrust laws to minor league baseball players, since *Brown v. Pro Football* was based on the basically destabilizing effect it could have on organized labor. While not being unionized harms minor league athletes in other ways, it may enable use of antitrust laws to protect athletes.

Even though antitrust laws may apply best to minor league athletes, antitrust laws still do not apply to baseball players while *Federal Baseball Club* remains in effect.[95] Because of the importance of precedent in the Supreme Court, this remains unlikely, but there are some reasons to believe that the Court would overturn the decision if challenged.

B. Weaknesses of Federal Baseball Club

Both *Radovich* and *Flood* have found the decision in *Federal Baseball Club* to be legally unfounded and have decided not to overturn it because they have found that Congress has

[94] *Sullivan v. Oracle Corp.,* 51 Cal.4th 1191, 1206 (Cal. 2011).
[95] *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922).

the ability to amend the law.[96] However, because Congress has demonstrated that they are unwilling to legislate to benefit minor league baseball players, the Court may be more willing to overturn *Federal Baseball Club* instead of relying on Congress to pass a law. Since *Federal Baseball Club* is considered to be a bad decision and since it exclusively applies to baseball without applying to other sports, there may be incentive to overturn the decision if a proper reason, such as Congress's recent action including the passage of SAPA, is provided. This remains incredibly unlikely, but it does appear more likely than a legislative solution.

If *Federal Baseball Club* were overturned, however, it would be easier for minor league athletes to receive labor improvements. If *Federal Baseball Club* were overturned, the uniform contract would probably not be allowed, both because of the mandatory time that athletes must play for the same team and because of the standardization of first-year salaries in the league. This would give minor league baseball players greater ability to bargain with teams but would not solve all their problems. Since many minor league athletes are not important to the future of their major league teams, they could have reduced market value, and increasing their ability to seek free agency may not substantially impact compensation. This is already apparent, as many minor league free agents have difficulty finding teams to hire them.[97] Therefore, reversing *Federal Baseball Club* could have some needed benefits for elite minor league baseball players, but would be difficult to achieve, and would not solve all of the problems faced by minor league baseball players. This remains a potentially useful action for minor league athletes but would need to coincide with legislative solutions.

C. Legislative Solutions

While federal legislative solutions seem unlikely in the aftermath of SAPA, they may be necessary to completely protect minor league athletes. While state-level solutions and reversing *Federal Baseball Club* could prove important for benefitting minor league baseball players, completely alleviating the problems faced by minor league athletes would require legislative solutions as well. There are a range of solutions which could be undertaken with varying likelihoods.

The first main legislative solution would be reversing SAPA, which could allow minor league athletes to pursue relief under the FLSA. This solution may be the easiest to

[96] *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

[97] Josh Jackson, *In Minors, Free Agency Can be Risky Business*, Minor League Baseball (Jan. 5, 2016), https://www.milb.com/milb/news/in-minors-free-agency-can-be-risky-business/c-160280956.

achieve, but remains very unlikely, especially given how recently SAPA was passed. Furthermore, this legislation may not benefit minor league athletes, as no court was able to rule on an FLSA lawsuit raised by minor league athletes before SAPA was passed. This legislation also would not benefit minor league athletes by protecting them from ownership trusts and the uniform contract.

Congress could also extend the Curt Flood Act to apply to minor league athletes, which would have a similar result to the Court reversing *Federal Baseball Club* by expanding some antitrust protections to minor league baseball players. As discussed earlier, this solution would not fix all of the problems for minor league athletes and it could also be politically difficult to achieve, especially because the Curt Flood Act deliberately excluded minor league players.

A final and less likely legislative solution would be to create legislation which explicitly provides minimum compensation requirement for minor league baseball players. This could create niche protections designed for minor league athletes, including guidelines for compensation during spring training, instructional; leagues, and working seven days a week. While legislation of this type would solve most of the labor issues faced by minor league athletes, it would be almost impossible to achieve, as Congress has historically sided with MLB owners and because it would require comprehensive legislation for a fairly niche topic.

All of these solutions are incredibly unlikely but would be a robust way to provide protections for minor league athletes. For any of these legislative solutions to come to pass, widespread public information and outrage would be necessary to provide political impetus. Barring increased reporting on this topic and public interest, these legislative solutions seem impossible, and are therefore much less likely than a judicial solution, such as overruling *Federal Baseball Club*.

D. General Solutions

In general, it is very unlikely that any of the legislative solutions proposed will be enacted, or that the Supreme Court will reverse *Federal Baseball Club*. States could promote laws which protect minor league athletes, but this is also unlikely. However, the possibility remains that non-governmental actors may solve the problems faced by minor league athletes.

Some MLB teams, including the Toronto Blue Jays, have willingly increased the compensation of their players and provided overtime pay.[98] This is not a sustainable solution, as it provides no guarantees for the futures of minor league athletes, but it may provide some short-term relief for athletes. Public knowledge and press coverage would greatly increase the number of teams who follow the Blue Jays' lead, but it seems far more likely than a legislative solution. Furthermore, with enough pressure, MLB may include overtime requirements in the next uniform contract, which would provide more long-term protections for minor league athletes. While difficult, this may be more possible than a legislative or judicial solution.

Furthermore, if minor league baseball players were able to unionize, either by joining the Player's Association or by starting an independent union, they would have greater bargaining power and could solve some of their labor problems through collective action. While this would undermine the ability of minor league athletes to pursue antitrust litigation, it could solve many problems. By threatening work stoppage, minor league baseball players could theoretically get a more favorable contract. However, minor league players may be replaceable, which would undermine the utility of this strategy.

Therefore, while governmental solutions exist, it is more likely that minor league athletes will receive needed improvements through advocacy and organization. While the issue for minor league athletes has been created by governmental institutions, the most achievable solution could be completely divorced from the legal system because precedent and political factors make it difficult for any solution to be reached by governmental organizations.

Conclusion

Minor league baseball players lack labor protections and are not compensated for overtime work, spring training or development leagues. Since a majority of minor league athletes will never become major-leaguers, the work they do as minor league athletes is both undervalued by teams and the work they do for their minor league teams cannot be considered a stepping-stone to larger opportunities. This requires a permanent solution which provides guaranteed labor protections for minor league athletes.

[98] John Delcos, *Toronto Blue Jays Boost Pay Of Their Minor Leaguers; Major League Baseball Not Thrilled*, Forbes (Mar. 18, 2019) https://www.forbes.com/sites/johndelcos/2019/03/18/toronto-blue-jays-boost-pay-of-their-minor-leaguers-major-league-baseball-not-thrilled/#390d85362a7b.

Minor league baseball players also are not protected by antitrust laws, which could provide labor relief for athletes. The Supreme Court has repeatedly chosen not to overturn *Federal Baseball Club*, even though it is anachronistic and creates policy unlike that in other sports wherein the Supreme Court relied on Congress to resolve the issue through legislation. However, Congress has recently acted against the interests of minor league athletes, which makes it unlikely that they will resolve the labor issues. While this forecloses one area of relief for minor league athletes, it makes it possible that the Supreme Court will revisit *Federal Baseball Club.*

However, I find it more likely that a non-governmental solution, such as unionizing, may have a greater impact on minor league athletes, and seems much more achievable. In this case, the government has created a unique situation for minor league baseball where players have few protections. Athletes may have the best chance of resolving the issue through collective action, instead of trying to change both statutory and case law. This demonstrates a failing of the government to protect individuals because of the focus on precedent and the importance of political factors in legislation.

Discriminatory Intent and Equal Protection Claims in the United States

Clarissa Boyd

Introduction

On October 12, 1978, the jury found Warren McCleskey guilty of two counts of armed robbery and one count of murder in the *Superior Court of Fulton County, Georgia* .[1] Two aggravating circumstances existed in this case: 1) the murder victim was a police officer, killed in the line of duty; and 2) the murder was committed during the course of a felony.[2] The aggravating circumstances in this case permitted the prosecution to pursue the death penalty against McCleskey. While prosecutors did not regularly pursue the death penalty for capital cases in Georgia, they charged Mr. McCleskey with a capital offense, and, upon the jury's decision that McCleskey was guilty beyond a reasonable doubt, the *Superior Court of Fulton County* followed the jury's recommended sentencing and condemned McCleskey to death for his crimes.

Although McCleskey was afforded a trial by a jury of his peers, he was likely doomed before he ever stepped foot in the courtroom: McCleskey was a black man charged with killing a white police officer. Unlike with his white counterparts, against whom prosecutors would pursue the death penalty approximately 32% of the time for similar crimes, McCleskey's race and the race of his alleged victim resulted in a 70% probability that prosecutors would pursue the death penalty against him.[3] Given prosecutors' decision to pursue the death penalty, McCleskey faced a 22% likelihood of conviction and condemnation to death.[4]

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[1] McCleskey v. Kemp, 481 U.S. 279, 283 (1987).
[2] *Id.*
[3] McCleskey v. Kemp, 481 U.S. 279, 287 (1987).
[4] *McCleskey,* 481 U.S. 279 at 286.

McCleskey appealed his conviction through petitioning for a writ of habeas corpus on the grounds that Georgia's capital sentencing process was administered in a racially discriminatory manner, which violated the Eighth Amendment and the Equal Protection Clause of the 14th Amendment.[5] McCleskey based his argument on a study conducted by David C. Baldus, Charles Pulaski, and George Woodworth, which evidences a racial disparity in the administration of the death penalty by the state criminal justice system in Georgia. McCleskey's appeal progressed through the courts before being granted certiorari by the US Supreme Court in 1987.[6] Upon review, the Court decided not only to affirm the decision of lower courts to deny McCleskey's petition but also established the test for equal protection clause violations in the context of criminal litigation as resting on precedence, thereby requiring a showing of "discriminatory intent" by state actors.[7] In addition to applying Whitus and Wayte in establishing the test for state equal protection violations,[8] the Court dealt another blow to the ability of equal protection claimants to prove their case in its finding that statistical studies such as that in the Baldus paper do not act as sufficient evidence of discrimination, due to the fact that empirical studies show, at most, "only a likelihood that a particular factor entered into some decisions."[9] Adhering to its historical hesitance to infringe on the extensive discretion afforded prosecutors by the constitution, the Court in *McCleskey* opined, "[W]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."[10] The decision in *McCleskey* effectively abandoned the standard of proving disparate impact –a disproportionately negative impact of a policy or procedure on a certain demographic, which can be evidenced by empirical data –and cemented the precedent of proving discriminatory intent as the governing test of equal protection violations in criminal litigation. Consequently, this case dealt a crushing blow not only to Warren McCleskey, but also to the plausibility of race-based equal protection claims absent an explicit admission of explicit discrimination by the prosecution.

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[5] *Id.* at 291.

[6] *Id.*

[7] *McCleskey,* 481 U.S. 279 at 291-92.

[8] McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (citing *Whitus v. Georgia,* 385 U.S. 545, 550 (1967); *Wayte v. United States,* 470 U.S. 598, 608 (1985)).

[9] *Id.* at 308.

[10] *McCleskey,* 481 U.S. 279 at 313.

Although intentional discrimination is increasingly rare in contemporary American society, implicit biases continue to color individuals' decisions. Therefore, the standard of proving discriminatory intent by criminal prosecutors proves particularly sinister in its ability to invalidate equal protection violations so long as state actors never verbalize racist intent. Prosecutors, as deciders of which crimes to charge and which to overlook, hold enormous power in the criminal justice system. Prosecutors are also human, biased by their personal experiences and identities. However, due to its inherently subjective and immaterial nature, intent *cannot* be accurately proven absent an explicit admission by the party in question. Accordingly, a standard of proof reliant on a showing of discriminatory intent makes it almost impossible for claimants to obtain a favorable judgment in civil rights claims against racially biased prosecutors, who likely do not voice any explicitly racist intent.

This article, through its examination of the Supreme Court's notorious ambiguity in its interpretation of the Equal Protection clause, will focus on the standard of proving discriminatory intent in criminal cases and its threat to Americans' constitutional right to equal protection under the law. In Part I of this article, I provide a brief history of equal protection jurisprudence in the United States. In Part II, I focus on the Court's historical definition and interpretation of "discriminatory intent," as well as previous standards of proof governing equal protection litigation, including "disparate impact," "discriminatory effect," and "discriminatory purpose." Part II also discusses the role of prosecutorial discretion in the United States criminal justice system, including its constitutional basis and the Supreme Court's hesitance to limit it. Finally, in Part III of this article, I argue that, in order to adequately address the infringement on individual rights currently allowed by the discriminatory intent standard in equal protection claims, the Supreme Court must adopt a clear definition of discrimination that focuses on impact rather than intent. Once the Court has unambiguously defined discrimination, it must implement a totality of the circumstances approach that takes into account such factors as disparate impact, a history of discriminatory behavior on the part of the government actor, and the state's treatment of similarly-situated individuals. In order to ensure this system of review's efficacy, the admissibility of empirical studies evidencing objective bias must accompany the implementation of this test in the United States judicial system.

I. The Background and Legal Precedent of Equal Protection Jurisprudence

The Fifth Amendment of the United States Constitution first asserts the principle of equal protection under the law, which acts as citizens' primary source of protection against discriminatory treatment in the United States judicial system.[11] The Fifth Amendment establishes the idea of equal protection in its Due Process Clause, which states that "No person shall…be deprived of life, liberty, or property, without due process of law."[12] The Fourteenth Amendment reiterates the concept of Due Process and introduces the principle of equal protection in its forbiddance of the states to "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."[13] The equal protection principle represents the ideological foundation on which the United States rests: a system of governance which indiscriminately works for every citizen.. The Equal Protection Clause acts as the American individual's strongest defense against the infringement of her constitutional rights by state governments, under whose jurisdiction the majority of criminal cases in the United States fall.[14] In practice, however, equal protection jurisprudence in the United States has eroded this Constitutional defense, resulting in a specious promise of liberty rather than a coherent legal mechanism by which individuals can plausibly challenge systemic discrimination by state governments.

With regard to equal protection jurisprudence, the Court first assigns the claim to one of three classifications: those which necessitate "strict scrutiny," those which require "intermediate scrutiny," and those which only warrant "rational basis review."[15] Historically, the Supreme Court has assessed equal protection claims deemed to involve racial discrimination under the classification of strict scrutiny, which is the highest level of judicial scrutiny.[16] For cases of racial discrimination, this standard requires that the law or policy in question, "if they are ever to be upheld…must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[17] Strict scrutiny allows the least leeway for the government with regard to permissible discrimination, and, as a result, legislation rarely holds up against the Court's standard of strict scrutiny. To

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[11] U.S. CONST. amend V.

[12] *Id.*

[13] U.S. CONST. amend XIV, § 1.

[14] Russel W. Galloway, *Basic Equal Protection Analysis,* SANTA CLARA L. REV. 120, 121 (1989) (discussing the intended purpose and real functions of the Equal Protection Clause of the US Constitution).

[15] Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 755 (2011).

[16] Loving v. Virginia, 388 U.S. 1 (1967) (citing *Korematsu v. United States,* 323 U.S. 214, 216 (1944)).

[17] Loving v. Virginia, 388 U.S. 1 (1967).

this point, the Court's opinion in *Loving v. Virginia* cites Justice Stewart's concurring opinion in *McLaughlin v. Florida,* which states that they "cannot conceive of a valid legislative purpose…which makes the color of a person's skin the test of whether his conduct is a criminal offense."[18] In fact, in *Miller v. Johnson* (1995), the Court subjected a Georgia congressional redistricting plan to strict scrutiny review due to its finding that race was the "predominant factor" motivating the redrawing of the congressional districts in question.[19] Although the state of Georgia argued that a meaningful attempt to comply with the Voting Rights Act of 1965 constituted its motivation for creating a congressional map based on race, the Court found that this argument did not meet the standard of strict scrutiny, as "carving electorates into racial blocs" reinforced rather than redressed the racial stereotypes the Voting Rights Act meant to combat and therefore was not "narrowly tailored to achieve a compelling interest."[20]

While strict scrutiny review constitutes a demonstrably powerful tool in combating racially discriminatory government practices, the Court applies this standard of review sparingly, declaring that state action appearing "facially neutral…would draw only ordinary rational basis review so long as it was not enacted with discriminatory intent."[21] In significant contrast to strict scrutiny, rational basis review "requires only that state action be 'rationally related to furthering a legitimate state interest.'"[22] Furthermore, under rational basis review, the burden of persuasion transfers from the government (which carries the burden of proving the state action's necessity in the fulfillment of a compelling government interest under strict scrutiny) to the petitioner, who must demonstrate that the state action is not rationally related to a legitimate government interest. Under rational basis review, if the Court could find a reasonable basis for the law or policy, even if the state failed to do so, it would uphold the statute/practice.[23] For instance, in *Williamson v. Lee Optical of Oklahoma, Inc.,* the Court validated a law that distinguished opticians from optometrists and ophthalmologists by providing several reasons the state of Oklahoma "may" or "might" have instituted the law, which would meet the standard of rationality required by rational basis review.[24] Because

[18] McLaughlin v. Florida, 379 U.S. 184 (1964) (Stewart, J., concurring).
[19] Miller v. Johnson, 515 U.S. 900, 917 (1995).
[20] *Id.* at 921-28.
[21] Washington v. Davis, 426 U.S. 229, 245-47 (1976).
[22] Mass. Bd. Of Ret. v. Murgia 427 U.S. 307, 312 (1976), *cited in* Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 760 (2011).
[23] Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 760 (2011).
[24] Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487 (1955).

rational basis review requires only that the action in question is not so bizarre that it cannot be rationalized by the broad imagination of the State or the Court itself, this standard can amount to a virtual "free pass for legislation."[25] Furthermore, because the standard of proving discriminatory intent in race-based Equal Protection claims subjects the vast majority of these cases to rational basis review, even policies that result in a racially disproportionate impact are deemed constitutional. Because the level of scrutiny applied by the Court to the policy in question so strongly influences whether the policy will stand or fall, the Court must adopt as its determinative factor a showing of discrimination based on an approach that considers the *impact* of rather than simply the *intent* behind the policy.

A. Ambiguous Precedent & Standards of Evidence

Throughout its history, the United States judiciary has struggled to adopt a firm, unambiguous standard of evidence required to prove discrimination. Pre-*McCleskey,* the Court vacillated between requiring a showing of discriminatory intent and a showing of discriminatory consequences in its review of equal protection claims.[26] For instance, in *Strauder v. West Virginia* (1879)*,* the Supreme Court's first case involving an equal protection claim, the Court reversed the conviction of an African American man based on its finding of a West Virginia statute that limited jury service to white males as unconstitutional.[27] The *Strauder* court made no mention of West Virginia's intent in enacting the discriminatory law.[28] Rather, the Court decided that the statute's exclusion of black men from juries constitutes discrimination and, therefore, a violation of the equal protection clause, based simply on the intended impact of the legislation –that individuals be barred from serving on juries based solely on their race.[29] In *Plessy v. Ferguson* (1896), the Court acknowledged discriminatory intent as a factor in reviewing equal protection claims.[30] However, the Court rendered proving discriminatory intent extremely difficult through its upholding of a Louisiana law permitting racially segregated railway cars, as it argued that any assumptions of a "badge of inferiority" placed on members of the African American community by segregation were not a result of the act itself, but rather a result of African Americans "choos[ing] to put that

[25] Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 760 (2011).
[26] McCleskey v. Kemp, 481 U.S. 279 (1987).
[27] Strauder v. West Virginia, 100 U.S. 303, 310 (1879).
[28] *Id.* at 303.
[29] *Id.* at 303, 309-10.
[30] Plessy v. Ferguson, 163 U.S. 537 (1896).

construction upon it."[31] By arguing that racial stereotypes are figments of the minority communities' imaginations, the Court effectively freed the State from accountability in practices such as segregation that order unequal treatment of people based on their race. Therefore, the government won freedom from claims of discriminatory intent so long as it could claim that the any discrimination perceived by people of color was simply a result of their own misperceptions. Moving from *Plessy's* contortion of the logic behind discrimination and discriminatory intent, the Court decided in *Ah Sin v. Wittman* (1905) that no equal protection claim would stand without evidence of discriminatory intent,[32] though, as discussed, the decision in *Plessy* rendered proving discriminatory intent by the state nearly impossible through its suggestion that racial stigmas arise out of people of colors' active misinterpretation of race-based legislation rather than out of real discrimination.[33] As this discussion illustrates, the Court began the twentieth century with a system of equal protection jurisprudence moving toward a reliance on an implausible standard of evidence that it chose not to apply only twenty years before.

After decades of wrestling with segregation legislation and establishing no clear rule for proving discrimination by the State, the Supreme Court was faced with a case in which the city of Jackson, Mississippi closed its public swimming pools in lieu of conforming with court-ordered desegregation.[34] In *Palmer v. Thompson* (1971), the Court brought the discussion on intent back into the forefront of equal protection claims and found that the discriminatory motives of those who adopted the legislation in question did not affect the legislation's constitutionality.[35] This disregard for discriminatory intent was short-lived, however, as the Court in *Washington v. Davis* (1976) held, "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[36] Post-*Davis,* the Court focused primarily on outlining the admissible evidence which would prove sufficient in showing discriminatory intent. However, the Court has yet to establish a stable definition or clear parameters for what it considers discriminatory intent by state actors.[37]

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[31] *Id.* at 537, 551.
[32] Ah Sin v. Wittman, 198 U.S. 500, 508 (1905).
[33] Plessy v. Ferguson, 163 U.S. 537 (1896).
[34] Palmer v. Thompson, 403 U.S. 217 (1971).
[35] *Id.*
[36] Washington v. Davis, 426 U.S. 229, 240 (1976).
[37] Aziz Huq, *Judging Discriminatory Intent,* UNIVERSITY OF CHICAGO LAW SCHOOL: CHICAGO UNBOUND (2017).

The Court's decision in *McCleskey* invalidated claims of racial discrimination based on statistically-proven disparities in sentencing and, relying on its interpretation of precedence, insisted on a showing of discriminatory intent by the state actors directly involved in the case in question as an essential prong of the reigning discrimination test in criminal litigation-based equal protection claims.[38] This decision effectively shifted the burden of addressing systemic racial discrimination in the state criminal justice systems from the courts to the legislatures, nodding to the role of "legislative bodies" in determining whether or not to limit prosecutorial discretion.[39] In the wake of *McCleskey,*[40] both the federal and state governments began to seek reforms limiting the bounds of prosecutorial discretion and codifying tests of discrimination by the State that do not rely on showing intent by individual prosecutors in the cases in question and, further, allow for equal protection claimants to use statistical evidence to invalidate a state action on the basis of racial discrimination. The reforms drafted in the House of Representatives, namely the 1988 Racial Justice Act and the 1994 Racial Justice Act, were introduced by the House Judiciary Committee with the intent to respond to the results of the such studies as the Baldus study introduced in *McCleskey*, since the Court cited the role of legislatures in addressing the disparate impact of selective prosecution shown in empirical data.[41] Both acts focused particularly on limiting the racial discrimination protected by the notion of prosecutorial discretion in capital cases by prohibiting the imposition of the death penalty in a racially disproportionate pattern, as well as by establishing the possibility of statistical evidence as sufficient to establish a basis for claims of discriminatory practices.[42] Importantly, these bills, if enacted, would formally abandon the necessity of showing "discriminatory motive, intent, or purpose on the part of any individual or institution," thereby ameliorating the blow to equal protection violation claims dealt by the Court in *McCleskey.*[43] Both bills died in committee, never reaching a full House vote.[44] Similar racial justice acts were proposed and

[38] McCleskey v. Kemp, 481 U.S. 279, 291-312 (1987).

[39] *Id.* at 319-20.

[40] *McCleskey,* 481 U.S. 279.

[41] Racial Justice Act of 1988, H.R. 4442, 100th Cong. § 2(a) (1988); Racial Justice Act, H.R. 4017, 103rd Cong. § 2(a) (1994); McCleskey v. Kemp, 481 U.S. 279, 319-20 (1987).

[42] Racial Justice Act of 1988, H.R. 4442, 100th Cong. § 2(a) (1988); Racial Justice Act, H.R. 4017, 103rd Cong. § 2(a) (1994).

[43] Racial Justice Act of 1988, H.R. 4442, 100th Cong. § 2(a) (1988); Racial Justice Act, H.R. 4017, 103rd Cong. § 2(a) (1994).

[44] Racial Justice Act of 1988, H.R. 4442, 100th Cong. § 2(a) (1988); Racial Justice Act, H.R. 4017, 103rd Cong. § 2(a) (1994).

rejected by the US Senate in 1989, 1990, and 1991. The failure of the federal legislature to remedy the Court's blow to race-based Equal Protection claims makes clear the country's ongoing and urgent need for reform on the part of the judiciary.

Though the post-*McCleskey* attempts at racial justice reform found little success in the federal legislature, some state reforms have been adopted in recent years. For instance, the 2009 North Carolina Racial Justice Act (RJA) allowed defendants charged with capital crimes to petition their death sentences if race played a significant factor in the sentencing process.[45] Two notable cases were brought under the RJA: *North Carolina v. Robinson* and *North Carolina v. Augustine.*[46] In *Robinson,* a North Carolina judge commuted the death sentence of Marcus Robinson to life without parole based on the results of a Michigan State University statistical study that evidences racial bias in jury selection, prosecutorial discretion, and jury sentencing in cases involving the death penalty.[47] Likewise, in *Augustine,* a North Carolina judge commuted the sentences of three separate defendants whose right to equal protection was violated in their prosecutors' reliance on race in jury selection.[48] The State Supreme Court, while it found no issue with the MSU study cited in *Robinson,* ruled in both cases that the State should have been allowed more time to conduct its own study showing the absence of prosecutorial bias to contradict that provided by the petitioner.[49] To this day, the State of North Carolina has yet to conduct such a study.[50] The RJA was repealed in 2013, when Republicans took complete control of the North Carolina state legislature with the inauguration of Republican Governor Pat McCrory.[51]

In an increasingly polarized political landscape marked by partisan gridlock, the role of legislators in repairing the damage done to equal protection in criminal justice is impotent at best. The Court must adopt a clear, rational approach to determining discrimination that does not rely on proving intentional racial bias by prosecutors. Not only does this standard allow intentional discrimination to continue so long as it cannot be proven with non-

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[45] Racial Justice Act of 1988, H.R. 4442, 100th Cong. § 2(a) (1988).

