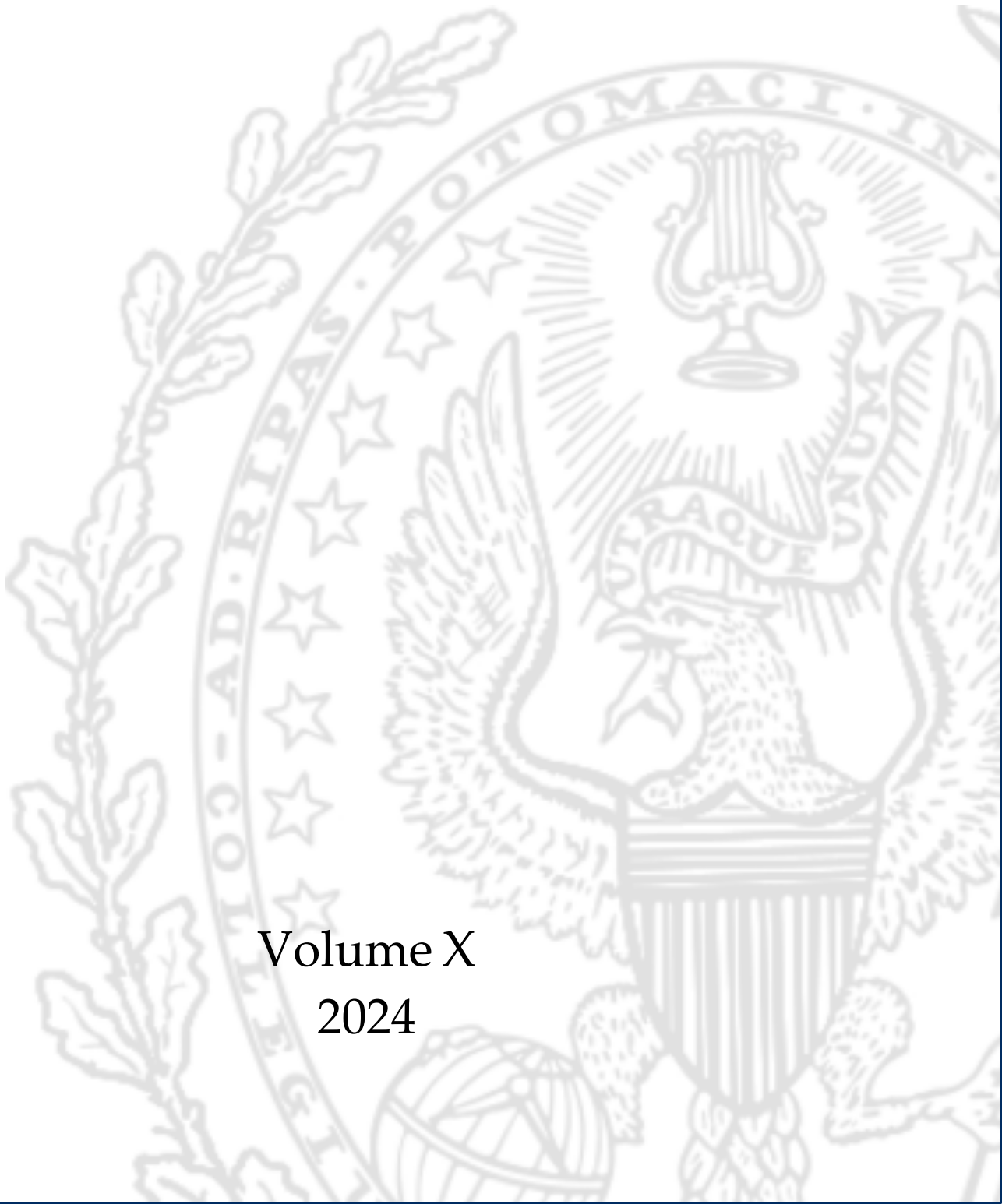
Georgetown University Undergraduate Law Review



Volume X
2024

Letter from the Editor

Dear Reader,

I am delighted to present Volume X of the Georgetown University Undergraduate Law Review (GUULR), the culmination of an extensive editorial process that rigorously reviewed both graduate and undergraduate submissions. This year, we received a record number of submissions, and as a result of the remarkable volume and quantity of submissions, Volume X is the largest GUULR publication to date.

Authors in this edition wonderfully uphold GUULR's tradition of showcasing diverse topics in their work. This edition includes articles which explore timely issues such as the illegality of legacy admissions and the complex relationships between tribal communities, sovereignty, and gaming operations. They take on challenging questions regarding the First Amendment and when constrictions on speech are necessary. Others explore important issues of immigration, care, and American identity. Many authors in this volume ask readers to reflect on how our justice system functions—and whether it is a "just" system at all. Each article in Volume X moves beyond bare analysis, and pushes readers to connect the words on the page to our living world. These are truly