[46] State of North Carolina v. Marcus Reymond Robinson, 368 N.C. 596 (N.C. 2015); State of North Carolina v. Quintel Augustine, 368 N.C. 594 (N.C. 2015).

[47] State of North Carolina v. Marcus Reymond Robinson, 368 N.C. 596, 596 (N.C. 2015).

[48] State of North Carolina v. Quintel Augustine, 368 N.C. 594, 594 (N.C. 2015).

[49] State of North Carolina v. Marcus Reymond Robinson, 368 N.C. 596, 596-97 (N.C. 2015); State of North Carolina v. Quintel Augustine, 368 N.C. 594, 594 (N.C. 2015).

[50] *North Carolina Racial Justice Act,* AMERICAN CIVIL LIBERTIES UNION, http://aclu.org/north-carolina-racial-justice-act (last visited January 25, 2020).

[51] *Id.*

empirical evidence, it also fails to consider the implicit biases that inherently drive humans', including prosecutors', decisions.

II. The Issue of Proving Discriminatory Intent and its Relevance to the Application of the Equal Protections Clause

A. Introduction

As previously mentioned, the Court affords prosecutors wide discretion in carrying out their role in the criminal justice system.[52] The concept of prosecutorial discretion lies in prosecutors' role as agents of the Executive Branch, whose duty is to "faithfully execute" the laws of the United States. The courts have historically shown significant hesitance in their limitations of prosecutorial discretion based on the separation of powers doctrine,[53] which has effectively freed prosecutors from facing judicial review of their charging decisions. [54] Therefore, as it stands, federal prosecutors possess virtually unchecked discretion in when, whom, and how to prosecute violations of federal criminal law.[55] In a world free from bias, prosecutorial discretion could protect against infringements on the State's ability to enforce its laws in the manner it determines most effective and beneficial. However, the U.S. criminal justice system does not exist in such an ideal. Rather, law enforcement actors in the United States, like all humans, are biased by their unique identities, circumstances, and experiences. Explicit prejudice and implicit bias coexist in the US criminal justice system, cooperating to systematize racial discrimination in this country. The Equal Protection principle acts as the safeguard against such systematized racism,[56] yet the Court has diluted Equal Protection litigation to the point of impotence through its shifting standards of proof and in its current requirement of showing discriminatory intent to warrant strict scrutiny of criminal prosecutors' sentencing actions.[57]

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[52] *See* United States v. Goodwin, 457 U.S. 368, 382 (1982); U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, U.S. ATTORNEY'S MANUAL §9-27.110 (2018) (discussing the purpose and appropriate exercise of prosecutorial discretion).

[53] U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, U.S. ATTORNEY'S MANUAL §9-27.110 (2018); U.S. CONST. Art. II §3.

[54] Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments,* 6 SETON HALL CIRCUIT REVIEW, no. 1, 2012, at 2.

[55] U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, U.S. ATTORNEY'S MANUAL §9-27.110 (2018).

[56] U.S. CONST. amend V, XIV, § 1.

[57] *See* Washington v. Davis, 426 U.S. 229, 245-47 (1976) (discussing the constitutional inappropriateness of Title VII's requirement of a higher level of scrutiny than rational basis review for race-based Equal Protection claims).

B. Levels of Scrutiny

In order to understand the Court's analysis of Equal Protection claims, one must first understand the structure governing the review of any policy or practice granted *certiorari* by the Court. Over its history, the Court has constructed a tiered system of scrutiny with regard to equal protection jurisprudence.[58] With regard to the policies and actions it reviews, the Court first classifies each case as subject to one of three scrutiny levels: rational basis review, intermediate scrutiny, or strict scrutiny.[59] Rational basis review (also known as the "rational basis test") constitutes the least rigorous standard of review afforded by the Court.[60] Under the rational basis test, the Court upholds the policy in question if it can conceive the state action to be "rationally related to furthering a legitimate state interest."[61] Importantly, a government action can pass the rational basis test even if the government fails to show such a rational justification: in *Ry. Express Agency, Inc. v. New York,* 336 U.S. 106 (1949), the Court provided hypothetical rationales for a New York City traffic regulation prohibiting advertising vehicles from the city streets in order to justify the state action and, further, stated that proving the acceptable rationales posed by the Court would require "a degree of omniscience which we lack to say," thereby cementing the idea that the Court will uphold a state action for which someone can find even a single rational justification not based on protected qualities such as race.[62] Unsurprisingly, the Court rarely overturns legislation and state actions reviewed under the rational basis test.[63]

Slightly less lenient than the rational basis test, intermediate scrutiny demands the government action in question to be "substantially related" to a legitimate and important government interest.[64] Unlike in the rational basis test, the Court does not legitimize the state

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[58] Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 755 (2011).

[59] Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.3, at 12-41 (2d ed. 1992), *cited in* Jeffery A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, And The Potential Impact on the Criminal Justice System,* 50 WASH. AND LEE L. REV. 1791, 1794 (1993).

[60] Jeffery A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, And The Potential Impact on the Criminal Justice System,* 50 WASH. AND LEE L. REV. 1791, 1794-95 (1993) (citing Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3, at (2d. ed. 1992))).

[61] Williamson v. Lee Optical, Inc., 348 U.S. 483, 486 (1955).

[62] *Ry. Express Agency, Inc. v. New York,* 336 U.S. 106, 110 (1949).

[63] *See* Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 760 (2011) ("Because judges could imagine many things [as a rational justification for state action], ordinary rational basis review was tantamount to a free pass for legislation.").

[64] *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979) (explaining that, under intermediate scrutiny, government classifications based on gender must bear a substantial relationship to important governmental objectives), *cited in* Jeffery A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, And The Potential Impact on the Criminal Justice System,* 50 WASH. AND LEE L. REV. 1791, 1795 (1993).

action in question based on any seemingly reasonable rationale hypothesized either by the government or the Court itself.[65] Rather, the burden falls completely on the government to show the action's purpose and relationship to a legitimate interest.[66] The Court uses intermediate scrutiny principally in its review of policies involving gender discrimination.[67]

The most stringent level of scrutiny utilized by the Court is the "strict scrutiny" standard, which originated in a footnote by Justice Harlan Fiske Stone that suggested the necessity of "a correspondingly more searching judicial inquiry" into legislation that threatens to violate one of the fundamental rights accorded to individuals in the U.S. Constitution.[68] Strict scrutiny analysis today is two-pronged.[69] First, courts must determine if the government's purpose behind the policy or practice in question is "compelling," or of the upmost societal importance.[70] If the government's interests behind the legislation is "compelling" in nature, the court must then decide if the policy is narrowly tailored to advancing these interests.[71] The Court has formally granted strict scrutiny to government actions alleged to discriminate based on race.[72] However, since *Korematsu,* the Court has qualified its requirement that cases involving racial discrimination be reviewed under strict scrutiny, deciding that only cases shown to involve discriminatory intent on the part of the government would merit strict scrutiny review.[73] Further, in *Washington v. Davis,* 426 U.S. 229, 247-48 (1967),[74] the Court asserted that government actions neutral on their face and lacking discriminatory intent warrant only rational basis review.[75] With its decision in *Davis,* the Court effectively cleared the way for racially discriminatory state action, so long as the claimant of an Equal Rights violation fails to show the state's discriminatory intent, and the

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[65] Jeffery A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, And The Potential Impact on the Criminal Justice System,* 50 WASH. AND LEE L. REV. 1791, 1795 (1993).

[66] *Id.*

[67] *Id.*

[68] United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938).

[69] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 793, 800 (April, 2006).

[70] *Id.*

[71] *Id.*

[72] *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("…all legal restrictions which curtail the civil rights of a single racial group are immediately suspect…courts must subject them to the most rigid scrutiny").

[73] *See* Washington v. Davis, 426 U.S. 229, 243 (1976) (asserting that government actions neutral on their face and lacking discriminatory intent warrant only rational basis review); *See also* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977) (reinforcing Court's decision in *Davis* that a government action is not unconstitutional solely because of a racially disproportionate impact).

[74] Washington v. Davis*,* 426 U.S. 229, 247-48 (1967).

[75] Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 764 (2011).

state or the Court itself can imagine a neutral, rational justification for the action in question. As discussed in this article, this standard amounts to a virtual green light for racially discriminatory state actions whose crafters lacked publicly discriminatory motives.

C. Disparate Impact

Before its adoption of discriminatory intent into its test for racial discrimination in Equal Protection claims, the Court focused primarily on a showing of "disparate impact" in order to evidence racial discrimination and, therefore, warrant strict scrutiny of the policy or practice by the Court.[76] The idea of disparate impact originated in the context of Title VII of the Civil Rights Act of 1964, which sets out the principle of equal opportunity in employment.[77] According to the Department of Justice, "disparate impact regulations" describes those policies that "seek to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination."[78] Disparate impact, unlike discriminatory intent, focuses on the effect of rather than the motivation behind a specific policy or practice.[79] In order to bring a successful disparate impact claim, the plaintiff need only make a prima facie showing that the policy/practice has "'a disproportionately adverse effect on minorities' and [is] otherwise unjustified by a legitimate rationale."[80] Once the plaintiff shows disparate impact, the burden shifts from the plaintiff to the employer to defend against the liability by showing the "business necessity" of the policy in question.[81] The burden-shifting approach of disparate impact claims poses an important contrast to the Court's tiered-scrutiny approach to analyzing Equal Protection claims.[82] While the Court affords strict scrutiny to Equal Protection cases involving racial

[76] *See* Griggs v. Duke Power Co., 401 U.S. 430, 432 (1971) (finding discriminatory intent unnecessary to prove violations of Title VII); City of Rome v. United States, 446 U.S. 156, 173 (1980) (finding the provision in the Voting Rights Act of 1965 prohibiting electoral changes that are discriminatory in effect to be constitutional); Gaston Cty. v. United States, 395 U.S. 285, 297 (1969) (striking down Gaston County's policy of issuing literacy tests to determine an individual's ability to vote based on its discriminatory effect).

[77] Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2019).

[78] TITLE VI LEGAL MANUAL § 7A (DEP'T OF JUSTICE 2019).

[79] Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (defining disparate impact as those practices that, though they lack intent to discriminate, result in a disproportionately negative impact on minorities).

[80] TITLE VI LEGAL MANUAL § 7A (DEP'T OF JUSTICE 2019).

[81] Scott E. Rosenow, Note, *Equal Protection Scrutiny Applies to the Disparate-Impact Doctrine,* 20 TEX. J. ON C.L. & C.R. 163, 169 (Fall, 2014 / Spring, 2015); Ricci v. DeStefano, 557 U.S. 557, 578 (2009) ("The *Griggs* Court stated that the "touchstone" for disparate-impact liability is the lack of 'business necessity'…") (citing Griggs v. Duke Power Co., 401 U.S. 424, (1971))).

[82] Scott E. Rosenow, Note, *Equal Protection Scrutiny Applies to the Disparate-Impact Doctrine,* 20 TEX. J. ON C.L. & C.R. 163, 169 (Fall, 2014 / Spring, 2015).

discrimination, it follows an ambiguous threshold of proof that a claimant must meet in order to warrant this heightened level of scrutiny, which, as this article argues, has settled for the moment on a two-pronged test that renders this burden near-impossible to meet. The analysis afforded to disparate impact claims, however, is clear: if the claimant shows a policy or practice to negatively and disproportionately impact one group of individuals based on a protected characteristic such as race, and the respondent cannot show a reasonable basis for the policy or practice in question, then it is prohibited. In looking to its treatment of Title VII claims, the Court can begin to incorporate elements of disparate impact analysis, such as its standard of proof required of the claimant, into its determination of the appropriate level of scrutiny to apply to the policy in question.[83] Furthermore, the burden-shifting approach to examining Title VII claims requires the respondent to show a reasonable basis for any action deemed to have a disparate impact, which, if adopted by the Court in the context of race-based equal protection claims, would alleviate the issue of the all-or-nothing approach to review resulting from the tiered, strict scrutiny vs. rational basis review system currently in place.[84]

The concept of disparate impact was introduced into civil rights jurisprudence in *Griggs v. Duke Power Co.*, 401 U.S. 424, (1971),[85] which involved a claim that the Duke Power Company's requirement of a high school education or the passage of an intelligence test as a condition of employment violated Title VII of the Civil Rights Act.[86] In *Griggs,* the Court found that the intelligence test violated Title VII, as it deemed a disproportionately large number of black applicants ineligible for employment with the company yet had no "demonstrable relationship to successful performance of the jobs for which it was used."[87] Further, the Court held that practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[88] *Griggs,* then, set out disparate impact as the standard for proving an Equal Protections violation in the Equal Opportunity Employment context and removed intent from the test of a policy's nature as discriminatory.[89] In this case,

[83] Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2019).
[84] *Id.*
[85] *Griggs v. Duke Power Co.*, 401 U.S. 424, (1971).
[86] Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2019).
[87] *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).
[88] *Id.* at 430.
[89] *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2019).

the Court set out a clear, simple standard of proof for claimants of Equal Protection violations and deemed statistical evidence acceptable to support claims of disparate impact.[90] However, the Court in *Griggs* narrowed its use of the disparate impact standard to Equal Opportunity cases, as opposed to Equal Protection cases, pointing to the focus of Congress in its construction of Title VII as being on the "consequences of employment practices, not simply the motivation."[91] The Court made this distinction between the necessary standards of evidence to strike down a state action in Equal Opportunity and Equal Protection claims clear only five years after *Griggs* in its opinion in *Davis:*

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices…We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.[92]

The frustrating ambiguity in the American judiciary becomes clear in this glaring contradiction in its protection against racial discrimination: while the United States requires only a showing of disparate impact with regard to protection against racial discrimination in employment, it requires a showing of both disparate impact and discriminatory intent in state actions that threaten one's right to equal protection under the law. The result of such ambiguity is a muddled system of protecting against racial discrimination in the United States whose theoretical strength pales in comparison to its practical dilution.

D. The Problem of Discriminatory Intent

In addition to its inconsistent requirements for reviewing allegedly racially discriminatory state actions, the Court has also significantly hindered Equal Protection litigation in this country through its bewildering, incompatible definition of discriminatory intent –the very concept on which the Court's most recent test for Equal Protection violations warranting strict scrutiny lies. The idea of discriminatory intent as necessary to prove discrimination in Equal Protection cases is, relative to the history of the United States judiciary, quite a recent notion. In fact, in *Palmer v. Thompson,* a case involving the permissibility of the City of

[90] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (citing statistical evidence as evidence of an intelligence test's lack of correlation with job performance).

[91] *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971); Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2019).

[92] Washington v. Davis*,* 426 U.S. 229, 247-48 (1967).

Jackson's decision to close all its public swimming pools in response to court-ordered desegregation, the Court made clear its skepticism of intent as the basis of proof for Equal protection violations when it found that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of men who voted for it."[93] Only five years later, however, in *Davis,* the Court ruled that "Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[94] The *Davis* Court, as discussed, went on to include discriminatory intent as a necessity in advancing Equal Protection claims.[95]

From the introduction of discriminatory intent into the test for racial discrimination in state actions in *Davis,* the Court moved to further limit the definition of discriminatory intent to the idea of "discriminatory purpose."[96] Even stricter in its required showing, discriminatory purpose, according to the *Feeney* Court, "…implies more than intent as awareness of consequences. It implies that a decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[97]

Just under twenty years after the *Feeney* Court put forth its limited definition of discriminatory intent, the Court decided *McCleskey* and, in so doing, focused on a showing of both discriminatory effect and discriminatory purpose by the state actors specifically involved in the prosecution of the claimant's case as the reigning standard of classifying discrimination claims as race-based Equal Protection cases (and, consequently, assigning them strict scrutiny).[98] However, when the Court adopted intent as a prong of its discrimination test, it had yet to reach a plausible, or even consistent, standard for proving discriminatory intent. For instance, in *Davis,* the Court opined that disparate impact, while it does not by itself invalidate a government policy on Equal Protection grounds, may act as strong evidence of discriminatory intent.[99] *Davis,* then, provided the judiciary with one factor

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[93] Palmer v. Thompson, 403 U.S. 217, 224 (1971).
[94] Washington v. Davis*,* 426 U.S. 229, 240 (1976).
[95] *Id.* at 247-48.
[96] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).
[97] *Id.* at 279.
[98] McCleskey v. Kemp, 481 U.S. 279 (1987).
[99] Washington v. Davis*,* 426 U.S. 229, 241-42 (1976) ("This is not to say…that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination…. Necessarily, an invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another").

which could aid in proving discriminatory intent. Rather than defining clear grounds on which to base allegations of discriminatory intent, however, the Court's simultaneous qualification of disparate impact as a factor evidencing discriminatory intent and its assertion that disparate impact alone cannot render a government action unconstitutional served to further muddle the doctrine governing the review of Equal Protection claims. Perhaps attempting to bring direction to the confusion encompassing discriminatory intent, the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* provided several means of showing discriminatory intent, including "the impact of the official action," "the historical background of the decision," "departures from the normal procedural sequence," "substantive departures," and "the legislative or administrative history."[100] None of these criteria, however, withstand the definition of discriminatory purpose set forth in *Feeney,* as the claimant must show that the government chose the policy in question *in order to* achieve a disparate impact.[101] Because the Court has centered its test for racial discriminatory state actions warranting strict-scrutiny review on the motivations of the state, any evidence that shows only unequal application of a policy (such as varying sentencing rates for individuals in similar circumstances but for their race) proves insufficient to warrant strict scrutiny review.[102] As if to emphasize this point, the *McCleskey* Court invalidated statistical evidence as sufficient proof of discrimination.[103] Clearly, the United States judiciary has transformed successful race-based Equal Protection claims into a Sisyphean task: to prove a government policy or practice discriminatory, the claimant must show that it has a disproportionate impact on members of a certain race and that the government explicitly meant to achieve this impact, and she must do so without reliance on statistical evidence or, usually, an admission of racially prejudiced motives on the part of the government.

Looking specifically to Equal Protection claims against criminal prosecutors, one sees the extent of the Court's dilution of Equal Protection litigation's force through an analysis of the Court's treatment of claims alleging selective prosecution. In Equal Protection claims alleging selective prosecution on the basis of race, the Court has pointed to the necessity of

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[100] Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68 (1977), *cited in* Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 764 (2011).

[101] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 764 (2011).

[102] *See* Washington v. Davis*,* 426 U.S. 229, 241-42 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[103] *McCleskey,* 481 U.S. 279 at 308.

selectivity in prosecution by nature of the long-protected principle of prosecutorial discretion and set an implausibly strict standard for proving selectivity as the fruit of racial discrimination.[104] In *Wayte v. United States,* the Court adopted the two-prong test in selective prosecution that it would apply only two years later in *McCleskey* to all race-based Equal Protection claims, stating that "It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require the petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."[105] After deciding that selective prosecution claims require a showing of discriminatory purpose to warrant strict scrutiny review in *Wayte,* the Court acted to render a showing of discriminatory intent even more implausible by reemphasizing its historical hesitance to limit prosecutorial discretion in sentencing. [106] In *United States v. Armstrong,* the Court considered whether defendants, who were charged with conspiring to possess with intent to distribute and conspiring to distribute fifty grams of cocaine, were entitled to discovery based on the claim that the prosecutor singled them out due to their race.[107] The defendants in *Armstrong* based their claim on a study which showed that all cases brought by the prosecutor's office involving similar drug violations involved a black defendant.[108] The Court in this case adhered to the precedent of the two-pronged discrimination test it set in *McCleskey*,[109] holding that claimants of selective-prosecution must show both discriminatory effect and discriminatory purpose on the part of the prosecutor.[110] Further, the Court rejected defendants' claim, finding that "respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races."[111] Hence, in *Armstrong,* the Court set out a new standard for showing discriminatory intent –the claimant of an Equal Protection violation in the context of criminal litigation must show that the involved prosecutor failed

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[104] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) ("…the conscious exercise of some selectivity in law enforcement is not in itself a federal constitutional violation); *See also* United States v. Armstrong, 517 U.S. 456, 465 (1996) ("The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose").

[105] Wayte v. United States, 470 U.S. 598, 608 (1985).

[106] *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379-80 (2d Cir. 1973); *See* United States v. Goodwin, 457 U.S. 368, 382 (1982).

[107] United States v. Armstrong, 517 U.S. 458, 458 (1996).

[108] *Id.* at 459.

[109] *McCleskey,* 481 U.S. 279 at 291-92.

[110] United States v. Armstrong, 517 U.S. 456, 465 (1996).

[111] *Id.* at 458.

to charge suspects similar to the claimant but for his race.[112] Clearly, this standard loses its plausibility when considered under the lens of *McCleskey*, which invalidates statistical evidence as an acceptable basis of proof of racial discrimination.[113] Further, the Court in *McCleskey* asserts that "The very exercise of discretion meant that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law."[114]

Taken together, the decisions in *Armstrong* and *McCleskey* work to invalidate each other. In both cases, the Court requires a showing of discriminatory intent; however, the Court in *Armstrong* focuses on systemic disparities by asserting that the claimants of an Equal Protection violation involving selective-prosecution must show that the prosecutor charged some suspects while declining to charge others based only on the defendants' race,[115] while the Court in *McCleskey* held that discretion is essential to the individualized approach of prosecutors needed to protect defendants against "arbitrary" and capricious sentencing.[116]Clearly, race-based Equal Protection jurisprudence, especially in the context of selective prosecution claims, in the United States lacks a navigable system of judicial review. While the Court has made a firm stance on its interpretation of the Constitution as requiring facial discrimination (i.e. policies discriminatory in both their effect *and* their formulation) to review government actions under strict scrutiny, it has visibly and continually failed to identify reasonable methods of proving discriminatory intent or even to define discriminatory intent. In looking to accomplish a system of effective Equal Protection jurisprudence moving forward, one must face several tough questions. How can we require individuals to prove something when we cannot agree on its definition? Perhaps even more urgent, how can we boast equal protection under the law for all Americans when we have so eroded the teeth of Equal Protection litigation with shifting and ambiguous standards that policies which glaringly disadvantage swaths of the population based only on the color of their skin can continue virtually unchecked?

Without a clear definition, and test for, discriminatory intent, the parameters by which we judge discrimination will be up to the dynamic whims of the judiciary-of-the-moment. The United States Supreme Court and federal judiciary have been ambiguous in their

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[112] United States v. Armstrong, 517 U.S. 458 (1996).
[113] *McCleskey,* 481 U.S. 279 at 308.
[114] *McCleskey v. Kemp,* 481 U.S. 289 (1987).
[115] United States v. Armstrong, 517 U.S. 458 (1996).
[116] *McCleskey,* 481 U.S. 289 at 303-08.

definition of discriminatory intent and unpredictable in their rulings on this strain of intent. If SCOTUS demands that the claimant meet such a high standard of proof that discriminatory intent requires to show discrimination in an Equal Protection claim, thereby subjecting the state action to strict scrutiny review, then it *must* be clear on what constitutes this standard. To remain ambiguous is to deprive persons of a reliable method by which to challenge violations of their right to equal protection under the law when these violations are committed by officers of their own government.

III. The Two-Dimensional Objective-Subjective Bias Test

The previous sections of this article discuss the threats to Equal Protection posed by the standard of proving discriminatory intent. In looking forward to reforming the United States criminal justice system to address these threats, one must understand the two primary weaknesses of the Court's current protocol. First, to this day, the Court has failed to establish a clear, consistent definition of discriminatory intent, thereby harnessing Equal Protection claimants with the near-insurmountable burden of proving the discriminatory nature of the state's *motivations* with no meaningful guidance on what (in the eyes of the Court) evidences these motivations. Second, even if the Court furnished a proper definition for discriminatory intent, a system asking victims of racial discrimination to prove the unpublished motives of the government in order to achieve serious review of the policy that violated their constitutional right to Equal Protection is a system broken and bound forever by the chains of inequality. In order to address the two principal issues with the Court's inclusion of discriminatory intent in its test for racial discrimination, the United States should create a system which combines elements of the system of review exercised by the European Union's judiciary with elements once pursued (or suggested) by its own.

The Equal Protection Clause exists to protect against the violation of individuals' freedoms based on such inherent characteristics as race by a state run by flawed human beings.[117] This protection, then, functions to safeguard individuals from the *actions* of the state, not its motivations. Prior to the Court's decision in *McCleskey,* Justice Stevens, in his concurring opinion in *City of Mobile v. Bolden,* stated that "[a] proper test [of discrimination] should focus on the objective effects of the political decision rather than the subjective

[117] U.S. CONST. amend V, XIV, § 1.

motivation of the decisionmaker."[118] The Court, therefore, has previously acknowledged the need for a test of racial discrimination that requires a showing not of the subjective motivations of the state but rather the objective consequences of state action.

As discussed, the United States has already adopted legislation both in the state, through the passage of laws such as the Racial Justice Act in North Carolina,[119] and the federal sphere through policies such as that governing the judicial review of claims falling under Equal Opportunity.[120] The adoption of a system that uses objective measures such as disparate impact would, therefore, is not unreasonable or anomalous to precedent. However, in looking to reform the judiciary's current test for discrimination in Equal Protection cases, one may look to the successes of judiciaries outside of the United States.

The European Union Non-discrimination directives provide an excellent model on which the United States can base its system of classifying government policies as racially discriminatory.[121] According to the EU's Racial Equality Directive, adopted by the legislature in 2000, "[d]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be treated in a comparable situation."[122] This idea, far from foreign to the American judiciary, supports the Court's definition of discriminatory intent in *Armstrong,* which dictates that to classify a state action as an Equal Protection violation, the claimant must show that the prosecutor failed to charge similarly situated individuals who differed only on the grounds of some protected characteristic such as race.[123] In addition to its clear, concise definition of "direct discrimination," the EU's Racial Equality Directive asserts that the courts should take into account the totality of the circumstances (e.g. racially insensitive remarks by involved government officials, discriminatory behavior in questioning) when determining the state's culpability. [124] Implementing a system that takes a "totality of the circumstances" approach allows the courts to consider such factors as discriminatory intent *and* disparate impact in their review

[118] City of Mobile v. Bolden, 446 U.S. 55, 90 (Stevens, J., concurring) (1980).

[119] Racial Justice Act of 1988, H.R. 4442, 100th Cong. § 2(a) (1988); Racial Justice Act, H.R. 4017, 103rd Cong. § 2(a) (1994).

[120] Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2019).

[121] Council Directive 2000, 2000 O.J. (L 180) 43 (EC).

[122] *Id.*

[123] United States v. Armstrong, 517 U.S. 458 (1996).

[124] Council Directive 2000, 2000 O.J. (L 180) 43 (EC); *See also* Gregor Maučec, *Proving Unlawful Discrimination in Capital Cases: In Quest of an Adequate Standard of Proof,* ULTRECHT JOURNAL OF INTERNATIONAL AND EUROPEAN LAW no. 33(85), at 5 (discussing the European Union's approach to finding discrimination by the state in the application of the death penalty).

of state practices alleged to be racially discriminatory. In adopting such a system in the context of race-based Equal Protection claims, the United States would not have to sacrifice its consideration of either motivation or effect when determining whether to classify a government action as an Equal Protection violation. This system allows the courts to assign proper weight to the real impact that government policies or practices may have on the lives of people of color without subjecting any legislation with a non-uniform impact amongst communities to invalidation or severely limiting prosecutorial discretion amongst federal criminal prosecutors.

Also necessary to the implementation of a "totality of the circumstances approach" is the reinstatement of statistical evidence as a tool to evidence both discriminatory effect and intent. The United States House of Representatives has already drafted legislation that would take the first step in accomplishing this goal, though it has not yet been adopted into law: the Fairness in Death Sentencing Act of 1991.[125] This act would allow defendants condemned to death to appeal their conviction on the basis that their race acted as a basis for the prosecutor's decision to pursue the death penalty in their cases.[126] Importantly, this legislation would allow petitioners to use statistical evidence to "demonstrate that, at the time [the petitioner's death sentence] was imposed, race was a statistically significant factor in decisions to seek or to impose the death sentence in the jurisdiction in question.[127] While the State is not required to amass statistical data, the complainants gain through this law the ability to present statistics which show significant racial disparities in actions of State with regard to prosecution.[128] Claimants must "prove by a preponderance of evidence either that race was a motivating factor in their individual case or that the death penalty was being administered in a racially discriminatory manner in the jurisdiction in question."

In order to further protect the ability of the State to pass legislation and prosecute violations of its laws from undue interference by the courts, the United States can maintain discriminatory intent as a significant element in its consideration of race-based Equal Protection claims. If the United States is to keep discriminatory intent as a measure of discrimination, however, the Court must put forth an easily comprehensible system for

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[125] Fairness in Death Sentencing Act of 1991, H.R. 2851, 102nd Congress (1991-1992).
[126] *Id.*
[127] *Id.*
[128] *Id.*

proving intent. For inspiration on a model that accomplishes this necessity, the United States can again look to European jurisdictions.

In the European Union's judicial system, the governing test for discrimination in the context of judicial impartiality is two-dimensional.[129] The European Commission of Human Rights described the two-levelled system utilized by the European human rights system in its statement that "[if] the possibility of bias on the part of the juror comes to the attention of the trial judge in the course of a trial, the trial judge should consider whether there is actual bias or not (a subjective test). If this has not been established, the trial judge or appeal court must then consider whether there is 'a real danger of bias affecting the mind of the relevant juror or jurors' (objective test)."[130] In these cases, two tests are used to determine the presence of bias: the objective and the subjective. While the subjective test focuses on whether bias is actually present in the juror under consideration, the objective test focuses on whether there is a "real danger" of bias among the relevant juror(s). While the European judiciary utilizes this system in the context of judicial impartiality, the American judiciary can adopt this tiered system in the context of race-based Equal Protection claims. Such a system would allow the United States judiciary to consider the role of implicit bias in state actors such as prosecutors' decisions through its analysis of potential objective bias. Furthermore, the initial test for subjective bias encompasses the review of explicitly discriminatory motives that currently serves as the center of the test for racial discrimination in United States government actions. In combining the two-tiered test for bias with the disparate impact standard, the Court would fulfill its most urgent and confounding problem with regard to race-based Equal Protection jurisprudence in this country by both providing a clear definition of and measures for discriminatory intent and adding weight to the presence of disparate impact while abandoning discriminatory intent as the central requirement for proving racial discrimination by the government.

Conclusion

If the judiciary is to restore the fortitude of Equal Protection jurisprudence in the context of race-based claims in the United States, then it must focus on the real impact that

[129] *See* Piersack v. Belgium A/53 5 EHRR 169, para 30 (1982) (discussing various tests accepted by the body to denote prejudice or bias); *See also* Gregory v. United Kingdom 25 EHRR 577, para 32 (1997) (describing the two-levels constituting the test for illegal bias by trial juries).

[130] Gregory v. United Kingdom 25 EHRR 577, para 32 (1997).

the government's policies and practices have on people of color in this country. While true social equality requires each person in the society to confront and overcome their implicit (and, in some cases, explicit) racial biases, this cultural change lies outside the jurisdiction of the courts. Rather, the courts possess a responsibility to protect the freedoms granted by the Constitution to every American and must therefore work to abolish systemic racial discrimination by the government in its legislatures and its court rooms. In a society in which implicit racial biases constitute the norm, this responsibility demands a concern primarily for the *impact* of state action. While it may be easy to deal in subjective abstractions such as discriminatory intent and, in doing so, avoid a challenge to the very values which underlie the American criminal justice system,[131] the framers of the Constitution drafted this document in order to protect people's real interests. Any system that gets so lost in its abstractions that it renders its protective legal mechanisms implausible for large swaths of the population, then, forsakes the essence of the Constitutional protections.

As previously discussed in this article, the solution to the current state of race-based Equal Protection jurisprudence in the United States is three-pronged: 1) the Court must institute a "totality of the circumstances approach that assigns more weight to the effect of a government action than to the motivations behind it, 2) reinstate statistical evidence as a means of showing discriminatory effect and intent, and 3) using the European Human Rights system as a model, implement a two-dimensional system for showing discriminatory intent as *one factor* evidencing racial discrimination by the State.

[131] McCleskey v. Kemp, 481 U.S. 289, 314-19 (1987) (discussing the potentially existential threats to the U.S. criminal justice system arising out of a validation of McCleskey's Equal Protection claim).

Speech and Punishment: Felon Disenfranchisement Laws and the First and Eighth Amendments

Olivia Niuman

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right"

– Justice Black, in Majority Opinion for Wesberry v. Sanders, 1964

Introduction:

The right to vote is fundamental to representative government. The Supreme Court of the United States has affirmed that the right to vote is one that comes prior, and is necessary to, every other right.[1] Any restrictions on the right to vote, according to the Court, "strike at the heart of representative government."[2] The Court has also acknowledged that history has shown continuing expansion of the scope of the right to suffrage in the United States.[3]

Yet, the United States restricts the disenfranchises nearly 6.1 million people--approximately 2.5% of its population--due to a prior felony conviction.[4] Various states disenfranchise people who have a felony conviction—in some cases maintaining that

[1] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).
[2] *Reynolds v. Sims*. 377 U.S. 533, 555 (1964).
[3] *Id.*
[4] Christopher Uggen, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT 3 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

restriction even for those who have completed their sentences or who were never actually incarcerated due to their conviction.[5]

The current status of voting rights for those convicted of a felony varies state-by-state. Two states--Maine[6] and Vermont[7] --have no restrictions and allow all prisoners to vote. Seventeen states and the District of Columbia disenfranchise all prisoners but immediately restore voting rights upon completion of the sentence. Three states restore rights after completion of prison and parole, eighteen states restore it after completion of prison, parole, and probation, and eleven states include other post-sentence obligations like waiting periods, fines, or restricting the right permanently.[8]

The extension of suffrage to various groups in the United States has historically been done through constitutional amendment. The Fifteenth Amendment barred denial or abridgement of the right to vote on the basis of race;[9] the Nineteenth Amendment for sex;[10] the Twenty-Sixth with age for those over eighteen.[11] This "continuous expansion of suffrage"[12] stops short with one last remaining group: those convicted of a felony.

The Supreme Court's history of marking the right to vote as a crucial part of republican society while at the same time refusing to give the vote the legal force it deserves is flawed. The decision of who has the right to vote is not one that should be left up to the states and should be protected at a national level through constitutional interpretation. This article will explore the potential unconstitutionality of felon disenfranchisement laws. First, it will examine the shortcomings in the interpretations of the Fourteenth Amendment which have failed to properly defend felons' right to vote. Second, it will explore the First Amendment jurisprudence to argue that voting is a form of constitutionally protected political speech. Finally, it will examine the Eighth Amendment to argue that disenfranchisement is a form of cruel and unusual punishment. Ultimately, this article will conclude that all state disenfranchisement laws are unconstitutional and should be deemed as such by the Supreme Court of the United States.

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[5] From this point on, the term "felon" will refer to anyone previously convicted of a felony

[6] Me. Const. § 1, art. II.

[7] Vt. Const. § II, art. 42.

[8] Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT, 1 (2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/

[9] U.S. CONST. amend. XV, § 1.

[10] U.S. CONST. amend. XIX, § 1.

[11] U.S. CONST. amend. XXVI, § 1.

[12] *Reynolds v. Sims,* 377 U.S. at 555.

I. Background

A. The Fight for the Right to Vote in American History

The essence of a republican society is one that relies on just governance derived from the consent of the governed.[13] This sentiment--articulated in the Declaration of Independence--has been invoked as the principal cause for American independence from Great Britain. In keeping with this, the right to vote, being the mechanism through which the governed express their consent, is fundamental to republican government, and is the sole source of its legitimacy.

The United States Supreme Court has consistently asserted the importance of the right to vote. In *Wesberry v. Sanders*,[14] Justice Black articulates the importance of voting in American government:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[15]

The Supreme Court has also referred to the right to vote as "preservative of all rights," and has held that "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[16] The question, therefore, of who gets to vote, is one of utmost importance. As articulated by James Madison in the Federalist number fifty-seven:

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.[17]

This sentiment perfectly encapsulates the argument for universal suffrage regardless of place in society; yet the reality of the United States is that throughout its history, the right to vote was held by a privileged few who gradually extended that right over time to larger and larger groups of people.

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[13] THE FEDERALIST No. 57 (1788).
[14] *Wesberry v. Sanders,* 376 U.S. 1 (1964).
[15] *Wesberry*, 376 U.S. at 17.
[16] *Reynolds v. Sims.* 377 U.S. 533, 562 (1964).
[17] THE FEDERALIST No. 57 (1788).

The first large scale expansion of suffrage was granted to men of color with the Fifteenth Amendment: "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."[18] The specific language grants suffrage to men of color, but is also restrictive. The amendment specifically lists race, color, and previous condition of servitude as factors that may not limit someone from voting, yet leaves out women and those who fall outside the aforementioned groups.

Indeed, there was tension between proponents for suffrage based on race and based on sex. Some prominent feminists in the late nineteenth century, like Elizabeth Cady Stanton and Susan B. Anthony, opposed the Fifteenth Amendment as they viewed it as creating more inequality between men and women.[19] This tension represents a longer, curious theme of Americans seeing voting rights as a zero-sum game, where the extension of rights to one group somehow restricts another.

After the Fifteenth Amendment, southern states devised ways to restrict the right to vote based on color without violating the federal law. An example of this can be seen in the Mississippi Constitution of 1890,[20] which had a stated purpose "to obstruct the exercise of the franchise by the negro race."[21] The measures devised by Mississippi were not uncommon in the South, but were so pervasive that many were specifically addressed by the Voting Rights Act of 1965.[22] Among them was the poll tax, which effectively disenfranchised the poor, and the literacy test which required a voter to read and interpret a part of the Mississippi Constitution. The passing of the test was left entirely up to the administrator, which resulted in almost all black voters being denied the right to vote.[23]

The provisions designed by Mississippi illustrate how the right to vote is vulnerable to infringement even where it is constitutionally protected. Further, it shows how those in power often use that power to restrict the vote of vulnerable communities, in this case African Americans, in order to maintain their position of power.

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[18] U.S. CONST. amend. XV § 1.

[19] NATIONAL PARKS SERVICE, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 8-9 (2007, rev. 2009), https://www.nps.gov/subjects/nationalhistoriclandmarks/upload/Civil-Rights-Racial-Voting-Rights-2018.pdf

[20] MISS CONST. § 243 (1890).

[21] *Ratliff v. Beale*, 74 Miss. 247, 266 (1896).

[22] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965) (amended 1975).

[23] John Ray Skates, *The Mississippi Constitution of 1890* MISSISSIPPI HISTORICAL SOCIETY (2000) http://mshistorynow.mdah.state.ms.us/articles/103/mississippi-constitution-of-1890

Following the granting of suffrage to people of color, the right was granted to women in 1920 with the Nineteenth Amendment, which said "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 sex."[24] Previously, legal challenges to female disenfranchisement had failed, most notably in *Minor v. Happersett* (1875). The Court held that while women were citizens, they were not necessarily voters, and therefore their right to vote was not guaranteed by the Constitution.[25] Like with African Americans, judicial efforts to gain the franchise were rejected by the Supreme Court, and instead given by Congress through constitutional amendment.

The next largest extension of the franchise also happened through constitutional amendment: in 1971, the Twenty-Sixth Amendment declared "the right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."[26] This amendment was passed in the midst of the Vietnam War, in response to rising public opinion that those old enough to fight in the war should also be legally considered old enough to vote.[27]

B. Current Status of Felon Disenfranchisement

In contrast to Justice Warren's assessment that the United States experiences a continuing expansion of suffrage, felony disenfranchisement has instead halted this expansion. At the time of the Fourteenth Amendment, twenty-nine states had provisions which authorized their legislatures to prohibit felon voting.[28] By 2006, forty-eight states had imposed some type of restriction on the voting rights of felons.[29] The number of disenfranchised persons has also been rising: in 1996, 3.3 million felons were disenfranchised, by 2016 this number had almost doubled to 6.1 million.[30] The rising number of convicted felons paired with the existence of felon disenfranchisement laws means that

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[24] U.S. CONST. amend. XIX, § 1.

[25] *Minor v. Happersett*, 88 U.S. 162, 171 (1875), *superseded by constitutional amendment,* U.S. CONST. amend XIX.

[26] U.S. CONST. amend. XXVI § 1.

[27] Wynell Schamel, *The 26th Amendment and Youth Voting Rights* SOCIAL EDUCATION *374 (*1996) https://search.proquest.com/docview/210613253/fulltextPDF/4A02783AA0D74608PQ/1?accountid=11243

[28] *Richardson v. Ramirez,* 418 U.S. 24, 47-8 (1974).

[29] ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 17 (2006).

[30] Christopher Uggen, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT 9 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

the United States will continue to take away a fundamental civil right from an ever-increasing number of people.

Compared to the rest of the world, the United States incarcerates the largest percentage of its people, holding 25% of the world's total population of prisoners.[31] In addition to punishing the most people, the United States is also uniquely harsh in its restriction of voting rights for those currently or previously convicted of a felony.[32] Nearly half of all European countries have no restrictions on the right to vote for, and in most of those that do have restrictions, they are more narrowly-tailored than in the United States.[33]

Currently, only two states, Maine[34] and Vermont,[35] allow everyone to vote, even those convicted of a felony, meaning that prisoners may vote. In both states prisoners vote via absentee ballot in the jurisdiction of their last residence, thus ensuring that the prisoners' votes do not disproportionately affect the electoral district where the prison is located. Prisoners serving time in Maine and Vermont but who live in other states may not vote unless they would be allowed to do so by where they formerly resided.[36]

The other forty-eight states and Washington, D.C. vary widely in their restrictions. The Department of Justice itself has referred to this variation as a "something of a crazy-quilt of disqualifications and restoration procedures."[37] In sixteen states and D.C., felons are disenfranchised while in prison but have their voting rights immediately restored after completing their sentence. In three states, California, Connecticut, and New York, felons are disenfranchised until completion of their prison sentence and parole. In 2018, Governor Andrew Cuomo of New York granted clemency to 35,000 New York parolees and restored their voting rights and said he would continue to do so every month. However, as this practice is left to the discretion of the governor, parolees in New York are still legally disenfranchised, with their right to vote left to the mercy of those in power.

In eighteen states, felons are disenfranchised until they complete prison, parole, and

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[31] *Incarceration Rates by Country 2019*, WORLD POPULATION REVIEW, http://worldpopulationreview.com/countries/incarceration-rates-by-country/

[32] Laleh Ispahani, *Out of Step With the World,* THE AMERICAN CIVIL LIBERTIES UNION 3-4 (May 2006) https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf

[33] *Id.*

[34] ME. CONST. § 1, art. II.

[35] VT. CONST. § II, art. 42.

[36] Jane C. Timm, "Most states disenfranchise felons. Maine and Vermont allow inmates to vote from prison." NBC NEWS (Feb 26, 2018), https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406.

[37] ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 5 (2006).

probation. Finally, eleven states disenfranchise felons in prison, during probation and parole, and have additional conditions for the restoration of the right to vote. While states are grouped in this way to help understand the general categories of restrictions, policies vary even within these groups and largely depend on how states define a "felony." For example, in 2017 Alabama codified a list of offenses that result in permanent disenfranchisement.[38] Prior to this, Alabama law disenfranchised felons convicted of a "felony involving moral turpitude."[39] Thus, the new law at once reinstated the right to vote for some, and permanently took the right away from others. In 2018, Louisiana restored the right to vote for residents on probation or parole if they had not been in prison for five years, but excluded those convicted for election-related felonies.[40] In Maryland, writing a bad check or having fireworks without a license are considered felonies.[41] Because of this patchwork, the question of who gets to vote is left up to the relatively unscrutinized process of state legislatures categorizing crimes.

Felons currently serving their time account for only 23% of those who disenfranchised. The other 77% are out of prison and living in their communities, with half having completely finished their sentences.[42] This means that restrictions on the right to vote do not just affect people in prison, but rather people who have successfully reintegrated into society in every other way.

State-by-state, the percentage of felon disenfranchisement varies wildly as well. In Massachusetts, less than 0.5% of the population is disenfranchised due to a felony conviction.[43] On the other hand, Florida alone accounts for 27% of the total national disenfranchised population, taking away the right to vote from 10% of its population, or 1.7 million people.[44] Felon disenfranchisement also disproportionately affects people of color; in Florida one in five voting-age African Americans are disenfranchised.[45] Nation-wide, one

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[38] ALA CODE § 17-3-30.1 (LexisNexis 2017)

[39] 2017 Al. HB 282.

[40] La Stat. Ann. §§ 18:101 — 18:118).

[41] MD. SENTENCING GUIDELINES OFFENSE TABLE 7, 19 (Updated 11/4/19) http://www.msccsp.org/Files/Guidelines/offensetable.pdf

[42] Uggen, *6 Million Lost Voters* THE SENTENCING PROJECT 6 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

[43] Christopher Uggen, 6 MILLION LOST VOTERS **7** (2016).

[44] Sarah A. Lewis, "The Disenfranchisement of Ex-Felons in Florida: A Brief History" UF LAW REPOSITORY 10 **(**2018) https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1846&context=facultypub

[45] *Id.* at 10

in thirteen voting-age African Americans is disenfranchised, which is four times greater than the rate for non-African Americans. Legal challenges to felon disenfranchisement laws have largely been unsuccessful. In the most notable case, *Richardson v. Ramirez*, the Supreme Court rejected the plaintiff's claim that felon disenfranchisement violated the Fourteenth Amendment.[46] Since then, the Supreme Court has not taken up another challenge to felon disenfranchisement.

III. The 14th Amendment and Voting Rights

A. The Role of the Court

The Supreme Court of the United States has the power to strike down acts by the states that violate the Constitution. Article Six of the U.S. Constitution establishes that the Constitution is supreme over state laws,[47] and long-established jurisprudence affirms that the Supreme Court has the power to declare actions and statutes unconstitutional.[48] Thus, if felon disenfranchisement is unconstitutional, it is proper for the Supreme Court to decide this issue so that felon disenfranchisement may be struck down nation-wide.

B. Richardson v. Ramirez

In past judicial efforts, plaintiffs have tried to gain felon voting rights by claiming that disenfranchisement statutes violated the Equal Protection clause of the Fourteenth amendment.[49] In the only case where the Supreme Court addressed the question of felon disenfranchisement, *Richardson v. Ramirez*, [50] the Court found that the Fourteenth Amendment did not protect felons from being disenfranchised. In *Richardson*, three petitioners, all of whom had past criminal convictions, sued for a writ of mandamus to force an election official to allow them to register to vote, claiming that preventing their registration was a violation of the Equal Protection Clause of the Fourteenth Amendment. The California Supreme Court held that California's provision did indeed violate the Fourteenth Amendment.[51]

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[46] *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).
[47] U.S. CONST. art VI., § 2.
[48] *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).
[49] U.S. CONST. amend. XIV, § 1.
[50] *Richardson v. Ramirez*, 418 U.S. 24 (1974).
[51] *Ramirez v. Brown*, 9 Cal. 3d 199, 205 (1973) overturned by *Richardson v. Ramirez*, 418 U.S. 24 (1974)

On appeal, however, the Supreme Court of the United States reversed and remanded, holding that the State had not violated the Fourteenth Amendment by disenfranchising felons. The Court's reasoning in this case relied on section 2 of the Amendment, where the disenfranchisement based off conviction of a prior felony is expressly sanctioned:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[52] (emphasis added)

Further, the Court went on to present historical research proving that the framers of the Fourteenth Amendment did indeed intend to permit the disenfranchisement of felons.[53] The Court also acknowledged that it had permitted the disenfranchisement of felons many times throughout the course of history.[54] The final point of the holding was that felon disenfranchisement could not be unconstitutional, because due to the express sanction of disenfranchisement in section 2, the framers of the Fourteenth Amendment could not have intended to contradict themselves by also guaranteeing the right to vote in section 1.[55]

C. Minor v. Happersett

Prior to *Richardson*, The Supreme Court had already ruled on the power of the Fourteenth Amendment to extend voting rights to disenfranchised groups. In *Minor v. Happersett*,[56] Minor, a woman, was denied the ability to register to vote, due to Missouri's Constitutional provision that only men were allowed to vote.[57] Minor argued that this was a

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[52] U.S. CONST. amend. XIV, § 2 cited in *Richardson*, 418 U.S. at 42.
[53] *Richardson*, 418 U.S. at 44-54.
[54] *Id.* at 53
[55] *Id.* at 55
[56] *Minor v. Happersett*, 88 U.S. 162 (1875), *superseded by constitutional amendment,* U.S. CONST. amend XIX.
[57] MO CONST. art. 2 § 18 , cited in *Minor v. Happersett* 88 U.S. 162, 165 (1975).

violation of the Privileges and Immunities Clause of the Fourteenth Amendment.[58] The Supreme Court held that while there was no doubt that Minor was indeed a citizen,[59] and that there was "abundant proof" that women had "always been considered as citizens the same as men."[60] In keeping with this, the justiciable question at hand was "whether all citizens are necessarily voters."[61] The conclusion was eventually reached that suffrage was not included among the "privileges and immunities" implicitly granted in the Fourteenth Amendment.[62] The Fifteenth Amendment was also used as justification in the Court's reasoning, because if suffrage really was protected by the Fourteenth Amendment, then it would not make sense to create another amendment to protect the same thing.[63]

In *Minor*, the Court used strong language to assert that the Constitution does not confer voting rights upon citizens:

> Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.[64]

This stance of the Court poses several important questions for the purposes of this article. First, the Supreme Court explicitly said that voting rights are outside the scope of the Constitution. This stands in stark contradiction, however, to the Court's position in *Wesberry v. Sanders*, where the Court noted that "all other rights are illusory if the right to vote is undermined."[65] An interpretation of both the Equal Protection and the Privileges and Immunities Clause under this quote strongly suggests that the right to vote rightly comes *prior:* the aforementioned "all other rights" protected by the Fourteenth Amendment are rendered illusory when the right to vote is not protected. In other words, there can be no discussion of rights and the equal protection of them if the right to vote, which is how citizens secure and protect those rights, is not protected first.

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[58] U.S. CONST. amend. XIV § 2 cl. 1
[59] *Minor v. Happersett*, 88 U.S. at 165
[60] 88 U.S. at 169
[61] *Id.* at 170
[62] *Id.* at 171
[63] *Id.* at 175
[64] *Id.* at 177-8
[65] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)

D. The Fourteenth Amendment and Racial Challenges to Felon Disenfranchisement

While the Court made it clear that the Equal Protection Clause and the Privileges and Immunities Clause could not be used to extend suffrage based on their intentions, litigants have also tried to challenge felon disenfranchisement statutes under the Fourteenth Amendment based on the racial aspect to these laws.

The Supreme Court has held that legislation can be struck down as unconstitutional based off the inevitable effect of the statute, not necessarily the statute itself.[66] In *Gomillion v. Lightfoot*,[67] the Court struck down the city of Tuskegee's redistricting efforts based on the outcome that it would disenfranchise black voters. Here, the Court evaluated the outcome of the action, and not the action itself.[68] In other words, the Court asserted its right to protect citizens not just from the unconstitutional actions of the government, but also the unconstitutional results of otherwise legal actions.

17 years later, the Court refined its discriminatory intent evaluation in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[69] This new test added to *Gomillion* that the purpose of the law must also be included. In order to be deemed unconstitutional, the law must be proven to have had an improper intent to discriminate and that this intent is what caused the disparate impact.[70] This approach was used in *Hunter v. Underwood*[71] where the question of felon disenfranchisement was directly addressed, and the court held that Alabama's disenfranchisement provision[72] did indeed violate the Equal Protection Clause, because it was clearly proven that the provision was enacted with a racially discriminatory intent.[73]

To legally prove that felon disenfranchisement laws violate the Fourteenth Amendment for racial reasons, successful cases must show the discriminatory intent to be true. This is difficult, however, because lawmakers rarely state their true intent for passing laws, especially if this intent is discriminatory. Further, in a case with mixed motives,

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[66] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *Gomillion v. Lightfoot,* 364 U.S. 339 (1960)
[67] *Gomillion v. Lightfoot,* 364 U.S. 339 (1960).
[68] *Id. at* 347.
[69] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).
[70] *Id.* at 265-66.
[71] *Hunter v. Underwood*, 417 U.S. 222, 225 (1985).
[72] AL. CONST. art. VIII, § 182.
[73] *Hunter,* 417 U.S. 222 at 225.

plaintiffs must prove "by a preponderance of the evidence that racial discrimination was a substantial or motivating factor."[74]

Other challenges to felon disenfranchisement laws have failed precisely due to this difficulty. In *Johnson v. Governor of Fla.,* the plaintiffs claimed that Florida's disenfranchisement statute violated the Equal Protection Clause. The Eleventh Circuit Court of Appeals decided that Florida's Constitutional provision to disenfranchise felons did not violate the Equal Protection Clause because the plaintiffs failed to demonstrate specifically how the provision was motivated by racial animus.[75] Further, the Court held that there was not intent to discriminate based on race because Florida amended its Constitution in 1968 through an open and public process, which was enough to remove any discriminatory taint that may have been left from the original Constitution.[76]

Prior to the Nineteenth Amendment, the Fourteenth Amendment was unsuccessfully used to extend voting rights to women. As the court said, the intention of the Amendment was to equally protect preexisting privileges and immunities, not to create more.[77] Further, the Fourteenth Amendment was employed in an attempt to secure the same rights for felons, and the Supreme Court again refused to extend suffrage.[78] Development of judicial thought around the Fourteenth Amendment and voting rights has created a strict test requiring proof of racial intent and result to justify a violation,[79] and this standard does not fully protect felons' right to vote. As a result, the Fourteenth Amendment is not the proper Constitutional Amendment to protect this right, and the Supreme Court must evaluate the question along other Constitutional lines.

IV. The First Amendment: Voting as Constitutionally Protected Political Speech

[74] *Id.*
[75] *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1224 (2005).
[76] *Id.*
[77] *Minor v. Happersett*, 88 U.S. 162, 171 (1875), *superseded by constitutional amendment,* **U.S. Const.** amend XIX.
[78] *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).
[79] *Hunter,* 417 U.S. at 225., *Johnson*, 405 F.3d at 1224.

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

-U.S. Const. amend. I § 1

A. Actions as Political Speech: United States v. O'Brien

To investigate whether voting constitutes political speech, and subsequently deserves the same level of protection, it is prudent to examine how the Supreme Court treats other types of political speech. In a landmark case, *United States v. O'Brien*,[80] the Court ruled that actions, as well as speech, are protected, and that actions that are political receive the highest level of protection from government restriction.[81]

After publicly burning his Selective Service registration certificate in front of a Boston Courthouse, O'Brien was convicted under Title 50, App., United States Code, Section 462 (b), which was amended in 1965 to make the knowingly destroying his certificate illegal.[82] O'Brien argued that the amendment was unconstitutional for abridging his First Amendment right to free speech.[83] The First Circuit Court of Appeals struck down the statute as unconstitutional, and the Supreme Court took up the case after the government petitioned.

In O'Brien, the Court found that the specific statute in question was constitutional and reversed the 1st Circuit's decision. In the decision, the Court spelled out a few important conditions that must be met in order for the government to infringe on First Amendment freedoms.[84] Notably, government regulation is "sufficiently justified" if "… it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[85]

The Supreme Court then proceeded to apply these standards to O'Brien's case, and continued to apply them to subsequent cases, resulting in the conditions being colloquially

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[80] *United States v. O'Brien*, 391 U.S. 367 (1968).
[81] *Id.* at 377.
[82] Title 50, App., UNITED STATES CODE, Sec 462 (b), amend. 1965 79 Stat. 586.
[83] 391 U.S. at 370.
[84] *Id.* at 376.
[85] *Id.* at 377.

referred to as "The O'Brien Test." In order to support that claim that voting constitutes political speech, an examination of how the O'Brien test has been applied to other types of speech cases is imperative.

B. O'Brien Applied: Buckley v. Valeo

In *Buckley v. Valeo*,[86] a statute placing limits on campaign contribution was found to violate the First Amendment on the grounds that campaign contributions constituted political speech.[87] The court cited Roth v. United States, in saying that the First Amendment affords protection to political speech "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[88] The Court goes on to explain that the First Amendment not only protects "the exposition of ideas," but also a wide scope of ideas relating to the debate and decisions concerning campaigns and political candidates.[89]

The Court then references and applies the O'Brien test, making clear that in order to regulate the "nonspeech element" of O'Brien's actions, the regulation had to be unrelated to the suppression of free expression and that the regulation advanced a sufficiently important governmental interest that only restricted as much as to further that governmental interest.[90]

Buckley is significant for its application of the First Amendment to a t different than what a person might normally consider "free speech." The Court's holding in *Buckley* suggests First Amendment protections extend to much more than just verbal speech. It is, as a consequence, prudent to question why the Court has not treated voting as a related First Amendment protection. Buckley explained that the First Amendment concerns the "wide scope of ideas relating to the debate and decisions concerning campaigns and political candidates,"[91] of which voting is unquestionably an integral part.

C. Voting as Political Speech

[86] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[87] *Id.* at 19.
[88] *Roth v. United States*, 354 U.S. 476, 484 (1957) cited in *Buckley*, 424 U.S. at 14.
[89] *Buckley*, 424 U.S. 1, 14-5
[90] *Id.* at 16.
[91] *Id.* at 14-5.

The Supreme Court has not historically considered voting to be political speech and, consequently, has not ever held that voting is entitled to receive the same protections. However, this is a faulty application of the First Amendment and a logical misstep. What is the point of placing such strict protections on political speech if the right to vote is not protected in the same way? Without the right to vote in elections, there is no need to even make campaign contributions in the first place. The right to vote must come prior to any political discussion. The application of the strict scrutiny standard as put forth in O'Brien demands the application of the same standard to voting rights because voting is a necessity to elections, and therefore political speech.

If voting rights are given the same level of scrutiny as other political actions, an application of this standard would clearly result in felon disenfranchisement being found unconstitutional. The O'Brien test first requires that the restriction further a substantial government interest.[92] Justice Marshall, in his dissent in Richardson v. Ramirez, pointed out that the government's stated intention in felon disenfranchisement, to prevent electoral fraud, has no logical basis.[93] The government has simply not met the standard needed to justify disenfranchisement.[94]

While it might be argued that felons rightly lose other rights, especially when incarcerated, constitutional rights do not stop short of the prison gates. As affirmed in *Cutter v. Wilkinson*,[95] 42 U.S.C. § 2000cc-1(a)(1)-(2) states that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means."[96] While religion and voting are indeed different things, both fall under the purview of the First Amendment, and the reasoning used in Cutter that prison officials must have a good reason to restrict a constitutional right can and should be extended to voting as well.

As the Supreme Court has stated, the character of the First Amendment is one that "has its fullest and most urgent application precisely to the conduct of campaigning for

[92] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).
[93] *Richardson v. Ramirez,* 418 U.S. 24, 74 (1974).
[94] *Id.* at 79.
[95] *Cutter v. Wilkinson*, 544 U.S. 709 (2005).
[96] *Id. at* 712.

political office."[97] This standard is curiously applied to campaign contributions[98] and political statements of various types[99] yet the right to vote has not received the "fullest" and "most urgent" application of the First Amendment. As will be shown in section V, when applied, it is clear that the government does not have a compelling interest in restricting felons from voting, and therefore those restrictions are unconstitutional.

V. The Eighth Amendment and Felon Disenfranchisement as Cruel and Unusual Punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

-U.S. Const. amend. VIII

A. Disenfranchisement as Punishment

United States courts have debated what precisely the definition of a punishment is, and this debate represents a crucial aspect of evaluating felon disenfranchisement on Eighth Amendment grounds. The Supreme Court has said that felon disenfranchisement is in fact not a punishment, and rather "a nonpenal exercise of the power to regulate the franchise."[100] The Court explained that because there is another stated purpose of disenfranchisement, to "designate a reasonable ground of eligibility for voting,"[101] it is not a penal statute. This reasoning, however, rests on the faulty assumption that felon disenfranchisement statutes accomplish a "legitimate government purpose."[102]

An evaluation of the actual results of felon disenfranchisement statutes proves that they do not accomplish the government's stated intention and therefore do not serve a legitimate purpose. Justice Marshall, in his dissent in *Richardson v. Ramirez,* outlines several reasons given for felon disenfranchisement, and elucidates the faults in each of them. One stated intention is to avoid election fraud. Marshall points out how disenfranchising people based off of a felony conviction both restricts those whose crimes were not related to

[97] *Monitor Patriot co v. Roy* 401 U.S. 265, 272 (1971).
[98] *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).
[99] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).
[100] *Trop v. Dulles,* 356 U.S. 86, 96-7 (1958).
[101] *Id.* at 96-7.
[102] *Id.* at 96.

election fraud at all, and does not restrict those whose crimes were related to election fraud, meaning the statutes fail in this stated intention.[103] In other words, the classification of "felony" is too broad and too variable across states to accurately disenfranchise those who are at greatest risk for committing election fraud. Secondly, there is not a clear link between the simple right to vote and the occurrence of election fraud.[104]

Further, Marshall cites the common argument of disenfranchisement as a means to protect the integrity of the electoral process, because it is believed that felons would vote in a way that is immoral or counter to the status quo.[105] A state "disenfranchising a class of voters to 'withdraw all political influence from those who are practically hostile' to the democratic order strikes at the very heart of the democratic process."[106] It is not a sufficient justification to disenfranchise a large group of people because they might vote in a way contrary to what politicians want.

As Justice Marshall has shown, there is not a consensus that felon disenfranchisement statutes accomplish a "legitimate government purpose," and therefore, according to the definition of penal and nonpenal statutes as stated in *Trop v. Dulles*,[107] felon disenfranchisement statues are penal in nature. Therefore, an Eighth Amendment claim must now look at whether they are "cruel and unusual."

B. Disenfranchisement as Cruel and Unusual

While at first glance the term "cruel and unusual" seems hyperbolic to apply to voting rights, the phrase has attained a broader meaning within the Supreme Court's jurisprudence. Because of the relatively vague language, and the changing nature of society, the Eighth Amendment "takes its meaning from the evolving standards of decency that mark the progress of a maturing society."[108] It is, therefore, prudent to continually reexamine the types and degrees of criminal punishment in relation to the Eighth Amendment, because a punishment that may have been seen acceptable 200 hundred years ago may not be now. It

[103] *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974).
[104] *Id.* at 80.
[105] *Id.* at 81-3.
[106] *Id.*
[107] *Trop v. Dulles,* 356 U.S. 86, 96-7 (1958)
[108] *Id.* at 100-1.

is in this light that the oft-said argument that felon disenfranchisement is a long-established practice fails to properly justify it.

The most analogous Supreme Court case to question of felon disenfranchisement and the Eighth Amendment is *Trop v. Dulles*, in which a wartime deserter was expatriated as a punishment. The Court found this an Eighth Amendment violation:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.[109]

The Court elaborated upon the importance of citizenship, saying that "Citizenship is not a license that expires upon misbehavior,"[110] and "Citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."[111]

The strong language explaining the importance of citizenship, in light of a discussion of felon voting, brings up a question: what is the difference between citizenship and voting? In *Minor*, the Court explicitly denied that that citizenship was closely tied to voting rights.[112] However, the Court in *Trop* explains how expatriation destroys political existence.[113] Perhaps it is time for the court to revisit this reasoning. What is citizenship if not the ability to vote? Is there political existence without the ability to vote and physically express that existence? Voting is the vehicle through which citizenship is exercised, and therefore it to take it away is cruel and unusual just as expatriation is.

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[109] *Id.* at 101-2.
[110] *Id.* at 92.
[111] *Id.* at 92-93.
[112] *Minor v. Happersett*, 88 U.S. 162, 170 (1875), *superseded by constitutional amendment,* U.S. Const. amend XIX.
[113] *Trop,* 356 U.S. at 101.

Conclusion

While the Supreme Court often expounds upon the importance of voting with eloquent phrases such as declaring it to be the "bedrock of our political system,"[114] it has stopped short of giving voting rights the full legal and constitutional protection they deserve by extending suffrage to those who have been convicted of a felony.

Critics of this approach may say that felon disenfranchisement is an issue that should be addressed through legislation, not jurisprudence. The Supreme Court has indicated similarly: in *Minor*, the Court explained that "our province is to decide what the law is, not to declare what it should be."[115] In *Richardson* the Court held that:

> Pressed upon us by the respondents, and by amici curiae, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments *if addressed to the legislative forum which may properly weigh and balance them.*[116] (emphasis added)

Considering that both these cases sought voting rights protection in the Fourteenth Amendment, the court is correct in holding that that the legal protection sought by the petitioners is absent. However, as this article has shown, there are plentiful constitutional protections to be found in the First and Eighth Amendments.

An examination of the Fourteenth Amendment and the strict standards required to prove an Equal Protection claim demonstrate how cases like *Richardson v. Ramirez* and *Johnson v. Governor of Florida* have failed to extend the right. An analysis of the First Amendment, however, shows that the treatment of voting as political speech provides the fullest legal protection, requiring the government to meet a strict standard of proof to restrict the exercise of the vote. The Eighth Amendment can be used to strike down felon disenfranchisement statutes on the grounds that they constitute cruel and unusual punishment similar to expatriation.

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[114] *Reynolds v. Sims*. 377 U.S. 533, 562 (1964).
[115] *Minor*, 88 U.S. at 177-8.
[116] *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

On these grounds, felon disenfranchisement statutes in every state besides Maine and Vermont are unconstitutional and should be deemed as such by the Federal Courts. It is far passed time for the Supreme Court to fully hold to its statements to treat voting as the most precious of rights to exist, and to fully restore this fundamental right to the 6.1 million Americans who rightly deserve it.

Prostitution, Privacy and the Constitution: The Moral Longarm of the Law

Karina Ochoa Berkley

Introduction

The popular imagination often reflects a belief in moral distinctions between different types of sexual conduct.[1] This is a direct result of our moral customs being shaped by religious beliefs and traditions—specifically those associated with Christian doctrine's views on "sex, sin, and shame."[2] Among these distinctions is the common view that prostitution is a fundamentally immoral and deviant sexual activity, distinct from "normal" or "regular" sex. This article argues that there are insufficient distinguishable characteristics between what is popularly considered "regular" sex and "prostitution" to justify a legal distinction that would criminalize prostitution.

This article first provides an analytical discussion of what constitutes sexual activity and prostitution. This analysis provides a foundation for the argument that there is no inherent distinction between "regular" sexual activity and prostitution and that since there is no inherent distinction between prostitution and constitutionally protected sexual activity, a major implication of this lack of a clear distinction is that the criminalization of prostitution represents an infringement on various civil liberties associated with the choice of engaging in sexual activity. The article then introduces various court rulings related to the constitutional protection of privacy, sexual activity, intimacy, and prostitution in order to establish case precedent surrounding the argument that the definition of prostitution is overly broad. It then introduces the Supreme Court's decision in *Erotic Service Providers Legal Education and Research v. George Gascon (*ESPLERP) where the Court, this article argues,

[1] GEOFFREY R. STONE, SEX AND THE CONSTITUTION XXVII (2017).
[2] *Id.*

incorrectly ruled that prostitution is not a fundamental right protected by the constitution. Finally, Part III analyzes the shortcomings of the ESPLERP decision and aims to provide alternative suggestions for how the Court should have ruled.

I. Prostitution as "Regular" Sexual Activity

To begin with, the very meaning of prostitution is problematic, and has been a source of controversy and debate in both philosophy and in law; this ongoing debate has resulted in a lack of consensus about how prostitution should be defined.[3] For example, across different states there are different legal classifications of what constitutes prostitution.[4]

Despite diverse legal definitions of prostitution, for purposes of analysis this article will evaluate prostitution as the "the act or practice of engaging in sexual activity for money or its equivalent."[5] From this definition of prostitution, we can gather that the two main components are 1) sexual activity and 2) its connection to money, or its equivalent. Thus, in order to make an accurate assessment of what constitutes prostitution, we must define what constitutes sexual activity and what constitutes money or something of equal value.

Few, if any, criteria exist for defining what sexual activity is. There are many proposed potential criteria for what could define a sexual activity whether it be in law or academic discourse around the philosophy of sex; however, none of them has been free of contradictions or logical inconsistencies.[6] First, a proposed criteria has included reproduction: "for an activity to be sexual it has to be or aim at being reproductive."[7] This suggestion fails to include commonly recognized categories like homosexual sex, oral and anal sex.[8] Another criterion is the concept that "sexual activities are those that involve contact with sexual body parts (though we need to figure out what these are)."[9] This idea also falters as it fails to encapsulate situations where contact with a sexual body part is necessary for a non-sexual purpose (i.e. a medical examination) or situations in which sexual

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[3] *What Is Prostitution?*, PROCON.ORG, Should prostitution be legal?, https://prostitution.procon.org/view.answers.php?questionID=000116 (last updated May 12, 2008, 12:12 PM).

[4] *Id.*

[5] *Prostitution*, BLACK'S LAW DICTIONARY, 1342 (9th ed. 2009).

[6] Raja Halwani, *Sex and Sexuality*, STAN. ENCYCLOPEDIA PHILOSOPHY (July 5, 2018), https://plato.stanford.edu/entries/sex-sexuality/.

[7] *Id.*

[8] *Id.*

[9] *Id.*

pleasure is achieved without direct contact with sexual body parts (i.e phone-sex).[10] The third criterion is that activities are sexual if they "give rise to sexual pleasure."[11] This logic would suggest that if the activity was not pleasurable it would not qualify as a sexual activity even if the purpose of the activity is inherently sexual (i.e non-pleasurable sex).[12] Another proposed criterion is the intention behind the sexual activity, such as "the intention to produce sexual pleasure in oneself or in another".[13] However, this does not account for those who engage in sexual activity only to procreate.[14]

Evidently, defining sexual activity in one, uniform, correct, or logical way is difficult. This is a result of the fact that 1) a "sexual act" can be a combination of several criteria including behavior or intentions[15] and 2) there are several concepts about sexual activity that are intimately related and like each other that nonetheless commonly mean different things.[16] For instance, a sexual act could be defined as an activity with the intent of procreating AND producing sexual pleasure for oneself. It could also be defined as an activity with the intent of procreating OR producing sexual pleasure for oneself. However, in both instances we once again run into the issue of this definition not taking into consideration obvious examples of activity that the popular imagination deems to be inherently sexual. With the former, oral sex would not be deemed a sexual activity because it doesn't carry the intent of procreating and with the latter, a prostitute performing oral sex on a client with the aim of receiving monetary compensation would not be considered a sexual act since the prostitute is not fulfilling a sexual desire of theirs.[17]

Defining the commercial component of prostitution is also complicated because money inherently plays a role in conventional sexual relationships.[18] Since, it is generally considered that a monetary transaction is the key factor that turns otherwise "normal" sex into criminal prostitution, one would have to determine at what point the role of money is significant enough to constitute criminal prostitution. For instance, if the standard is any sexual solicitation that involves money, then one would have to prosecute those who expect

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *What Is Prostitution?*, *supra* note 3.

sexual favors after paying for their date's meal or prosecute those who engage in sexual relationships for the sole interest of their partner's wealth since the sexual activity described is intrinsically tied to the expectation of a monetary contribution in return.

In the context of the date, the person expecting a sexual favor in return for dinner would be engaging in prostitution because they are seeking a sexual favor in exchange for something of monetary value. Also, in the context of someone seeking a sexual relationship with a wealthy person with the expectation of receiving financial support, this would be engaging in prostitution for the same reason—engaging in sex with the expectation of receiving money in return. It thus becomes clear that allowing the state to criminalize any sexual solicitation that is tied to an expectation for monetary compensation would be an infringement upon liberties associated with the right to engage in a consensual "sexual activity" with whomever you please.

To further elaborate, the popularization of dating media platforms designed for older wealthy persons seeking sexual relationships with younger, attractive persons interested in financial compensation represents a hypocritical and logically inconsistent popular distinction between constitutionally protected sexual activity and prostitution. The popular dating site, sugardaddymeet.com, for instance, encourages young attractive women "who want to upgrade their lifestyle" to engage in relationships with wealthy men who can "cover [their] bills".[19] It is clear that the primary motivation for the women on this site is meeting wealthy men who can provide them with money, or its equivalent, and the primary motivation for men on this site is meeting young, attractive women who can provide them with sexual favors. Under the broad definition of prostitution, "the act or practice of engaging in sexual activity for money or its equivalent", this exchange would constitute prostitution. The law, however, does not recognize this exchange as criminal prostitution—despite the fundamental similarity.

It is impossible to separate and isolate the way money influences sexual activity--whether that role is explicit or implicit. Therefore, defining prostitution as the practice of engaging in sexual activity in exchange for monetary compensation is an overly broad definition that logically gives the state the authority to regulate and criminalize any sexual activity that does not fall within the scope of what is considered to be an acceptable purpose-- an authority that would violate several constitutional clauses.

[19] SUGARDADDYMEET, https://www.sugardaddymeet.com/ (last visited December 20, 2020).

The fact that there is no logically coherent or clear legal line between "prostitution" and constitutionally protected sexual activity should create pause about the enforcement and regulation of laws that criminalize prostitution, as they represent an infringement on various civil liberties associated with the choice of engaging in sexual activity. Criminalizing prostitution not only represents a moral overreach of the law but it also represents the application of state power over behaviors that should rightfully be protected under the constitution. By not recognizing their constitutional protection, the state has created a category of sexual behaviors that is routinely stigmatized and treated punitively-- not on sound or constitutional grounds but because they do not fall within the scope of what is conventionally considered to be a morally acceptable purpose of sexual behaviors.

II. Prostitution, Sex, and Liberty

A. The Vagueness Doctrine

This article suggests that since there is no logically coherent or sufficiently specific way to define sexual activity nor determine when the monetary component of it becomes criminal, laws criminalizing prostitution inherently infringe upon fundamental liberties by being vague by nature The Supreme Court first introduced the unconstitutionality of overly vague laws in *Connally v. General Construction Co.*, where an Oklahoma statute[20] that provided, "[t]hat not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the state, . . ."[21] was overturned for not being sufficiently specific in what it was criminalizing. Justice Sutherland, for the majority, further established what is now known as the vagueness doctrine that asserts, "A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application lacks the first essential of due process of law."[22] In 1972, in *Grayned v Rockford* the Supreme Court established three reasons why vague or broad laws were unconstitutional:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act

[20] OKLA. STAT. tit. 1921 , § 7255., 7257).
[21] 269 U.S. 385, 388 (1925).
[22] *Id.* at 391.

> accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "about[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to" `steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[23]

This article argues that any statutes criminalizing prostitution are ones that the Supreme Court determined to offend several important values through their vague nature, thus being a violation of the vagueness doctrine-- and previous courts have agreed. To illustrate, in 2007 in Robert Theriault was charged with prostitution, under a New Hampshire statute[24], for approaching a couple and offering them money in exchange for their participation in a pornographic film. The defendant later appealed the trial court on the grounds that the prostitution statute was substantially overbroad and infringes upon constitutionally protected activity.[25] The Court rejected the defendant's motion to dismiss, concluding that the statute's overbreadth was not unconstitutional.[26] Theriault again appealed the decision to the Supreme Court of New Hampshire arguing that the statute was overbroad as it was specifically applied to his case.

On this appeal, the court reversed the previous ruling. The court cited *People v. Kovner*[27] in which the Court asserted that "a literal interpretation of the prostitution laws, and their vigorous enforcement may create potentially a chilling effect on the exercise of First Amendment freedoms" [28] but nonetheless held that "[w]hile First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against a prosecution for a crime committed during the origination of the act."[29] The majority in *State v. Theriault* asserted this distinction was illogical, had no basis in case law and further cited

[23] 408 U.S. 108, 109 (1972).
[24] N.H. REV. STAT. ANN. § 645:2(I)(f) (2007).
[25] State v. Theriault, 949 A.2d 678, 681 (2008).
[26] *Id.*
[27] 409 N.Y.S.2d 349 (N.Y. Sup. Ct. 1978).
[28] *Id.* at 352.
[29] *Id.*

People v Freeman, where the defendant was charged with pandering for hiring actors to engage in sexual activity on film[30].

In *Freeman,* the court asserted that the defendant did not engage in prostitution under the statute and further elaborated that "even if defendant's conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a non-obscene motion picture would impinge unconstitutionally upon First Amendment values."[31] Heavily relying on the majority opinion in *Freeman*, the court in *Theriault* acknowledged the New Hampshire statute was unconstitutionally overbroad. This article argues that the opinions in *Theriault* and *Freeman* are on point in their contentions that the vague nature of the respective prostitution statutes makes them unconstitutional. However, this article contends that the issue of vagueness and overbreadth is not merely one that can be remedied on a case by case basis as *Theriault* and *Freeman* contend, but it is rather an issue fundamental in the criminalization of prostitution.

B. Right to Privacy

Legislation that criminalizes prostitution is a manifestation of unreasonable state intervention in fundamental decisions involving privacy. The Supreme Court first recognized a "right to privacy" of citizens in the context of intimate relationships in *Griswold v. Connecticut*, a lawsuit challenging the constitutionality of a Connecticut law passed in 1879 that "makes it a crime for any person to use any drug or article to prevent conception."[32] In *Griswold,* the Court ruled that the right to prevent contraception "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[33] These "zones of privacy", the Court asserted, are a direct product of rights guaranteed by the First, Third and Ninth Amendments.[34] This sphere of privacy is what protects citizens from state intervention on decisions that dictate their intimate affairs, such as why one chooses to be intimate or who one chooses to be intimate with.

[30] 758 P.2d 1128, 1129 (Cal. 1988).
[31] *Id.* at 1131.
[32] 381 U.S. 479, 479 (1965).
[33] *Id.* at 485.
[34] *Id.* at 484.

The court in *Griswold* originally intended for that sphere of privacy to only apply to married couples, however this liberty was later recognized to apply to unmarried persons. In 1972, *Eisenstadt v Baird* further extended "the right to make certain decisions regarding sexual conduct" to unmarried persons because distinguishing between single and married individuals when deciding who is allowed access to contraceptives is in violation of the Fourteenth Amendment's Equal Protection Clause.[35] Justice William J. Brennan, Jr. for the majority further asserted, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[36] Furthermore, *Eisenstadt* maintained that the government's claim that the state had a compelling health interest behind the statute was overbroad.[37]

The majority opinion in *Eisenstadt* established two considerations relevant in analyzing prostitution as a sexual activity protected by the right to privacy: 1) that there is a fundamental right central to individual liberty to make decisions on one's participation in sexual activity and 2) government regulations, designed to infringe upon those decision making processes, that use health as an overarching excuse for state interest are not constitutionally valid. These two principles would support the notion that the ability to engage in prostitution is a constitutional right since it has been established there is a liberty interest in engaging in sexual activity for whatever purpose, perhaps monetary, and with whomever, like a prostitute.

Additionally, using health as an argument for a state interest in the criminalization of prostitution would be overly vague and broad as it would be an extensive overreach of regulation of sexual activity. In *Martin v Ziherl,* a plaintiff and a defendant were engaged in a sexually active unmarried relationship and upon the termination of the relationship the plaintiff sought compensatory damages for being infected with a sexually transmitted disease by her partner who allegedly knew of his infection. However, the Virginia trial court held that damages couldn't be sought since she had acquired the STD while performing an illegal act under a Virginia statute that criminalized sex between unmarried individuals. [38] Furthermore, the trial court held that the ruling in *Lawrence v Texas* did not strike down the

[35] 405 U.S. 438, 454 (1972).
[36] *Id.* at 453.
[37] *Id.* at 450-52.
[38] Martin v. Ziherl 269 Va. 35 (Va. 2005), 607 S.E.2d 367.

Virginia statute since the statute had a "legitimate purpose" including the protection of public health.[39]

The plaintiff appealed this decision and on appeal, the Court reversed the trial court's holding. The appellate Court held that, "Because [the Virginia statute], like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest which is exercised in making these personal decisions, it violates the Due Process Clause of the Fourteenth Amendment"[40] and "regardless of the merit of the policies referred to by the trial court… policies [including the protection of public health] are insufficient to sustain the statute's constitutionality."[41] While *Martin* notes that the case does not involve prostitution, what can be taken from the case is the decision that even when a law has legitimate interests, its constitutionality can and should come into question if its legitimate purpose is not specifically fulfilled by the law.

C. Freedom of Association

Sexual activity while having significant protection under the right to privacy, also has significant protection under the freedom of association-- a protection that can also be applied to engaging in prostitution.

In 2003, in *Lawrence v Texas*, the Supreme Court held that a Texas statute that criminalized same-sex intimate sexual conduct violated the Due Process Clause.[42] The Court reasoned that the case turned on whether Lawrence and Garner were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. Justice Kennedy, for the majority, concluded, "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government... [and t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[43] Justice Kennedy thus established that the liberty to engage in intimate activity has more precedence than the interest the state would have in regulating what can and cannot happen between two consenting adults in private, otherwise known as the freedom of association. Since prostitution is an intimate exchange between two consenting adults, the decision in *Lawrence* would establish that the state should

[39] *Id.*
[40] *Id* at 370.
[41] *Id.* at 369.
[42] 539 U.S. 558, 575 (2003).
[43] *Id.* at 578.

have no say in whether those consenting adults have the liberty to engage in that conduct or not.

Furthermore, as a message to future courts Justice Kennedy warns, "this, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[44] In this opinion, Justice Kennedy explicitly extended the right to engage in intimate sexual conduct to all consenting adults, not just those who are in a formally recognized relationship—a fact that was not previously established and relatively at issue. Justice Kennedy further took issue with the fact that courts in the past have made attempts to limit the right to private intimate conduct to those in traditional relationships and have tried to specifically define what constitutes those relationships. By doing this, the Court in *Lawrence* affirms that neither ones' choice of consenting partner nor whether ones' intimate conduct is being carried out in the context of traditional relationship, is a ground for state encroachment on the right to be intimate. As such, these stances should also be applied in the context of prostitution—neither choice of partner nor the nature of relationship should be considered when evaluating whether the conduct of prostitution is a conduct protected by the constitution.

The *Lawrence* Court also critiqued the decision reached in *Bowers v. Hardwick*, in where a Georgia police officer caught the defendant participating in homosexual activity in the privacy of his bedroom-- an act that violated a Georgia statute criminalizing sexual activity between two people of the same sex.[45] The defendant appealed to the Supreme Court, claiming that the Georgia statute violated his constitutional rights. The Court disagreed and upheld the statute. The majority opinion in *Lawrence,* however, overruled the decision reached in *Bowers* for the reason that, "their penalties and purposes... have more far-reaching consequences [than criminalizing a certain sexual conduct], touching upon the most private human conduct, sexual behavior."[46] The majority opinion further cited the dissenting opinion, asserting that its analysis was correct, and the opinion that should have controlled *Bowers.*[47] Justice Stevens in his dissenting opinion affirmed:

> The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law

[44] *Id.* at 567.
[45] *Id.* at 561.
[46] *Id.* at 567.
[47] *Id.* at 563.

> prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.[48]

The issue described in *Bowers*, and subsequently in *Lawrence*, faces prostitution today. As the previous section contended, the distinctions made between prostitution and other kinds of sexual activity trace back to outdated traditions with foundations in religious doctrine. Like the sexual activity described in *Lawrence* and *Bowers*, prostitution too should be free of the historical associations of immorality with which it is chained.

III. The Constitutionality of Prostitution Challenged

Looking specifically at decision reached in *Erotic Service Providers Legal Education and Research v. George Gascon,* regarding the constitutionality of a California statute that criminalizes prostitution*,* this section argues that the Court erred in its evaluation of prostitution as a fundamental liberty and thus applied the wrong degree of scrutiny in the evaluation of the statute. The Erotic Service Provider Legal Education and Research Project (ESPLERP) filed a lawsuit against the city of San Francisco challenging Section 647(b) of the California Penal Code, that criminalizes the "commercial exchange of sexual activity."[49] ESPLERP argued that the statute was unconstitutional both on its face and as applied on the grounds that it created a fundamental liberty issue.[50]

The Ninth Circuit Court in *Erotic Service Providers Legal Education and Research* held that criminalization of prostitution 1) does not violate the due process clause[51], 2) does not violate the Fourteenth Amendment freedom of intimate or expressive association[52], 3) does not violate their substantive due process right to earn a living because there is no constitutional right to engage in illegal employment, namely, prostitution[53] and 4) does not violate the First Amendment freedom of speech because prostitution does not constitute protected commercial speech and therefore does not warrant such protection.[54]

A. Rational Basis Review

The above conclusions were reached incorrectly, however, since the Court erred in applying the correct degree of scrutiny in the evaluation of the statute. In deciding whether

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[48] *Id.* at 577.

[49] Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 880 F.3d 450, 454 (9th Cir. 2018).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

the California statute constituted a violation of due process, freedom of association, and freedom of speech, the Court was first required to determine what degree of scrutiny was to be utilized in the evaluation of Section 647(b).[55] If the statute regulated a fundamental liberty interest, that statute would require a stricter level of scrutiny upon review, meaning the statute would have to serve a compelling state interest in order to validly infringe upon that fundamental right.[56]

When deciding whether Section 647(b) violated the fundamental right to due process, the Ninth Circuit considered the precedent set by *Lawrence.* Upon evaluation the court asserted, "the Due Process Clause protects the fundamental right to liberty in certain, though never fully defined intimate conduct"[57] As concluded in *Lawrence, "*Liberty also presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct" and as previously established in *Griswold,* this right also extends to a right to privacy. *Gascon* argues that *Lawrence* explicitly states that those conditions don't extend to prostitution. The court further contended that Lawrence has never and should never be interpreted as creating the right to engage in prostitution, citing *Doe v. Jindal*[58], *Lowe v Swanson*[59], *United States v Thompson*[60], *United States v Palfrey*[61], *State v Romano*[62], and *State v Thomas*[63] that arrived at similar conclusions regarding Justice Kennedy's assertion that "[The present case] does not involve public conduct or prostitution."[64]

This conclusion, however, is misinterpreted. Justice Kennedy was not referring to situations that the definition of liberty could not be extended to but rather situations that don't embody traditional intimacy. The hasty dismissal of the view that *Lawrence could protect* prostitution as a fundamental right appears to be reasonable when one looks at that one phrase, but when one considers the entirety of the opinion it becomes clear that the previous courts erred. Looking to the language in *Lawrence*, the judgment clearly establishes that the right to be intimate without unreasonable intervention on part of the state is one that is fundamental. However, the majority in *ESPLERP* relied on *IDK Inc. v. Clark County,* that

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[55] *Id.*
[56] *Id.*
[57] *Id.* at 459.
[58] 851 F. Supp. 2d 995, 1000 n.11 (E.D. La. 2012).
[59] 639 F. Supp. 2d 857, 871 (N.D. Ohio 2009).
[60] 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006).
[61] 499 F. Supp. 2d 34, 41 (D.D.C. 2007).
[62] 155 P.3d 1102, 1110 (Haw. 2007).
[63] 891 So. 2d 1233, 1236 (La. 2005).
[64] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

asserted that the relationship between a paid escort and the other person involved in the sexual exchange for monetary compensation is not a relationship protected by the due process clause. The Court in *ESPLERP* further argues that since the Supreme Court has not fully elaborated on the opinion since the *Lawrence* ruling, *IDK* could not be invalidated.[65]

Because *Lawrence* established "a fundamental right among consenting adults to engage in sexual activity in private,"[66] the court in *ESPLERP* should have concluded that *IDK* was no longer good law. Instead, when considering whether a due process right to engage in prostitution exists, the Court further relied on *IDK*. Using *IDK,* arguing the language in *Lawrence* wasn't "sufficiently clear" to suggest prostitution was a liberty protected by due process, the majority concluded that "laws invalidating prostitution may be justified by rational basis review, rather than a more searching review called for when a right protected by *Lawrence* is infringed."[67] A rational basis review would require the state to prove only a connection between a legitimate state interest and a "disparity of treatment" as opposed to a higher standard such as having to prove a connection between a disparity of treatment and legitimate or compelling interest.[68] If *ESPLERP* had concluded that prostitution was a fundamental right established in *Lawrence*, the California statute would have been subject to a higher level of scrutiny-- as it should have, since *Lawrence* established a fundamental right to engage in sexual activity.[69]

Since the Court ruled that prostitution was not a fundamental right established in *Lawrence* the *ESPLERP* applied a rational basis review, the lowest level of scrutiny. Under this level of review, the Court found that Section 647(b) had several governmental interests and furthered those interests, thus having enough cause to justify the criminalization of prostitution. These interests included, "discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases."[70] As this article will later discuss, these interests are indeed legitimate, however the challenged statute is not specific or necessary to achieving said interests as required by standing precedent.

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[65] Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 880 F.3d 450, 461 (9th Cir. 2018).

[66] *Id.* at 456.

[67] *Id.* at 457.

[68] Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 128 (1999).

[69] Gascon, 880 F.3d at 462.

[70] *Id.* at 457.

ESPLERP further evaluated whether the California statute violates the freedom of intimate association of the Substantive Due Process Clause of the Fourteenth Amendment. The *ESPLERP* court referred to *Gascon* that suggests that a relationship between a prostitute and a client is not one that qualifies as being protected under the due process clause because that relationship "lasts for a short period and only as long as the client is willing to pay a fee".[71]

> An escort bureau is a business. Money is its guiding light.[4] Unlike traditional dating, love and affection are far from paramount in its scheme of priorities . . . To buttress their position, plaintiffs rely primarily on *Wilson v. Taylor* . . . The Wilson opinion is not on point. Associational rights under the First Amendment ought to include the right to date whomever one chooses. However, the young women and men who work for Las Vegas escort bureaus are not involved in simple dating relationships. Any assertion to the contrary is incorrect.[72]

The *Gascon* Court concluded, "therefore, the duration of the relationship...does not suggest an intimate relationship" and "the commercial nature of the relationship between a prostitute and a client suggests a far less selective relationship than that which has been held to constitute an intimate relationship."[73] Thus, *Gascon* created two "criteria" for what constitutes a relationship protected by freedom of association.

This contradicts the ruling of *Lawrence* that explicitly states that freedom of association applies to consenting adults engaging in intimate acts. The notion that the quality, duration, or purpose of the relationship need to be considered is completely fabricated and lacks basis. This also suggests that the courts have a right to determine whether a consensual relationship has a satisfactory quality, duration, or purpose.

The *Gascon* court, without supporting precedence, thus suggests that duration or quality of intimacy need be taken into consideration when deciding what qualifies as a protected relationship. This unfounded consideration creates a dangerous precedent that the majority in *Lawrence* explicitly warned against-- attempting to define what constitutes as a relationship. Justice Kennedy asserted that this process would inherently strip constitutional liberties to engage in sexual or intimate conduct.

Not only would this be a moral overreach on part of the courts, but an overreach that precedence has explicitly prohibited the courts from making. Recalling the decision in

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[71] *Id.* at 459.
[72] IDK, Inc. v. County of Clark, 599 F. Supp. 1402, 1406-07 (D. Nev. 1984).
[73] Gascon, 880 F.3d at 459.

Martin, the Court uses the ruling in *Lawrence* to establish that, regardless of the quality (marital status) or duration of a relationship, "subjecting certain private sexual conduct between two consenting adults to criminal penalties infringes on the rights of adults to 'engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.'" [74] *Martin* also uses the opportunity to emphasize the portion of the *Lawrence* ruling that asserts, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[75] Both *Lawrence* and *Martin* direct their decisions to private intimate conduct between consenting adults while making abundantly clear that the ability to engage in this conduct is a right fundamental to their liberty as free individuals. These decisions didn't establish a right to engage in a consensual relationship, that right had already been established. Rather, these decisions established a right for consenting adults to engage in private intimate conduct-- a right that isn't exclusive to those engaging in a relationship, a marriage, or a partnership. Being that engaging in the conduct was established as a fundamental right, the evaluation of laws that infringe upon that right would need to be evaluated with strict scrutiny and since the right to engage in prostitution is encompassed in the right to engage in private consensual intimate conduct, laws that criminalize prostitution must also be evaluated with strict scrutiny.

B. Strict Scrutiny

Since the right to engage in prostitution should be considered by the courts to be a fundamental liberty, the court in *ESPLERP* should have evaluated the California statute with strict scrutiny as opposed to a rational basis review. The Supreme Court has applied strict scrutiny, based on the equal protection clause of the First Amendment and of the Fourteenth Amendment to statutes that infringe upon rights either explicitly enumerated by the constitution or other rights the court has deemed to be fundamental. For example, *Roe v. Wade* held that laws prohibiting abortions are unconstitutional because they infringe upon a fundamental right to privacy.[76] *Wade* held that the fundamental right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[77] Being that the right to obtain an abortion was a fundamental right, the state of Texas was

[74] 607 S.E.2d 370
[75] *Id.* at 369.
[76] 410 U.S. 113 (1973).
[77] *Id.* at 153.

placed with the burden of proving a "compelling state interest."[78] The state argued that the legitimate interest was protecting an unborn life and the court affirmed that this constituted a legitimate interest, however, it held that the state's interest was not compelling enough to prohibit abortions.[79] Additionally, the court held that a state may prohibit abortion in the specific instance that the fetus is able to live outside of the womb but since the law was not narrowly tailored for that specific purpose the court held the law was unconstitutional.[80]

In *ESPLERP,* the state argued that its "legitimate reasons for criminalizing prostitution in California … include discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases."[81] However, upon further examination it becomes clear that the criminalization of prostitution is not narrowly tailored to these interests.

For instance, the State of California argued that prostitution is directly linked to higher rates of human trafficking in women and children.[82] However, the criminalization of prostitution would obviously not significantly reduce human trafficking rates since prostitution occurs independently of human trafficking and vice versa. In fact, a report by the Thomson Reuters Foundation reported that "sex workers who had been exposed to repressive policing like arrest or prison were three times more likely to experience sexual or physical violence by clients, partners and other people."[83] Since the criminalization of prostitution doesn't specifically serve to reduce trafficking rates and evidence exists to prove it exacerbates the issue, criminalizing prostitution doesn't serve the sufficiently compelling state interest required to infringe upon the fundamental right to engage in consensual sexual activity.

The state further argued that "prostitution creates a climate conducive to violence against women."[84] Like the state interest to reduce trafficking, the state interest to reduce violence against women is also not specifically targeted in the criminalization of prostitution.

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[78] *Id.* at 154.

[79] *Id.*

[80] *Id.*

[81] Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 880 F.3d 450, 457 (9th Cir. 2018).

[82] *Id.*

[83] Umberto Bacchi, *Legalizing Prostitution Lowers Violence and Disease, Report Says*, REUTERS (Dec. 11, 2018, 2:07 PM), https://www.reuters.com/article/us-global-women-prostitution/legalizing-prostitution-lowers-violence-and-disease-report-says-idUSKBN1OA28N.

[84] Gascon, 880 F.3d at 457.

A report from the World Health Organization contends that violence against women is largely a cultural issue and argues:

> Different cultural and social norms support different types of violence… For instance, traditional beliefs that men have a right to control or discipline women through physical means makes women vulnerable to violence by intimate partners (8,9) and places girls at risk of sexual abuse (10)[85]

Considering violence against women is the product of a variety of sociocultural factors largely unimpacted by prostitution, it would be illogical to suggest that criminalizing prostitution narrowly fulfils the specific interest of curbing violence against women. Since the criminalization of prostitution would not significantly reduce violence against women and is not narrowly tailored to do so, this interest also fails under this high-level scrutiny.

Lastly, the state suggests a compelling interest to criminalize prostitution to reduce the spread of sexually transmitted diseases.[86] However, according to the Center for Disease Control and Prevention (CDC), "STDs are passed from one person to another through [any kind of] sexual activity including vaginal, oral, and anal sex."[87] Obviously, unsafe sexual activity is the underlying cause of STD transmission and since unsafe sexual activity is not only limited to engagement in prostitution then this interest is also not sufficiently narrowly tailored. For instance, according to the National Coalition of STD Directors (NCSD) more than half of all Americans will contract an STD in their lifetime[88] and according to Gail Bolan, the director of the CDC's Division of STD Prevention, the rise in STD rates can be attributed to decreased condom usage.[89] Since the transmission of STDs occurs across all types of sexual activity, criminalizing prostitution, one type of sexual activity, would not serve the purpose demanded by *Lawrence*, *Martin*, or strict scrutiny, thus making it unconstitutional.

Standing as a great infringement to a fundamental liberty, the California statute as well as any statute criminalizing prostitution should be assessed with the same standard of judicial review as issues concerning gender, sex, and free speech. Since the *ESPLERP* Court

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[85] *Violence Prevention the Evidence: Changing Cultural and Social Norms That Support Violence*, WORLD HEALTH ORGANIZATION (December 2009), https://www.who.int/violence_injury_prevention/violence/norms.pdf.

[86] Gascon, 880 F.3d at 463.

[87] *Diseases & Related Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/std/general/default.htm (last reviewed Nov. 4, 2016).

[88] *STD Prevention 101*, NATIONAL COALITION OF STD DIRECTORS, https://www.ncsddc.org/resource/stds-the-basics/ (last reviewed December 12, 2019).

[89] Why Are STDs on the Rise If Americans Are Having Less Sex?, https://www.ncsddc.org/resource/stds-the-basics/ (last visited January 19, 2020).

erred in their assessment of this liberty, this review implores future courts to overrule its decision.

Conclusion

The criminalization of prostitution stands as an infringement of liberty on two fronts. First, there is no coherent way to distinguish between what is generally perceived to be "regular sexual activity" and prostitution since 1) there is no logical way to define what constitutes sexual activity and 2) there has yet to be a line drawn as to suggest a point where the monetary component of sexual relations becomes criminal. Thus, the criminalization of prostitution represents a moral and authoritarian overreach of the state criminalizing a too-broad set of activities. The second is the fundamental right of adults to engage in consensual sexual activity.

The decision is *ESPLERP* not only represents an infringement of liberty, but it also represents an enduring yet outdated bias against sex work. Attitudes about sexual activity have clearly evolved and revolutionized since the birth of the Constitution but what has not changed is the fundamental liberties the Constitution guarantees—ones of privacy, intimate association, and autonomy. When the courts enumerated these rights, whether it be the right to marry out of your race, have an abortion, engage in sexual activity with a member of the same sex or get married, these rights were not "created" but rather realized based on the basic guarantees of our founders. The right to engage in prostitution is no different. It is not a new right, just one that has yet to be realized by our nation's courts.

Sinking States and Sovereignty: Questions of Responsibility

Yasmin Underwood

"The spirit of the people . . . will not be extinguished. It will live on somewhere else because a nation isn't only a physical place. A nation – and the sense of belonging that comes with it – exists in the hearts and the minds of its citizens wherever they may be."

– Ratu Epeli Nailatikau, February 11, 2014

Introduction: Disappearing States and the Legal Dilemma of Responsibility

Climate change is steadily and increasingly being recognized as a crisis by states worldwide – 1,191 jurisdictions in twenty-four states across the globe formally declared it an emergency as of the end of 2019. Climate change brings with it a host of environmental problems with legal implications; this review will discuss in particular the issue of rising sea levels. This is a particularly concerning issue on the international stage, as "more than 70 states are or are likely to be directly affected by sea-level rise, a group which represents more than one third of the states of the international community."[1] This will lead to mass displacement, which will likely overwhelm developed states with unprecedented numbers of refugees and migrants. These refugee crises will only continue to grow exponentially, as the Intergovernmental Panel on Climate Change's (IPCC) Fifth Assessment Report states, in addition to its suggestion that this process will further accelerate.[2] Furthermore, the International Law Commission (ILC) outlines how the flooding of small and low-lying states

[1] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10 at 326 (2018).

[2] IPCC, *Summary for Policy Makers, in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. (T.F. Stocker et al. eds., 2013).

will render "these zones less and less habitable or uninhabitable, resulting in their partial or full depopulation."[3] These threats to state territories also calls into question the future of their statehood and sovereignty, which afford states with the agency to interact with other states at the global level, as well as exercise power over their territory. It is in the interests of those states whose coastlines and entire physical territories are threatened, as well as those that are likely to be affected by incoming migrants, to publicly address and prepare for these imminent phenomena.

The IPCC, an intergovernmental body of the United Nations (UN), found in its 2013 report that due to increasing island flooding as a result of rising sea levels, there is the looming threat of an environmental "tipping point" - whereby there will no longer be potable groundwater available to the residents of many small low-lying island states, such as the Marshall Islands.[4] This tipping point is predicted to occur within the lifespan of its current inhabitants.[5] Should the islands' groundwater be compromised, their inhabitants may risk losing their only source of drinking water within the next few decades and be forced to migrate.[6] Thus, not only are many states' physical territories at risk of disappearing below the sea, but the land left behind will likely be rendered uninhabitable come the middle of this century.[7] Given the imminent threat posed by these conditions, the island states' ability to sustain the international community's recognition of their statehood, as well as assure the wellbeing of their inhabitants, must be deliberated and accounted for.

In this review I seek to determine what the effects of climate change mean for the statehood of endangered states and the rights of their human populations, and I will explore how and whether responsibility and liability for this anthropogenic disaster can be clearly established, as well as suggesting what may be suitable remedies. I will argue that industrialized states should be held accountable for the damages incurred by their small and low-lying neighbors. In Part I, I will first explain the science behind climate change and its impact on sea levels, before discussing the issue of disappearing states. I will also provide context with respect to the earliest instances of international environmental law and as well

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[3] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10 at 326 (2018).

[4] Curt D. Storlazzi et al., *Most atolls will be uninhabitable by the mid-21st century because of sea-level rise exacerbating wave-driven flooding*, 4 SCIENCE ADVANCES, 25 Apr, 2018, at 3, https://advances.sciencemag.org/content/4/4/eaap9741.

[5] *Id.*

[6] *Id* at 5.

[7] IPCC, *Summary for Policy Makers, in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 5 (T.F. Stocker et al. eds., 2013).

as explaining the use of relevant legal principles. In Part II, I will analyze the prerequisites for state sovereignty and question whether the sovereignty of low-lying, small-island states is indeed at risk. I will also break down the rights of these states' populations that are threatened by these environmental changes, before establishing which actor, if any, may be held liable for these rights violations. Finally, in Part III, I will examine previous remedies offered in environmental cases and determine which would be the most appropriate.

I. Background

A. The Science Behind Climate Change

Although growing climate anxiety has been notable in the last decade, 2019 has arguably been the year that climate change has become a universal concern, exemplified by Oxford University Press' Word of the Year: climate emergency.[8] In November, 11,000 scientists came together to fulfil their "moral obligation to clearly warn humanity of any catastrophic threat"[9] and "declare . . . that planet Earth is facing a climate emergency."[10] The IPCC's 2013 report supports this claim, stating that: "[CO_2] concentrations have increased by 40% since pre-industrial times, primarily from fossil fuel emissions."[11] The IPCC further details the scientific means of quantifying these changes in atmospheric energy fluxes with the use of radiative forcing (RF), explaining that "positive RF leads to surface warming, [whereas] negative RF leads to surface cooling."[12] Scientific findings show "the largest contribution to total [RF] is caused by the increase in the atmospheric concentration of [CO_2] since 1750."[13] Given that these increases correlate directly with the beginning of the industrial revolution, the IPCC confirms that "human influence on the climate system is clear."[14] The Alliance of World Scientists lists contributing human activities, such as:

> Sustained increases in human and ruminant livestock populations, per capita meat production, world gross domestic product, global tree cover

[8] Oxford University Press, *Word of the Year 2019*, OXFORD LANGUAGES (Jan. 27, 2019, 16:59 PM), https://languages.oup.com/word-of-the-year/2019/.

[9] William J. Ripple et al., *World Scientists' Warning of a Climate Emergency*, BIOSCIENCE, 1, biz152 (2019), https://doi.org/10.1093/biosci/biz152.

[10] *Id.*

[11] IPCC, *Summary for Policy Makers, in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 11 (T.F. Stocker et al. eds., 2013).

[12] *Id* at 13.

[13] *Id.*

[14] *Id* at 15.

> loss, fossil fuel consumption, the number of air passengers carried, . . . (CO_2) emissions, and per capita CO_2 emissions since 2000.[15]

These activities add directly to the growing mass of greenhouse gases collecting in our atmosphere, measured by RF, leading to a rapidly altering global climate. This dramatic shift in climate is reflected globally in the large bodies of ice that are "rapidly disappearing, evidenced by declining trends in minimum summer Arctic sea ice, Greenland and Antarctic ice sheets, and glacier thickness worldwide".[16]

The impacts of this melting extends beyond the changing Arctic landscape: "since the early 1970s, glacier mass loss and ocean thermal expansion from warming together explain about 75% of the observed global mean sea level rise."[17] The severity of this issue can be illustrated by the fact that "the rate of sea level rise since the mid-19th century has been larger than the mean rate during the previous two millennia . . .. Over the period 1901 to 2010, global mean sea level rose by 0.19 . . . m."[18] Rather than faltering, the IPCC predicts that this upward trend will continue and that "the rate of sea level rise will *very likely* exceed that observed during 1971 to 2010."[19] The IPCC further expects that "by the end of the 21st century, it is *very likely* that sea level will rise in about 95% of the oceans' surface area. About 70% of the coastlines worldwide are projected to experience sea level change."[20]

B. Disappearing States

Many countries are already beginning to experience the effects of rising sea levels, according to moderate calculations, projected sea levels in 2050 threaten to submerge the homes of 150 . . . million people, left to the mercy of high tides.[21] However, particularly at risk are low-lying, small island states. In 1989, the Small States Conference on Sea Level Rise was held at Malé, Maldives and attended by 18 small island states, with a number of larger states participating as observers. At the conference, the *Malé Declaration on Global Warming*

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[15] William J. Ripple et al., *World Scientists' Warning of a Climate Emergency*, BIOSCIENCE, 1, biz152 (2019), https://doi.org/10.1093/biosci/biz152.

[16] *Id.*

[17] IPCC, *Summary for Policy Makers, in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 11 (T.F. Stocker et al. eds., 2013).

[18] *Id.*

[19] *Id* at 25.

[20] *Id* at 26.

[21] Scott A. Kulp, Benjamin H. Strauss, *New elevation data triple estimates of global vulnerability to sea-level rise and coastal flooding*, 10 NATURE COMMUNICATIONS, Oct. 29, 2019, at 2, https://www.nature.com/articles/s41467-019-12808-z.

and Sea Level Rise was adopted.[22] In the Declaration, these states acknowledged that though the rest of the world would also be seriously affected by climate change and rising sea levels, states that are small, low-lying, coastal, or islands would see their very existence and survival threatened by these conditions.[23] Thus, sea level rise will not affect states equally; it is projected that sea level will be higher than the global average in the tropics, where there are thousands of low-lying atolls whose maximum elevations lie no more than four meters above present sea level, their average elevations lying less than two meters above present sea level.[24] The adverse impacts of sea level rise are likely to have significant disproportionate effects on these island states than to other states in the tropics because these islands often have limited resources: "Most atoll islands have limited adaptation space, land available for human habitation, and water and food sources, and most have ecosystems that are vulnerable to seawater inundation."[25] The effects of these new environmentally-induced conditions will be numerous, both prompting mass migration of populations, as well as calling into question the validity of these states' statehood, should they lose their territory. Furthermore, this creates problems when considering the nationality and citizenship of these states' inhabitants, potentially leaving populations legally vulnerable, should their very state cease to physically exist.

As stated earlier, the small-island community's first effort to engage the international community in discussing this matter dates back to 1989 in the *Malé Declaration on Global Warming and Sea Level Rise*, imploring industrialized states to recognize their moral obligations and help those who are suffering the most dramatic consequences of their actions.[26] However, the international legal community did not formally reflect on these issues until the 21st century; it was only in 2012 that the International Law Association (ILA), a universally respected non-profit organization seeking to improve international understanding of international law, formed a new *Committee on International Law and Sea Level Rise* with the purpose of discussing the law of the sea, forced migration and human rights, and issues of

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[22] Small States Conference on Sea Level Rise, *Malé Declaration on Global Warming and Sea Level Rise*, 1, U.N. Doc. IOC/OPC.IV/INF.2 (November 1989).

[23] *Id.*

[24] Curt D. Storlazzi et al., *Most atolls will be uninhabitable by the mid-21st century because of sea-level rise exacerbating wave-driven flooding*, 4 SCIENCE ADVANCES, 25 Apr, 2018, at 1, https://advances.sciencemag.org/content/4/4/eaap9741.

[25] *Id.*

[26] Small States Conference on Sea Level Rise, *Malé Declaration on Global Warming and Sea Level Rise*, 2, U.N. Doc. IOC/OPC.IV/INF.2 (November 1989).

statehood and international security. Following the ILA's lead, the ILC, a body of experts established by the UN to help develop international law, decided to include "Sea-level rise in international law" in its program of work at its seventy-first session in 2019, given that rising sea levels are likely to affect over a third of existing states.[27] This project would seek to reflect "new developments in international law and pressing concerns of the international community as a whole."[28] By undertaking this research, the ILC is seeking to determine: "What are the consequences for statehood under international law should the territory and population of a [state] disappear? What protection do persons directly affected by sea-level rise enjoy under international law?"[29]

These recent and contemporary efforts to achieve a common legal understanding indicate that this is not yet a clearly established area of law, as it continues to be actively debated on the global stage. As things stand, the international legal community's understanding of these issues is incomplete, meaning that it is ill-equipped to deal with the many claims and questions that will likely emerge regarding island states and their inhabitants in the coming years as sea levels steadily rise, with no signs of stopping.

C. International Environmental Law and its Earliest Precedent

The environmental impacts of the industrial revolution have only become observable within the last couple of centuries, often manifesting in transboundary consequences and damages, which have prompted the development of international legal precedent and legislation. As such, international environmental law is still considered a relatively new field of law. Some of the earliest cases that helped to create initial precedent for international environmental law, prompting the development of many of the concepts and principles that are found in contemporary climate cases today, are *United v. Canada* (1938 and 1941) and *France v. Spain* (1957), colloquially known as the *Trail Smelter* and *Lac Lanoux* cases, respectively.

In the *Trail Smelter* decisions, the Canadian and U.S. governments established an ad hoc arbitral tribunal in 1935 to settle a dispute relating to transboundary air pollution that had been emitted by a Canadian smelter in Trail, British Columbia.[30] Its 1938 decision

[27] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10 at 330 (2018).
[28] *Id* at 330.
[29] *Id* at 326.
[30] *Id* at 1911.

concerned the establishing of facts; it found that this air pollution from sulphur fumes had indeed caused damage to property in the U.S. State of Washington.[31] Conversely, the 1941 decision sought to revisit the issue after the implementation of the Tribunal's recommendations, assigning responsibility for these harms. The *Trail Smelter Case* established precedent by applying the pre-existing principle of *responsibility of states for private actors* to an environmental case, stating that "the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter."[32] This principle was later 'codified' in the *Stockholm Declaration on the Human Environment 1972*[33] and the *Rio Declaration on Environment and Development 1992*[34] - these are declarations of intent that are the product of international conventions that occurred respectively in Stockholm and Rio regarding the environment and its protection. Canada assumed responsibility for the harm caused to U.S. interests by the Canadian smelter and agreed to pay $78,000 for the damages incurred.[35] Furthermore, the Tribunal held that in the future, if "damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as compensation" to cover the costs of investigating potential pollution.[36] In reaching this decision, the tribunal invoked and created a precedent for the important *polluter pays* principle in international environmental law, stating that:

> No [state] has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[37]

The *Lac Lanoux Case* related to a dispute between France and Spain over the use of the waters of Lac Lanoux - a lake which is located in French territory, its water flows via the River Carol into Spain.[38] The Spanish Government worried that a French government proposal for works to utilize the waters of the lake would violate the French-Spanish *Treaty*

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[31] *Id* at 1922.

[32] *Id* at 1965.

[33] United Nations, Rep. of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 at 5 (June 1972).

[34] United Nations, Rep. of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev/1 (Vol. I) 3, 5 (June 1992).

[35] *Id* at 1949.

[36] *Id* at 1980.

[37] *Id* at 1965.

[38] Lake Lanoux Arb. (Fr. v. Spain), 12 R.I.A.A. 281 at 1 (Nov 16, 1957) [hereinafter Lac Lanoux case].

of Bayonne and its Additional Act.[39] It was claimed that under this Treaty, that the works in question could not be undertaken unless both parties overtly expressed their agreement.[40] The two governments signed a *compromis*, which is an international agreement to refer the matter to an arbitral tribunal.[41] Though France was found to be in compliance with the Treaty, the *Lac Lanoux case* reiterates the *responsibility and prevention* principle from the *Trail Smelter Case*, asserting that states have the "duty not to injure the interests of a neighboring [state]."[42] The *precautionary* principle is also expressed, stipulating "the obligation to take into consideration . . . adverse interests and the obligation to give a reasonable place to these interests in the solution finally adopted."[43]

D. Legal Principles

Legal principles serve an important role in international law, and in *Italy v. Venezuela* (1903), a claim was brought by Italian citizen Odoardo Gentini, challenging a decision made at the Italian-Venezuelan Mixed Commission.[44] In its decision, the Arbitral Tribunal explained the differences between rules and principles:

> A 'rule' . . . is essentially practical and, moreover, binding . . .. There are rules of art, as there are rules of government, while a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.[45]

Therefore, while principles may not be binding, they serve to guide states' actions and intentions, indicating the correct course of action to take. Rather than creating new laws, they merely express principles that the international community has collectively indicated that it recognizes through its actions. Some of the principles most relevant to international environmental law are the *precautionary* principle, the *polluter pays* principle, the principles of *responsibility and prevention*, and that of *common but differentiated responsibility*.

Observable in the *Lac Lanoux Case*, the *precautionary* principle holds that "parties should take precautionary measures to anticipate, prevent or minimize the causes of climate

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[39] *Id.*
[40] *Id.*
[41] *Id* at 35.
[42] *Id* at 9.
[43] *Id* at 34.
[44] Gentini Case (Italy v. Venezuela), X R.I.A.A. at 551 (1903) [hereinafter Gentini case].
[45] *Id* at 556, *asserted in* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24 (2d ed. 2006).

change and mitigate its adverse effects."[46] The UN *Conference on Environment and Development Declaration* further states that in the name of environmental protection, "the precautionary approach shall be widely applied by [states] according to their capabilities."[47] Should there be any risks of irreversible or serious damage, states are not permitted to present the argument that scientific certainty is lacking in order to justify a postponement of "cost-effective measures to prevent environmental degradation."[48]

Equally as meaningful in this area of law is the *polluter pays* principle, which is codified in Principle Sixteen of the 1992 *Rio Declaration*, prescribing "the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[49] The *polluter pays* principle was enforced in the *Trail Smelter Case*, where Canada was obliged to pay $78,000 as "complete and final indemnity and compensation for all damage which occurred."[50] The principle of *responsibility and prevention* was codified by the Principle 21 of the 1972 *Stockholm Declaration of the United Nations Conference on the Human Environment:*

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other [states] or areas beyond the limits of national jurisdiction.[51]

This principle ensures that the environmental activities of states do not interfere with the resources and territories of their neighbors and other states that lie further afield. It was enforced in *Argentina v. Uruguay* (2010), whereby Uruguay's economic activities on the shared River Uruguay risked causing environmental damages in Argentina.[52] The Court stated that "[a state] is . . . obliged to . . . avoid activities which take place . . . under its jurisdiction,

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[46] United Nations Framework Convention on Climate Change art. 3, 3, May 9, 1992, 1771 U.N.T.S 107.

[47] United Nations, Rep. of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26 at 15 (1992).

[48] *Id.*

[49] *Id.* at 16.

[50] Trail Smelter Case (U.S. v. Can.), III R.I.A.A at 1933 (Trail Smelter Arb. Trib. 1938 & 1941) [hereinafter Trail Smelter case].

[51] United Nations, Rep. of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 at 21 (June 1972).

[52] Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep 135, at 56, ¶ 103 (Apr. 2010).

causing significant damage to the environment of another [state]."[53] Additionally, the principle of *common but differentiated responsibility* is expressed in the *UN Framework Convention on Climate Change*:

> The parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[54]

This principle acknowledges that industrialized states historically have greater responsibilities than others with regards to greenhouse gas emissions. As such, it recommends that these states play more of a role in addressing the consequences of their collective actions, reflecting the significance of the harm that they caused.

Another important principle in international law is that of *proportionality*: it is applied in criminal sentencing, and it is used to decide upon a countermeasure "commensurate with the gravity of the injury suffered."[55] Courts will consider both "the gravity of the offence and the degree of responsibility of the offender" in order to arrive at a suitable countermeasure.[56] This principle was employed in *Hungary v. Slovakia* (1997), a case concerning the construction of a joint interstate dam on the river Danube, which runs through both countries.[57] Slovakia accused Hungary of violating the *Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System,* which the two countries had signed in 1977, by abandoning the portion of the project for which it was responsible.[58] Conversely Hungary argued that Slovakia had not been permitted to proceed with the construction of the "'provisional solution' (damming up of the Danube at river kilometer 1851.7 on Czechoslovak territory[])" that resulted in damages in Hungarian territory.[59] While the Court ruled in Slovakia's favor, it also required that both Parties provide compensation for the

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[53] Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep 135, at 56, ¶ 101 (Apr. 2010).

[54] United Nations Framework Convention on Climate Change art. 3, 1, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S 107.

[55] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, at 56, ¶ 85 (Sep. 1997).

[56] R. v. Hamilton, [2004] CanLII 5549 at 88 (Can.).

[57] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, at 8, ¶ 2 (Sep. 1997).

[58] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, at 16, ¶ 13 (Sep. 1997).

[59] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, at 15, ¶ 13 (Sep. 1997).

damages respectively incurred by each, given that Slovakia's response to Hungary's actions was not proportionate.[60]

II. Which Rights Have Been Violated and Who is Responsible?

A. Statehood, Territoriality, and Sovereignty

There existed only around fifty internationally recognized states at the beginning of the twentieth century, whereas by 2005 there were almost two hundred.[61] The creation of so many new states has altered the nature of international law and relations, requiring significant adjustments in practice and approach on the part of international organizations.[62] In particular, this is due to a vital component of statehood: state sovereignty. When considered internationally, sovereignty in and of itself is understood to encompass the "totality of international rights and duties recognized by international law."[63] The criteria that are often cited as fundamental to statehood are stated in the 1933 *Inter-American (Montevideo) Convention on the Rights and Duties of States* which necessitates: "(a) permanent population, (b) defined territory, (c) government, and (d) capacity to enter into relations with other [states]."[64] However, there are diverging theories surrounding the means through which a nation acquires statehood.

The first is the *declaratory* theory, posited by German jurists G. F. von Martens and J. C. W. von Steck in the 19th century, which affirms that statehood is a status independent of international recognition, whereby states simply *are*, rather than having to be externally acknowledged as such.[65] Furthermore this theory asserts that "sovereignty, upon which all legality depends, is itself a question of fact, and not of law."[66] In doing so, it makes reference to sovereignty itself and makes note of its necessity for the existence and application of the law, given that sovereignty establishes a hierarchy of power, according an entity the uncompromised authority to govern other entities, whether individuals or states. However,

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[60] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, at 82, 83, ¶ 87, 155 (Sep. 1997).

[61] JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 4 (2nd ed. 2007).

[62] *Id.*

[63] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep 4, at 180 (Apr. 1949).

[64] Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 3 U.S.T. 145.

[65] JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 13 (2nd ed. 2007).

[66] WESTEL W. WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE: A STUDY IN POLITICAL PHILOSOPHY 195 (1896).

the declaratory theory is confronted by a problem of logic. Should a state's sovereignty at both the international and domestic level be considered absolute, innate *and* equal, this sovereignty would then be confronted by the sovereignty accorded to international legislation, as well as that accorded to other states. This plethora of respective 'sovereignties' would be fundamentally incompatible, leaving the state system completely dysfunctional, as it would beg the question of who would be subject to whom. The sovereignty of the state would find itself constantly threatened by that of international law, and vice versa. State sovereignty could therefore not be considered inherently absolute, or incontrovertible, or else the international system would cease to function coherently.

Conversely, the *constitutive* theory, defended by William Hall and L. F. L. Oppenheim, proposes that statehood and the rights and duties that accompany it only arise from the recognition of other states.[67] Thus, this theory directly contradicts the declaratory theory, asserting that "the legal existence of a state . . . has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence."[68] This signifies that a state's sovereignty is dependent upon its recognition by other states. This theory also encounters issues, given that the first states to emerge did not do so thanks to the approval of other states, as there were no others to offer their assent. Therefore, in practice a combination of the two theories persists; fulfillment of factual criteria is necessary, in particular those asserted by the *Inter-American (Montevideo) Convention on the Rights and Duties of States,* which in and of itself accords validity to a state's claim to statehood, however a state's sovereignty and its statehood is not wholly absolute, requiring the acknowledgement of other states in order to enter into necessary relations with other states. These factors must be considered when reflecting upon the statehood and sovereignty of states disappearing due to sea level rise and begs the question – would other states' continued recognition of their sovereignty suffice to ensure their continued statehood, regardless of their loss of physical territory and permanent population?

Physical territory is often cited as a necessary criterion to qualify as a sovereign state, as "[t]erritorial sovereignty . . . involves the exclusive right to display the activities of a [state]."[69] This territorial sovereignty specifically refers to the state's sole ability to exercise

[67] JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 13 (2nd ed. 2007).

[68] Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 1941 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 35, 605, 609.

[69] Island of Palmas Case (Netherlands v. United States) [1928] 1 RIAA 829, 839.

power over a physical space.[70] What is challenging given rising sea levels, is that small-island states are not losing their sole ability to govern to another state or entity, but rather, the physical space that they occupy and control ceases to exist in a livable capacity. However, while a state must possess territory, there is no rule prescribing the minimum area of that territory: "infinitesimal smallness has never been seen as a reason to deny self-determination to a population."[71] Furthermore, there is the problem of the territory in question being "defined," meaning that its existence must be constant as well as being material, as some argue that "one cannot contemplate a [state] as a kind of disembodied spirit. . .. [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority."[72]

The *International Law Association Committee on International Law and Sea Level Rise* (2018) discussed these very issues at their Sydney Conference, noting the critical need to address questions such as whether:

> [T]he impact of sea level rise [would] require the creation of a new category of subjects of international law? What could be the role of an agreement between a [state] affected by submergence of its territory and a host [state] (implying both international and constitutional law aspects) regarding the possibility of performance of rights that are at present normally attributed to coastal [states] based on their territory?[73]

The nature of these questions implies that the ILA foresees cooperation between larger states and those that are threatened by these new and evolving environmental conditions, the former assuming the role of host for the latter.

The draft report from the Conference refers to the five traditionally recognized means to acquire territory: "Occupation; Prescription; Conquest; Cession; Accretion and Avulsion."[74] As such, disappearing states will likely not be left without territory. However, the Committee made a point of referring to multiple instances where governments have

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[70] MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (Hans H. Gerth & Charles Wright Mills trans. & eds., 1946)

[71] Thomas Franck and Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 1976 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 8, 331, 383–4.

[72] LINDA S. BISHAI, FORGETTING OURSELVES: SECESSION AND THE (IM)POSSIBILITY OF TERRITORIAL IDENTITY 62 (2004).

[73] Sydney Conference, *Report of the International Law Association Committee on International Law and Sea Level Rise*, 25 (2018).

[74] INTERNATIONAL LAW AND SEA LEVEL RISE: REPORT OF THE INTERNATIONAL LAW ASSOCIATION COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE 141 (Davor Vidas, David Freestone & Jane McAdam eds. 2019).

continued to exist without a physical hold over their territory, citing in particular the case of a government in exile.[75] There is other established precedent for this, namely the respective cases of Hong Kong[76] and Guantanamo Bay, where one sovereign state leased territory to another.[77] That being said, the Committee noted the lack of precedent for a situation such as this one and wished to stress the political nature and implication of these issues, complicating the role that international law has to play in their resolution.[78] In regards to the Committee's stance on the issues that arise from rising sea levels, "it was generally agreed that, as guidance and as a starting point, there should be a presumption of continuing statehood in cases where land territory was lost."[79] However, the Committee was unwilling to explicitly probe into the specific circumstances requisite to "the continuation of statehood, or perhaps some other form of international law personality, as well as other solutions for this problem (e.g., merger with another [state])."[80] Therefore, it can be assumed that while there is no existing precedent, the ILA Committee's reasoning would suggest the likely existence of an international understanding and acceptance of the continued statehood of these states. However, it remains important to the exercise of this sovereignty that a government also possess territorial sovereignty over which to exert its influence. Accordingly, small-island states would likely lose a facet of sovereign integrity should they not acquire alternative territory, when their own territory is rendered uninhabitable due to sea level rise. Furthermore, significant loss of territory does not merely call into question the statehood and sovereignty of a state, but also creates problems of "national identity, refugee status, [state] responsibility, access to resources, and international peace and security."[81] Therefore the questions posed by the ILA should also extend to the populace of these states, where will they go? Should they indeed relocate to another state, it is important to consider

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[75] *Id.*

[76] Convention between the United Kingdom and China respecting an extension of Hong Kong Territory, U.K.-China, June 9, 1898, in 21 HERTSLET'S COMMERCIAL TREATIES: A COMPLETE COLLECTION OF THE TREATIES AND CONVENTIONS, AND RECIPROCAL REGULATIONS, AT PRESENT SUBSISTING BETWEEN GREAT BRITAIN AND FOREIGN POWERS 293-4 (1840).

[77] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, art. 1-3, U.S.-Cuba, Feb. 1903, in INTER-AMERICAN RELATIONS; COLLECTION OF DOCUMENTS, LEGISLATION, DESCRIPTIONS OF INTER-AMERICAN ORGANIZATIONS, AND OTHER MATERIAL PERTAINING TO INTER-AMERICAN AFFAIRS (Barry Sklar and Virginia M. Hagen eds., 1972).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id* at 6.

that there would likely be strain placed upon the public services or resources of the host-state, particularly should the host be a developing country itself.[82]

B. How are threatened states' populations' rights being endangered by rising sea levels?

The issue of sea level rise does not merely affect small island states, but also those that are low-lying and coastal in nature. The Gangetic plain in Bangladesh and Egypt's Nile Delta are the primary source of sustenance for the two countries.[83] The Nile Delta in Egypt is extremely vulnerable to rising sea levels, as well as being "one of the most densely populated areas of the world." Should sea levels rise by only one meter, it would result in the displacement of 6 million people or more, and flood 4,500 km^2 of agricultural land.[84] This will result in immense numbers of climate refugees on an already overpopulated planet, flooding to the ever-decreasing habitable space remaining - causing significant economic and political strain on an international scale. Furthermore, the rights of the millions of displaced individuals would be under significant threat.

Fundamental human rights, that are considered to apply universally, are codified in the *Universal Declaration of Human Rights*. One of the rights established is the right to leave and return; the Declaration states that "[e]veryone has the right to leave any country, including his own, and to return to his country."[85] This right can be illustrated by *Chagos Islanders v. United Kingdom* (2012), where inhabitants of the Chagos Islands, a former colony of the United Kingdom since the 19th century, were forced to leave their homes and islands between 1967 and 1973, as the islands were to be used by the U.S. for defense purposes.[86] On April 16, 1971, the British Indian Ocean Territory Commissioner enacted the Immigration Ordinance 1 of 1971, which made it unlawful, and a criminal offense, for anyone to enter or remain in the territory without a permit.[87] A group of Chagos Islanders brought a case against the UK before the European Court of Human Rights, arguing that "the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being . . . could not have the character of a valid act

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[82] UN Refugee Agency, *Social and economic impact of large refugee populations on host developing countries*, 1, U.N. Doc. EC/47/SC/CRP.7 (Jan. 1997).

[83] International Organization for Migration, *Migration and Climate Change,* 2008 IOM MIGRATION RESEARCH SERIES, 31, at 18.

[84] *Id.*

[85] Universal Declaration of Human Rights, art. 13, 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[86] Chagos Islanders v. United Kingdom, 56 Eur. Ct. H.R. 173, 174 (2012).

[87] *Id.*

of governance."[88] A previous court had ruled in their favor, stating that "the two Orders in Council negate one of the most fundamental liberties known to human beings, the freedom to return to one's own homeland, however poor and barren the conditions of life."[89] The case brought before the European Court of Human Rights was considered inadmissible; it was ruled that as the islanders had already accepted compensation from the UK and in doing so, had renounced their "right to return."[90] This compensation consisted of £4 million in settlement of a previous case; 1,000 Chagossians had also applied for and been afforded full British citizenship.[91] The right to return to one's country is a fundamental human right, as evidenced in the reasoning from this case; being deprived of the ability to return to one's own country for reasons unrelated to one's well being violates this right. While in the *Chagos Islanders Case* the islanders' homeland remained physically intact, the homelands of many other islanders today are at risk of disappearing entirely, and with it their ability to return home or reside there at all. Citizens of small island and low-lying states are being deprived entirely of their right and ability to leave and return to their homeland by the anthropogenically-induced rising of sea levels.

The *Universal Declaration of Human Rights* also establishes a right to a nationality, stating that "[e]veryone has the right to a nationality,"[92] and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[93] The UN Human Rights Council discussed the implications of the loss of nationality in a report about children's rights, stating that "[t]he arbitrary deprivation of nationality of children is in itself a human rights violation, with statelessness its possible and most extreme consequence."[94] While not essential to international human rights law, nationality does afford greater access to other human rights.[95] Statelessness, the extreme consequence that the UN Human Rights

[88] *Id.* at 173, 178.

[89] R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] UKHL 61, [54] (appeal taken from UK.).

[90] Chagos Islanders v. United Kingdom, 56 Eur. Ct. H.R. 173, 176 (2012).

[91] Chagos Islanders v. United Kingdom, 35622/04 Eur. Ct. H.R. [Sec. IV], at 43 (2012).

[92] Universal Declaration of Human Rights, art. 15, 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec 10, 1948).

[93] Universal Declaration of Human Rights, art. 15, 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec 10, 1948).

[94] UN Human Rights Council, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless, U.N. Doc. A/HRC/31/29 at 27 (2015).

[95] *Id.*

Council makes reference to, is the reality of being "not recognized as a national by any [state] under the operation of its law."[96] Though, stateless individuals do receive certain rights under international law, the 1961 *Convention on the Reduction of Statelessness*, seeks to reduce the frequency of statelessness occurring, stating that:

> 1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavors to secure that any such treaty made by it with a [state] which is not a party to this Convention includes such provisions.[97]
>
> 2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.[98]

When applied to instances of sea level rise, territory is not transferred or acquired by another state, therefore this Article does not account for this novel problem. However, "statelessness will not be established to a reasonable degree where the determination authority is able to point to clear evidence that the individual is a national of an identified [state]."[99] This may or may not provide protection to the populace of disappearing states, depending on how we interpret their statehood. Their remaining "identified" and internationally recognized, or not, will be the difference between these citizens living at risk of statelessness or maintaining their legitimizing nationality.

C. Determining liability

As established in Part I, glacier mass loss, combined with thermal expansion of the seas, has resulted in sea levels rising.[100] The changing of the climate and warming of the planet have resulted in this melting and expansion. The greenhouse gases that have been emitted since the industrial revolution have led to dramatic changes in the earth's climate.[101] It is the heavily industrialized states that are responsible for the vast majority of greenhouse gas emissions; yet small low-lying island states are paying the price.

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[96] Convention relating to the Status of Stateless Persons, Sep. 28, 1954, 360 U.N.T.S. 117.
[97] Convention on the Reduction of Statelessness, art. 10, 1, Aug. 30, 1961, 989 U.N.T.S. 175.
[98] Convention on the Reduction of Statelessness, art. 10, 2, Aug. 30, 1961, 989 U.N.T.S. 175.
[99] AS (Guinea) v. Secretary of State for the Home Department [2018] EWCA Civ 2234 (Eng.).
[100] IPCC, *Summary for Policy Makers, in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 11 (T.F. Stocker et al. eds., 2013).
[101] *Id* at 15.

The ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)*, more commonly known as the *Articles of State Responsibility*, help to establish the ways states can be held responsible.[102] Article 2 states that "[t]here is an internationally wrongful act of a [state] when conduct consisting of an action or omission: (*a*) is attributable to the [state] under international law; and (*b*) constitutes a breach of an international obligation of the [state]."[103] In this instance, the emissions of businesses that are under state jurisdiction are not clearly attributable to the state. However, should they be harmful and have accumulated, "a [state] may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects."[104] These emissions were explicitly harmful to other states, for the reasons stated previously. Were they in breach of international law, however? In the *Gabčíkovo-Nagymaros Project* case, the ICJ stated that: "The existence of the general obligation of [states] to ensure that activities within their jurisdiction and control respect the environment of other [states] or of areas beyond national control is now part of the corpus of international law relating to the environment."[105] Given that the principle of *state responsibility and prevention* is now considered "part of the corpus of international law" by courts, it can be considered customary international law, and is therefore binding. Furthermore, the Court stressed the importance of this principle, given that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."[106]

Should we consider the assessment that "[t]he 'degree of responsibility' of [hypothetical defendant] *D* is primarily informed by the circumstances existing at the time of the offence, *not* by whether *D* was remorseful or rehabilitated after those events," when considering the actors that are to be held responsible and the proportionate nature of that responsibility, it is important to consider the knowledge that was in their possession at the time of these harmful actions.[107] Given that "[t]he heat-trapping nature of [CO_2] and other

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[102] Int'l Law Comm'n, *Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the Comm'n at its fifty-third session in 2001(Final Outcome)*, U.N. Doc. A/56/10, 43 (2001).

[103] Int'l Law Comm'n, art. 2, *Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the Comm'n at its fifty-third session in 2001(Final Outcome)*, U.N. Doc. A/56/10, 43 (2001).

[104] Chapter II, (4) Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

[105] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, ¶ 53 (Sep. 1997).

[106] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 92, at 78, ¶ 104 (Sep. 1997).

[107] R. v. Gejdos, [2017] ABCA 227 (Can.).

gases was demonstrated in the mid-19th century," states that were and have since engaged in industrialization have had two centuries to institute preventative measures and policies within their jurisdiction, which could slow and prevent the continued release of immense quantities of greenhouse gases that have been emitted.[108] Given that they have not made these reforms, they should be held responsible for their inaction.

It is difficult to establish a clear causal connection from one state's actions to another's territorial injuries. Due to the cumulative nature of greenhouse gas emissions, no one state is or can be held entirely responsible for the injuries caused to another. However, a lack of sole responsibility does not excuse a state for the damages that it has knowingly caused to another state. The Small-Island Conference itself called for action from these culpable states:

> In view of the fact that the overloading of the atmosphere with greenhouse gases occurred primarily through the actions of the industrialized nations during the past two hundred years, these nations now have a moral obligation to initiate on an urgent basis, international action to stabilize and subsequently reduce emissions of greenhouse gases and to sponsor, as a matter of priority, an urgent worldwide program of action to combat the serious implications of climate change, global warming and sea level rise.[109]

Here it is important to note the term "moral obligation" does not communicate a legal one, however, it is significant that the states threatened by its effects recognize where the responsibility for anthropogenic climate change lies. Furthermore, as established under international law in the *Articles on State Responsibility*, "the same conduct may be attributable to several [states] at the same time."[110]

Utilizing the principle of *common but differentiated responsibility*, as discussed in Part I, we can conclude that states that are developed with a history of higher emissions bear a greater share of the responsibility for the grievances incurred by small and low-lying island states. The countries in question are usually the most affluent countries, that have been found to have the greatest per capita emissions, and are responsible for the historical greenhouse gas emissions that have been referenced.[111] Given that no individual state is wholly

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[108] *Climate Change: How Do We Know?*, NASA, https://climate.nasa.gov/evidence/.

[109] Small States Conference on Sea Level Rise, *Malé Declaration on Global Warming and Sea Level Rise*, 1-2, U.N. Doc. IOC/OPC.IV/INF.2 (November 1989).

[110] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 80 (2002).

[111] William J. Ripple et al., *World Scientists' Warning of a Climate Emergency*, BIOSCIENCE, 1, biz152 (2019), https://doi.org/10.1093/biosci/biz152.

responsible for the greenhouse gas emissions, we must ascertain and assign shared responsibility to the states in question. This begs several questions; first, is there precedent for shared and proportional responsibility? Second, what might this look like when applied?

III: Solution and Implications

A. What are the possible remedies?

The aforementioned *Articles of State Responsibility* also list multiple remedies available to states. Article 30 offers the option of cessation and non-repetition, whereby the responsible state is required to stop the act, if it is continuing, and to ensure that there will not be any instances of repetition.[112] This assurance can take the form of a public declaration and acknowledgement of the wrongs committed, and the intentions of the state moving forwards. While preventing future harms from the release of greenhouse gases, this option does not cure the harms already suffered and that will be suffered by the small state and island community in the future as the ramifications of previously emitted gases are realized. Nonetheless, the cessation of the emissions of new greenhouse gases should be sought after by states, in the name of preventing further harms. Conversely, Article 31 offers reparation, requiring the state responsible "to make full reparation" for any injury it has caused through its commission of an "internationally wrongful act."[113] Furthermore the injury in question encompasses any physical or moral damages that it may have caused."[114] The responsible state achieves this by restoring the entity or moral that it damaged; however, given the projected rise of temperatures and sea level rise as a result of greenhouse gases that have already been emitted, not to mention those that are still being emitted, the likelihood of restoring small state territories to their former condition is nonexistent. Article 36 offers the alternative of compensation, requiring the responsible state to compensate for any damage it has caused, should it not have made sufficient reparations through restitution.[115] This "compensation shall cover any financially assessable damage including loss of profits."[116]

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[112] Int'l Law Comm'n, art. 30, *Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the Comm'n at its fifty-third session in 2001(Final Outcome)*, U.N. Doc. A/56/10, 43 (2001).

[113] Int'l Law Comm'n, art. 31, *Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the Comm'n at its fifty-third session in 2001(Final Outcome)*, U.N. Doc. A/56/10, 43 (2001).

[114] *Id.*

[115] Int'l Law Comm'n, art. 36, *Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the Comm'n at its fifty-third session in 2001(Final Outcome)*, U.N. Doc. A/56/10, 43 (2001).

[116] *Id.*

This compensation could take a monetary form, or a physical one. Responsible states could offer territory of the same nature or size as that, which has been lost. Furthermore, displaced citizens could receive monetary compensation, similarly to the Chagos Islanders, or they could be welcomed as climate refugees by responsible states. The International Organization for Migration cites "Professor Myers' estimate of 200 million climate migrants by 2050" as the most widely accepted number, these floods of people will need to go somewhere.[117] Should these people end up stateless, it would have catastrophic economic, social and political consequences across the globe. Should these culpable states be unwilling to forfeit a portion of their own territory, they should instead be required to implement high climate refugee quotas instead, proportionate to both the size of the territory and population, as well as the individual responsibility of the state in question, as an alternative form of reparation. Article 39 takes into account a state's contribution to the injury, stating that when determining reparations it is necessary to take account of the relevant "contribution to the injury by willful or negligent action or omission of the injured [state] or any person or entity in relation to whom reparation is sought."[118] This suggests that the extent of a state's contribution to the injury should help to determine and influence how much that state should contribute to the chosen remedies; this brings us to the notion of proportionate responsibility.

B. Proportionate Responsibility

As established in Part II, Section C, scientific findings demonstrated the harmful effects of greenhouse gases as early as the mid-19th century. Therefore, any industrialized states that have since continued to pursue their economic development through the means of burning fossil fuels are responsible for having knowingly contributed to this universal harm, which has resulted in significant damages to other states' territory. As such, the cumulative and proportionate contribution of states to climate change should be reflected in the proportionate responsibility afforded for these actions. States considered by the UN to be "developed" should share responsibility, proportionate to their respective contributions to greenhouse gas emissions from the last two centuries. The responsibility that they bear

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[117] International Organization for Migration, *Migration and Climate Change,* 2008 IOM MIGRATION RESEARCH SERIES, 31, at 11.

[118] Int'l Law Comm'n, art. 39, *Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the Comm'n at its fifty-third session in 2001(Final Outcome)*, U.N. Doc. A/56/10, 43 (2001).

should reflect the amount of time during which states have had knowledge of the significant harms of greenhouse gas emissions in their possession, yet have persisted in sustaining their emissions.

C. What are the appropriate remedies?

Should cessation be employed here, it would be appropriate for developed states to start implementing policies to aggressively curb and ultimately cease greenhouse gas emissions. Given the social and economic difficulties in completely and immediately ceasing such actions, a pledge of non-repetition in the form of a publicly stated target date to reach net zero emissions would provide an alternative. Should reparations be offered, they would have to be substantial, given the severe nature of the injury. In the short term, developed states could and should support small island states monetarily in preventative efforts against rising sea levels. Based upon the *polluter pays* principle established in the *Trail Smelter* case, these states states should be required to pay into a new fund for low-lying and small island states for mitigation of the effects of sea level rise. Once these small island states become uninhabitable, in order to compensate for the damages caused, the states that are the most developed, with the highest share in emissions from the previous two centuries, should be required to offer sovereignty over an uninhabited territory that is similar in size within their own borders.

In addition to the examples of Hong Kong and Guantanamo Bay presented in Part II, Fiji has set a precedent for states offering the option to migrate: In December 1945 Banabans were forced to relocate from present-day Kiribati to Rabi Island in Fiji. In February 2014, the president of Fiji reassured the people of Kiribati that if the "sea level continues to rise because the international community won't tackle global warming,"[119] they could "migrate with dignity" to his country.[120] "Fiji will not turn its back on our neighbors in their hour of need. We accepted the Banaban people when they were forced to leave Ocean Island. . . . And if necessary, we will do it again."[121] He further explained that "[t]hese people now live in Fiji but have their own seat in the parliament of Kiribati."[122] Furthermore,

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[119] *Fiji Leader Invites Climate-Hit Kiribati Residents to Relocate*, PHYS (Feb. 13, 2014), https://phys.org/news/2014-02-fiji-leader-climate-hit-kiribati-residents.html.

[120] *Id.*

[121] *Id.*

[122] SUVA, *Fiji Supports Kiribati on Sea Level Rise*, REPUBLIC OF KIRIBATI (Feb. 11, 2014), http://www.climate.gov.ki/2014/02/20/fiji-supports-kiribati-on-sea-level-rise/.

upon moving to Rabi, Banabans were offered "as nearly as possible the same Government organization and powers of self-Government as they enjoyed and were used to in Ocean Island."[123] This move has come from an undeveloped state that is itself threatened by rising sea levels – it has set an example for developed and, most importantly, responsible states to compensate for the damages that they have caused. Should prosperous and industrialized states not follow suit, accepting and accommodating large numbers of climate refugees from affected states is the very least they can do.

Conclusion

As scientists around the world unite to stress the urgency of the climate crisis, the responsibility lies with legal and political entities to respond and grapple with these issues, in order to provide solutions to those who are its immediate victims. Swift developments in international law are needed in order to prepare the international community to adequately address the questions of statehood and statelessness that it will soon be presented with. The legitimacy of states, as well as that of their populations, will need to be accounted for. The states that are most vulnerable are suffering the consequences of the actions of larger, developed states, while the latter continue to profit. If these industrialized states are not held accountable for their actions, they will continue to pursue profit over sustainability, forfeiting the wellbeing of those less fortunate until the "tipping point" is reached, and they too will have to endure what is seeming increasingly inevitable.

It is necessary, both for the global climate, as well as the states that are slowly sinking, for the states responsible to cease their behavior. Furthermore, insofar as the states that are experiencing the immediate effects of rising sea levels, their populations must be relocated, and their international legitimacy must be established. While the law as it stands is painfully ill equipped to deal with these issues given the unprecedented nature of this phenomenon, there is no legal precedent that indicates a suitable international response. Current legislative efforts to advance international cooperation in the fight against climate change, such as the Paris Climate Agreement, have been hampered by their unenforceable nature. However, the future of international climate change legislation lies in the space between human rights and the environment. It depends upon states' recognizing and being

[123] Jane McAdam, *Caught Between Homelands*, INSIDE STORY (Mar. 15, 2003), http://insidestory.org.au/caught-between-homelands/.

held accountable for their mistakes, as well as being proactive in extending support to those that they have harmed. This future can be seen in the actions and initiative of Fiji; while by no means a significant emitter of greenhouse gases, it felt compelled to help its neighbor, refusing to abandon it to the mercy of the sea.

The Fourth Amendment and its Applicability to Internet Cookies

Elizabeth A. Sheppard

Introduction: Digital Privacy Protection

In today's digital times, the concept of private information becomes blurred. Technological advancements have raised a plethora of privacy concerns, especially in regard to the Fourth Amendment. Within the last two decades, the Supreme Court decided several cases concerning these digital privacy implications. In 2018, the Supreme Court determined that acquiring cell-site location information from wireless carriers without a warrant constituted a search under the Fourth Amendment and invaded the realistic expectation of privacy of physical movements.[1] In 2014, the Court found that cell phone searches typically require a warrant.[2] Extending this line of reasoning, governmental acquisition of internet cookies should constitute a search under the Fourth Amendment and thus require a warrant. As digitization of everyday life increases, the Fourth Amendment should protect digital effects, especially internet cookies.

Internet cookies track an individual's internet activity on specific websites and across the internet, often used in internet advertising to "store website preferences, retain the contents of shopping carts between visits, and keep browsers logged into social networking services and webmail as individuals surf the internet."[3] Cookies work by downloading on to the internet-user's computer hardware from which the cookies subsequently track the user's browsing history.[4]

1 *Carpenter v. United States*, 138. S. Ct. 2206, at 2220 (2018).
2 *Riley v. California* 573 U.S. 373, at 403 (2014).
3 *Google Inc. Cookie Placement Consumer Privacy Litig.*, 988 F. Supp. 2d, 439, at 440 (D. Del 2013, filed).
4 *DoubleClick Privacy Litig.*, 154 F. Supp. 2d, 497, at 502 (S.D.N.Y. 2001, filed).

Existing statutes lack the nuance required to effectively regulate the privacy issues that arise in relation to internet cookies. Currently, individuals' internet-browsing data is primarily protected by federal and state laws, not by any established constitutional principles, because private corporations usually own the data in question. However, corporations are required to comply with their published privacy practices, provide adequate security of personal, including digital, information and avoid deceptive advertising or marketing methods.[5] Several statutes, including the Electronic Communications Privacy Act (ECPA) and the Stored Communications Act lack the nuance required to address cookie protection and enable companies to share data obtained through cookies should they choose to do so.

Some states have taken on this failure and adopted their own consumer protections that are sufficiently broad as to include cookies. Massachusetts, for example, has strong data protection regulations that state:

> Every holder maintaining personal data shall:– I not allow any other agency or individual not employed by the holder to have access to personal data unless such access is authorized by statute or regulations which are consistent with the purposes of this chapter or is approved by the data subject whose personal data are sought if the data subject is entitled to access under clause (i).[6]

The vagueness of this law enables it to include cookies and protect individuals from having cookie-acquired data shared without their permission. Similarly, California's Consumer Privacy Act (CCPA) requires companies who retain personal information about individuals to delete it upon request of that individual.[7] This law, passed in 2018, specifically deals with unique identifiers, including cookies.[8] While the Electronic Communications Privacy Act is also specific, it was not written in such a way as to include cookies, and this specificity enables courts to determine its inapplicability to cookies.

The lack of nuance within federal data-regulation statutes fail to address the privacy concerns raised regarding internet cookies. However, these privacy concerns may be addressed by the protections afforded by the Fourth Amendment. Supreme Court precedents regarding various types of technological data, particularly cell-site location information (CSLI) and cell phone data, should be applied to internet cookies to sufficiently protect individuals from violations of digital privacy.

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5 15 U.S.C. 41.; *Google Inc.* 988 F. Supp. 2d, at 445.
6 Mass. Gen. Laws ch.66 § 2 (2019).
7 Cal SB 1121 § 1789.105 (2018).
8 Cal SB 1121 § 1789.140.

While federal acts fail to adequately protect consumers' privacy regarding the usage of internet cookies, *Carpenter v. United States* and *Riley v. California* indicate that despite the failure of these acts, there may be a way to interpret the Constitution to protect consumers– apply Justice Roberts's interpretation of the Fourth Amendment in *Carpenter* and *Riley* to internet cookies. The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[9]

Historically, the Court has cited this amendment as an indication of the right to privacy.[10] For example, in *Griswold v. Connecticut,* Justice Douglas wrote the majority opinion, stating, "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance… Various guarantees create zones of privacy."[11]

Additionally, the Supreme Court has found that an expectation of privacy exists.[12] Importantly, the Court recognized that while "the Constitution does not explicitly mention any right of privacy...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[13] Similarly, the decision in *Lawrence v. Texas* further expanded privacy protection to sexual activity between consenting adults.[14] Here, the Court established that various constitutional guarantees provide for "zones of privacy" including the First, Third, Fourth, Fifth and Ninth Amendments. While the majority opinion in *Lawrence* dismisses an outright "constitutional right to privacy," it still helps to build the foundations for an expectation of privacy that is protected in some way by the Constitution.

Beyond these foundational cases concerning privacy, more recent cases have addressed the intersection between privacy, technology, and the Fourth Amendment. The 2001 case *Kyllo v. United States* determined the unconstitutionality of the warrantless usage of thermal-

[9] U.S. Constitution, Amend. IV.
10 *Griswold* v. *Connecticut,* 381 U. S. at 479 (1965).
[11] *Griswold,* 381 U. S. at 484.
12 *Byrd v. United States* 138 S. Ct. 1518, at 1531 (2018).
13 *Roe* v. *Wade,* 410 U. S. 113, at 152 (1973).
14 *Lawrence* v. *Texas,* 539 U. S. 558 (2003).

imaging on Kyllo's home by agents of the Department of the Interior.[15] Importantly, this case relied on the fact that thermal imaging shared details "that would previously have been unknowable without physical intrusion," thus classifying its usage as a "search."[16] In a later decision, the Court in *Riley* decided the applicability of Fourth Amendment protections to cell phones, heavily leaning on the pervasiveness and consistency of cell phones in our daily lives.[17] *Riley* especially highlights elements of cellular data that justify its protection under the Fourth Amendment.

I. *Riley* and its Applicability to Cookies

The decision in *Riley* examined the intersectionality of Fourth Amendment protections and cell phone searches in the digital age.[18] In his majority opinion, Chief Justice Roberts presents various reasons that cell phone searches, without a warrant, violate Fourth Amendment protections. Following the justification penned by Chief Justice Roberts in this decision, internet cookies should be protected from warrantless searches.

The decision in *Riley* examined two cases from lower courts, both concerning the same issue: "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."[19] In the first case, David Riley was stopped by a police for driving with an expired registration, after which the officer learned Riley's license had been suspended. Subsequently, per department policy, Riley's vehicle was seized, and Riley as arrested for possession of concealed and loaded firearms the police found in the apprehended vehicle. When Riley was searched at the arrest, an officer took Riley's cell phone from his pants, accessed information the phone and discovered contacts indicating Riley had connections to a local gang. On the phone, the police discovered photos of Riley was a car suspected of involvement in a shooting. Consequently, Riley was charged in connection with said shooting on multiple charges.[20] Before trial, Riley attempted to suppress the evidence collected form his cell phone, claiming that the search was performed

[15] *Kyllo v. United States,* 533 U.S. 27, at 40 (2001).
[16] *Kyllo,* 533 U.S. at 40.
[17] *Riley,* 573 U.S. 373, at 403 (2014).
[18] *Id.* at 378.
[19] *Id.*
[20] *Riley,* 573 U.S. at 379.

without a warrant and not justified by exigent circumstances, thus violating his Fourth Amendment rights. Ultimately, the Court found in his favor.[21]

In the second case, police witnessed Brima Wurie conduct an apparent drug deal from his car, leading to his arrest. The police subsequently searched his cell phone and used frequent phone calls to determine Wurie's address, receive a search warrant, and subsequently search his apartment, where they found various illegal drugs.[22] Wurie moved to dismiss the evidence, arguing that it was obtained via a search that violated his Fourth Amendment Rights.[23] The Court found in Wurie's favor.[24]

The decision importantly acknowledges the implicate complex privacy concerns raised by modern cell phones, stating that "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[25] Likewise, internet cookies are intrinsically more complex than material items possessed by any given individual.

Critically, the Court cites the pervasiveness of cellular information, noting that

> there is an element of pervasiveness that characterizes cell phones but not physical objects. Prior to the digital age, people did not typical carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception.[26]

Cookies also possess an element of pervasiveness that is not characteristic of physical records– their constant, consistent, and meticulous record keeping. Certain cookies "can stay on a device for months or years and may be used to help a website identify a unique browser returning to the site," during which they track the computer user's history and preferences.[27]

Cookie-compiled data, like the information on cellphones, is pervasive in a way that is unfathomable when thought of in terms of physical objects. This pervasiveness is illustrated through a decision from the United States District Court for the Northern District of California, which described cookies usage as follows:

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[21] *Id.*
[22] *Id.* at 380.
[23] *Id.* at 381.
[24] *Id.* at 403.
[25] *Id.* at 393.
[26] *Id.* at 394.
[27] *Mount v. PulsePoint, Inc.,* 2016 U.S. Dist. LEXIS 112315, at 4 (S.D.N.Y. 2016).

> When an individual using a web browser contacts a server - often represented by a particular webpage or internet address - the browser software checks to see if that server has previously set any cookies on the individual's computer. Id. at ¶ 39. If the server recognizes any valid, unexpired cookies, then the computer "sends" those cookies to the server. Id. at ¶ 39. After examining the information stored in the cookie, the server knows if it is interacting with a computer with which it has interacted before. Id. at ¶ 41. Since servers create database records that correspond to individuals, sessions and browsers, the server can locate the database record that corresponds to the individual, session or browser using the information from the cookie.[28]

One additional explanation provided in the Court's decision in *Riley* concerns the "immense storage capacity" of modern cell phones.[29] Today's cell phones, the Court determined, "are not physically limited in the same way" as physical searches.[30] Moreover, cell phones have "the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, internet browsing history, a calendar, a thousand-entry phone book, and so on."[31]

Likewise, cookies have the ability to store many different types of information. Third-Party cookies, especially, have this ability. In an opinion by Judge Fuentes of the Third U.S. Court of Appeals, the different data collected by cookies is well explained. The opinion explains:

> An Internet "cookie" is a small text file that a web server places on a user's computing device. Cookies allow a website to "remember" information about a user's browsing activities (such as whether or not the user is logged-in, or what specific pages the user has visited). We can distinguish between first-party cookies, which are injected into a user's computer by a website that the user chooses to visit (*e.g.*, Nick.com), and third-party cookies, which are placed on a user's computer by a server other than the one that a person intends to visit (*e.g.*, by an ad company like Google). Advertising companies use third-party cookies to help them target advertisements more effectively at customers who might be interested in buying a particular product. Cookies are particularly powerful if the same company hosts ads on more than one website. In those circumstances, advertising companies are able to follow a user's browsing habits across multiple websites that host the company's ads.[32]

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[28] *In re Facebook Internet Tracking Litig.* 140 F. Supp. 3d 922, at 96 (N.D. Cal. 2015).
[29] *Supra* note 25.
[30] *Id.*
[31] *Id.*
[32] In Re. Nickelodeon Consumer Privacy Litig. 827 F 3d 262, at 268 (2016).

Additionally, a parallel appears regarding the intimacy of information held in cellular and cookie-compiled data. In *Riley,* the Court relied in part on the intimate nature of cellular data to justify their decision. The majority opinion states: "An internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns– perhaps a search for certain symptoms of disease, couples with frequent visits to WebMD."[33] This finding conveys an expectation of privacy regarding medical information, even when using services such as WebMD. If cell phones require a warrant in part due to the intimate health-related information potentially possessed by these devices, cookies too should require a warrant before searches.

WebMD itself uses cookies in its regular operations, stating per its cookie policy that "every computer that accesses a WebMD Site is assigned a different cookie by WebMD," and that

> When you use the Services, we also automatically collect information from your browser or mobile device such as your IP address or unique device identifier, browser information (including referring URL), your preferences and settings, cookies and information about the content you have viewed and actions taken (e.g., search queries, ad engagements, clicks and the associated dates and times).[34]

Similarly, the Court's decision in *Riley* explained that

> Mobile application software on a cell phone, or 'apps' offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps or alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps or planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life.[35]

This justification too inadvertently highlights a similarity between cookies and cellular devices. Certain cookies, known as "persistent cookies, commonly called 'tracking cookies,' are designed to remain after the user moves on to a different website or even after the browser is closed."[36] Undoubtedly, just as there exist mobile applications for "every conceivable hobby," there are websites for almost every hobby as well.[37] Persistent cookies

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[33] *Riley,* 573 U.S. at 395.

[34] WebMD Cookie Policy, (31 Mar. 2020, 6:45 PM.) https://www.webmd.com/about-webmd-policies/cookie-policy.

[35] *Supra* note 33.

[36] *Mount.,* 2016 U.S. Dist. LEXIS, at 4.

[37] *Supra* note 33.

can track an individual across these websites. Using one of the specific examples provided by the Court also acts as an example for the intimacy tracked by cookies. Just as there are "apps for improving your romantic life," there are websites and programs that track internet users whilst they use programs aimed at improving their romantic lives. The popular dating app Tinder acknowledges in their privacy policy that cookies track users within their application by stating that "a cookie also may contain information about your device, such as user settings, browsing history and activities conducted while using [Tinder's] services."[38] Tinder's policy also acknowledges that the company collects information, including "how you interact with other users (e.g., users you connect and interact with time and date of you exchanges, number of messages you send and receive.)[39] The intimate details tracked by cookies yet again make this data comparable to that of cellular data. Using the example of Tinder, warrantless acquisition of cookies could enable the government to learn intimate details about numerous application users, as well as their intimate partners, view messages between them, and even acquire data about unsuccessful courtships. The intimate details held by cookie-tracking programs should thus be protected from warrantless searches, because the Court used the intimate details held by cellular devices to justify their decision in *Riley*.

Riley highlights the similarities between data found on a cell phone and data acquired by internet-cookies. Notably, both types of data are pervasive and capable of possessing intimate data about users. Furthermore, both cell phones and cookies compile data in large quantities, which the majority opinion used to justify its decision in *Riley*.[40] The opinion in *Riley* suggests that government procurement of internet cookies should be considered a search under the Fourth Amendment and as such deserves the protections afforded by this amendment.

II. *Carpenter* and its Applicability to Cookies

While *Riley* provides significant indication that cookie acquisition should require a warrant, *Carpenter* further demonstrates this conviction. In *Carpenter,* the majority used the right to privacy to hold that the government's acquisition of appellant Carpenter's location

[38] Cookie Policy (30 Mar. 2020, 8:38 PM) gotinder.com/cookie-policy.

[39] Privacy Policy (30 Mar. 2020, 8:45 PM) https://www.gotinder.com/privacy?locale=en#cookie-and-similar-tech.

[40] *Supra* note 25.

through cell-site location information (CSLI) violated Carpenter's Fourth Amendment protections. Likewise, the Court's decision in *Carpenter* should apply to internet cookies.

Carpenter revolved around the constitutionality of an FBI search of plaintiff Timothy Carpenter's cell-site location information conducted after the FBI identified Carpenter as a suspect in several robberies.[41] The FBI used this location-data to show at trial that Carpenter was at four robbery locations at the time of the robberies. Both the District Court and the Sixth Circuit Court of Appeals denied Carpenter's motion that his Fourth Amendment rights had been violated, "holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers." The Supreme Court reversed the lower court's decision, finding in favor of Carpenter and confirming that his Fourth Amendment right to privacy had indeed been violated, despite that the private information being held by a third party.

Importantly, the Court quoted *Riley,* focusing on the necessity of cell phones in today's society, calling them "almost a 'feature of human anatomy."[42] Likewise, internet cookies track human users' digital locations constantly, partially because of the prevalence of these cellular devises. Popular applications, including Instagram and Facebook use cookies on mobile devices.[43] Other websites, in a mobile browser, also require the acceptance of cookies, such as SCOTUSblog.org, which states, "This website may use cookies to improve your experience. We'll assume you're ok with this, but you can leave if you wish."[44] While in theory, individuals could opt out of these programs, modern society requires the usage of at least some websites, most of whom collect cookies. Government websites also collect cookies, including the Department of Justice and the FBI, whose websites state, respectively, "you can still use Department websites if you do not accept the cookies, but you may be unable to use certain cookie-dependent features" and "you can still use our website if you do not accept the cookies, but you may be unable to use certain cookie-dependent features."[45]

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41 *Carpenter,* 138 *S*. Ct. at 2212.

42 *Id.* at 2218.

43 Instagram Privacy Policy (Jan. 25, 2020, 8:18 PM) https://help.instagram.com/1896641480634370?ref=ig. ; Facebook Privacy Policy (Jan. 25, 2020, 8:18 PM) https://www.facebook.com/policy.php.

44 SCOTUSblog.org (Jan. 25, 2020, 8:10 PM) https://www.scotusblog.com/app-support/.

45 Privacy Policy, Department of Justice (Mar. 31, 2020, 11:26 AM) https://www.justice.gov/doj/privacy-policy; Privacy Policy, Federal Bureau of Investigation (Mar. 31, 2020, 11:27 AM) https://www.fbi.gov/privacy_policy.

The Court has not established that *Carpenter* does not apply to internet cookies, leaving the regulations around cookie access blurry. Cookies do not constitute electronic storage because cookies reside on individuals' hard drives long-term and are thus not entitled to the same regulations as electronic storage.[46] *Carpenter,* however, found that cell-site location information acquisition violated the right to privacy even though this data is permanent and remains with companies for five years.[47] The permanence of CSLI enabled the Court to classify the acquisition of data as a search. As such, cookies too should be subject to the same restraints.

In theory, the Electronic Communications Privacy Act (ECPA) should protect individuals from internet cookie surveillance. The ECPA protects "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter."[48] This act should therefore protect the communications of individuals, but *DoubleClick* and *Google Inc. Cookie Placement* both demonstrate how the definition of what constitutes "electronic storage" and "electronic communication" limits what falls under this act. Critically, while these cases distinguish cookies from electronic communication, they also present the similarities between cookies and the cell-site location information dealt with in *Carpenter*.

For example, each of these cases distinguishes the terms "user" and "provider" in such a way as to render websites the "users" while categorizing cookies as a service "used" by these sites. In *DoubleClick,* the court discussed the application of Title II of the Electronic Communication Privacy Act to Cookies.[49] Title II defines violations of the ECPA as

> whoever (1) intentionally accesses without authorization a facility through which an electronic information service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains. . . access to a wire or electronic communication while it is in electronic storage in such system shall be punished.[50]

The plaintiffs alleged that DoubleClick, a corporation that collects internet cookies, violated this title by placing cookies on the plaintiff's hard drives. DoubleClick claimed that the user's opted into sites that used their cookie technology, thus falling under the exceptions laid out

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[46] *DoubleClick,* 154 F. Supp. 2d, at 511.
[47] *Carpenter*, 138 S. Ct. at 2210.
48 18 USC § 2520(a).
[49] *DoubleClick,* 154 F. Supp. 2d, at 507.
[50] Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2523.

in Title II of the ECPA.[51] Essentially, the Court found that the ECPA did not protect the plaintiffs, because they were not considered "users" under the ECPA, stating:

> The ECPA defines a "user" as "any person or entity who (A) uses an electronic communication service; and (B) is duly authorized by the provider of such service to engage in such use." 18 U.S.C. § 2510 (13). On first reading, the Double-Click-affiliated Web sites appear to be users -- they are (1) "entities" that (2) use Internet access and (3) are authorized to use Internet access by the ISPs to which they subscribe. However, plaintiffs make two arguments that Web sites nevertheless are not users. Both are unpersuasive.[52]

Here the court dismisses the notion that people who use the internet are "users" and instead qualifies the cookie-enabled websites as "users" in terms of ECPA protection. In relation to *Carpenter,* this interpretation would consider Carpenter's cell phone the "user" of CSLI technology, instead of Carpenter.

In a similar fashion, *Google Inc. Cookie Placement* again brought up the issues surrounding the term "user" in the context of internet cookies and privacy violations. The plaintiffs in this case alleged that Google Inc., Vibrant Media, Inc., Media Innovation Group LLC, WPPP and PointRoll Inc. "tricked" the defendants' internet browsers into accepting cookies in order to disseminate targeted advertising.[53] Yet again, the court dismissed the claim. While this decision did not revolve around constitutional privacy principles, it highlighted the similarities between CSLI and cookies that suggest the Fourth Amendment could apply to cookies as well as CSLI.

In this decision, the similarities between Google features that use cookies and CSLI in *Carpenter* are evident. A significant similarity between CSLI and cookies is the infallibility of the two tracking programs. In *Carpenter,* one of the reasons provided by Justice Roberts in favor of classifying CSLI data acquisition as a search and seizure was that "Unlike the nosy neighbor who keeps an eye on comings and goings, they [telephone companies] are ever alert, and their memory in nearly infallible."[54] With this phrasing, the Court confirmed that the exhaustive procurement of data by cell phone companies enables the data they collect to be protected under the Fourth Amendment. Likewise, the court in DoubleClick explained the steps taken by DoubleClick's cookie programming, which "aggregates and compiles the

[51] *DoubleClick,* 154 F. Supp. 2d, at 508.
[52] *Id.* at 508-509.
[53] *Google Inc. Cookie Placement,* 988 F. Supp. 2d, at 439.
[54] *Carpenter,* 138 S. Ct. at 2219.

information to build demographic profiles of users."[55] Comparably, the court in *Google Inc. Cookie Placement* explained that

> cookies are used by advertising companies to help create detailed profiles on individuals, including, but not limited to an individual's unique ID number, IP address, browser, screen resolution, and a history of all websites visited within the ad network by recording *every communication request* [emphasis added] by that browser to sites that are participating in the ad network.[56]

The exhaustive chronicle of information collected by CSLI is similar to that of cookies. While CSLI tracks the physical movements of individuals, cookies, as noted by the court in *Google Inc. Cookie Placement,* track *every communication request* sent from an individual's browser, such as Safari, Google Chrome or Firefox. In District Judge Robinson's opinion in *Google Inc. Cookie Placement,* she explained the technological process of how cookies function:

> Every document has a unique 'URL' (Universal Resource Locator) that identifies its physical location in the Internet's infrastructure." (D.I. 46 at ¶ 10 n.1) When a user requests a website, "the user's Safari browser starts by sending a GET request to the server which hosts the publisher's webpage," to retrieve the data for display on the user's monitor. (*Id.* at ¶ 85) ... Upon receiving a GET request from a user seeking to display a particular webpage, the server for that webpage will respond to the browser, instructing the browser to send a GET request to the third-party company charged with serving the advertisements for that particular webpage. The third party receives the GET request and a copy of the user's request to the first-party website and responds by sending the advertisement to the user's browser which displays it on the user's device. (*Id.* at ¶ 41).[57]

Judge Robinson used the term "user" to indicate the subject who set the GET request, in this case, the internet browser. Just as CSLI data is effortlessly compiled by phone companies, cookies enable browsers and advertising companies to effortless compile data as well.

Furthermore, in *Carpenter*, Justice Roberts explained that, in contrast to GPS locators in cars, "A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales."[58] Equally, cookies on laptops and phones can follow individuals onto their doctors' offices' websites, personal email servers, or any other cookie-enabled websites.

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[55] *DoubleClick,* 154 F. Supp. 2d, at 504.
[56] *In re Google Inc.,* 806 F.3d 125, at 131 (2015).
[57] *Google Inc. Cookie Placement,* 988 F. Supp. 2d, at 440.
[58] *Carpenter,* 138 S. Ct. at 2218.

Even more similarities arise between cookies and CSLI regarding the actions of the individuals being tracked. In *Carpenter,* the Court found that Fourth Amendment rights protect CSLI data because "a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up."[59] Likewise, in Judge Buchwald's decision in *DoubleClick,* she wrote "DoubleClick's targeted advertising process is invisible to the user. His experience consists simply of requesting the Lycos.com homepage [a DoubleClick affiliate that uses cookies] and, several moments later, receiving it complete with banner advertisements."[60] She continued, "DoubleClick places GIF tags on its affiliated Web sites. GIF tags are the size of a single pixel and are invisible to users. Unseen, they record the users' movements throughout the affiliated Web site, enabling DoubleClick to learn what information the user sought and viewed."[61] Judge Buchwald's decision evidently highlights the similarities between CSLI and cookie data acquisitions. Neither require affirmative action on the part of the individual being tracked.

Furthermore, in *Google Inc. Cookie Placement,* the court interpreted the Stored Communications Act in such a manner as to exclude cookies from its application. Although the court acknowledged that "the SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the *Fourth Amendment* does not address," it went on to decide that cookies did not fall under this act by determining that "if now the 'facility is an individual's own personal computer that 'provides' the electronic communication service, then 'the website is a 'user' of the communication."[62] Thus, the court decided that the SCA did not protect individuals from having their personal data collected by cookies. Nevertheless, the CSLI addressed in *Carpenter* would also fall under this categorization of "user" and "provider" as the phone Carpenter possessed was "using" the CSLI technology. Nevertheless, the Court used the Fourth Amendment to protect Carpenter's CSLI data and thus this Amendment should protect individuals' cookie data as well.

A. The Third-Party Doctrine and the Exceptionality of Cookies

The Third-Party Doctrine adds complexity to the discussion of privacy concerns and internet cookies. However, *Carpenter* provides insight into how the Third-Party Doctrine

[59] *Id.* at 2210.
[60] *Supra* note 55.
[61] *Id.*
[62] *Google Inc. Cookie Placement,* 988 F. Supp. 2d, at 446.

could be applied in cases of this sort. This doctrine indicates that an individual reduces their expectation of privacy if they knowingly share information with another party.[63] The Court found in *Carpenter,* that although the cell-site location information was contractually shared with a third party, the cellular phone company, Carpenter's location was "detailed, cyclopedic and effortlessly compiled," which partially mitigated the Third Party Doctrine.[64]

The Court went on to decide "there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller"* which invoked the third party doctrine, "and the exhaustive chronicle of location information casually collected by wireless carriers."[65] The Court continued that cell phone ownership is a "daily part of life" and thus not easily opted out of. Writing for the majority in *Carpenter, Chief* Justice Roberts acknowledged:

> Nor does the second rationale for the third-party doctrine--voluntary exposure--hold up when it comes to CSLI. Cell phone location information is not truly 'shared' as the term is normally understood. First, cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430.[66]

Here, the Court introduces a new concept that circumvents the Third-Party Doctrine: that of a "daily part of life." Even though cell-site location information is owned by companies, the consumers still expect and possess certain rights regardless of the Third Party Doctrine.[67] Given that the Court determined Carpenter's phone is indispensable in today's world, the usage of cooking-collecting sites should be considered equally indispensable. Carpenter's rights were violated, according to the Court, because

> Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[68]

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[63] *United States v. Miller* 425 U.S. 435 (1976).
[64] *Carpenter,* 138 S. Ct. at 2209.
[65] *Id.* at 2210.
[66] *Id.* at 2220.
[67] *Id.* at 2220.
[68] *Id.* at 2217.

In this statement, the Court acknowledged that the Third-Party Doctrine had exceptions, notably that individuals maintain "a legitimate expectation of privacy" from the government.

These determined exceptions to the Third-Party Doctrine should apply to data collected via cookies as cookie-enabled websites are integrated into today's society, just like a cell phone. Technology and the internet dominate daily life. Prominent examples include the use of Apple and Google products and platforms. The importance of the issue of privacy and cookies is demonstrated through these two corporations in particular.

Google's privacy policy for example, states "We use various technologies to collect and store information, including cookies, pixel tags, local storage, such as browser web storage or application data caches, databases, and server logs."[69] The company goes on to define cookies as

> A cookie is a small file containing a string of characters that is sent to your computer when you visit a website. When you visit the site again, the cookie allows that site to recognize your browser. Cookies may store user preferences and other information. You can configure your browser to refuse all cookies or to indicate when a cookie is being sent. However, some website features or services may not function properly without cookies.[70]

Google notes that some services may not function without the acceptance of cookies. Essentially, Google requires users to accept cookies in order to gain access to features such as email and word processors.[71] Often, individuals are required to use these features for their employment and some employers create Google affiliated accounts for all employees. These programs, like cell phones, are a "daily part of life." No student in higher education can succeed in their institution without visiting cookie-affiliated websites. Educational institutions, governments, employers, and companies often require the usage of certain websites and platforms, such as Google's Gmail, that typically require site-goers to accept cookies in order to use them. If cell phones are "indispensable," the Court should consider cookie-affiliated websites indispensable as well.

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[69] Google Privacy & Terms, (Jan. 5, 2020, 8:18 PM) https://policies.google.com/privacy?hl=en-US.

[70] *Id.*

[71] Google Privacy & Terms, Your Privacy Controls, (Jan. 5, 2020, 8:18 PM) https://policies.google.com/privacy?hl=en-US

In fact, one of the only exceptions to this required cookie-acceptance is the California Consumer Privacy Law. It is unique in that it states:

> (1) A business shall not discriminate against a consumer because the consumer exercised any of the consumer's rights under this title, including, but not limited to, by: (a) Denying goods or services to the consumer. (b) Charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties. (c) Providing a different level or quality of goods or services to the consumer. (d) Suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services. (2) Nothing in this subdivision prohibits a business from charging a consumer a different price or rate, or from providing a different level or quality of goods or services to the consumer, if that difference is reasonably related to the value provided to the consumer by the consumer's data.[72]

In this section of the CCPA, individual users not only have the right to opt-out of tracking and request that their person information be deleted, but also retain the right to use goods and services after they opt-out of data collection. Yet again, this protection only exits state-wide, highlighting the need for federal level protection.

Indeed, Google, according their policy, "will share personal information outside of Google if [they] have a good-faith belief that access, use, preservation, or disclosure of the information is reasonably necessary to: Meet any applicable law, regulation, legal process, or enforceable governmental request. We share information about the number and type of requests we receive from governments in our Transparency Report."[73] This "good faith" element enables Google to share individuals' information without their consent, simply because the individual used Google's services. Google further states "We review each request we receive to make sure it satisfies applicable legal requirements and Google's policies. If we feel that a request is overly broad—asking for too much information given the circumstances—we seek to narrow it. In certain cases, we'll push back regardless of whether the user decides to challenge it legally."[74] Yet again, the privacy of individuals is in the hands of Google. A warrant requirement would provide a clearer standard. Justice Roberts wrote for the majority in *Carpenter* that, "If the choice to proceed by subpoena

[72] Cal SB 1121 § 1798.125.

[73] *Supra* note 69.

[74] Google Transparency Report, (Jan. 5, 2020, 8:25 PM) https://transparencyreport.google.com/?hl=en.

provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement."[75]

Similarly, Apple essentially will not, according to its privacy policy, release information without a subpoena.[76] However, as a corporation, Apple chooses whether or not to share this information. The choice is not that of the individual using Apple's products. Google requires a subpoena for Gmail contents and "other services," citing the Fourth Amendment's prohibition on unreasonable search and seizures.[77] If *Carpenter* was applied to cookies, these companies would not be allowed to share the private information collected via cookies without a warrant, in most, but not all cases. The decision to share the data without a warrant would not be the choice of the corporations that hold this data and the privacy of individuals and their data would be protected.

Exceptionally, the majority opinion in *Carpenter* provides situations in which CSLI data could be searched without a warrant, including "the need to pursue a fleeting suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence."[78] Correspondingly, each of these warrant exceptions should exist for the acquisition of cookies as well. In *Carpenter,* the Court established that "fact-specific threats will likely justify the warrantless collection of CSLI."[79] Following this determination, certain situations of cookie acquisitions could be constitutional without a warrant, assuming the situation meets the criteria set out in *Carpenter.*

Conclusion

The cell-site location information data protections established in *Carpenter* should in turn protect data collected by cookies. The lack of federal policy regulating cookies indicates a statutory failure to protect individuals' data. The Electronic Communications Privacy Act and the Stored Communication Act both aimed at protecting individuals' personal information, fail to do so when internet cookies collect this data. Cookies, as indicated by the Google privacy and transparency policies, determine whether or not specific services function, and these services are ever prevalent in modern society.[80] Fortunately, the

[75] *Carpenter,* 138 S. Ct. at 2222.
[76] Apple, Privacy Policy (Jan. 5, 2020, 8:26 PM) https://www.apple.com/legal/privacy/en-ww/.
[77] *Supra* note 74; *Supra* note 69.
[78] *Carpenter,* 138 S. Ct. at 2223.
[79] *Id.*
[80] *Supra* note 74; *Supra* note 69.

precedents established in *Riley* and *Carpenter* indicate that the data acquired by cookies should be protected under the Fourth Amendment.

Cell-site location information and internet cookies share several characteristics that lessen the power of the Third-Party Doctrine. Both of these data collectors contain voluminous and nearly infallible memory, unlike a "nosy neighbor."[81]

Furthermore, the decision in *Carpenter* determined the inapplicability of the Third Party Doctrine because cellphones are "such a pervasive and insistent part of daily life" that the Third Party Doctrine does not supersede privacy rights.[82] Likewise, internet usage, including that of websites that use cookies, should be considered a "pervasive and insistent part of daily life," as nearly every profession requires the usage of some of these tools.

Moreover, in *Carpenter* the Court recognized that "cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up."[83] Cookies operate in a similar fashion. The individual browsing the internet does not take any affirmative action other than opening a website, and the cookie programing downloads to their hard drive without any affirmative act by the user.[84] Thus, cookies should be subject to the same standard as cell-site location information.

Using the rulings in *Carpenter* and *Riley* as a standard, the government should need a warrant in order to seize individual's internet cookie history, subject to certain limitations. Just as cell phone users are constitutionally protected under the Fourth Amendment from government seizure of their cell-site location information from their wireless carriers and from warrantless searches of their cell phones, internet users should be afforded the same protection.

In modern society, digital life and physical life are inherently connected. Without applying *Carpenter* to the acquisition of internet cookies, intimate details about what individuals search, buy, write, or watch on the internet could be shared with the government, subject only to the privacy policies of the companies that possess this data. If individuals in today's world are to be protected under the Fourth Amendment, the standards set in *Carpenter* and *Riley* must be applied to internet cookies.

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81 *Carpenter,* 138 S. Ct. at 2219.
82 *Id.* at 2220.
83 *Id.*
84 *Supra* note 55.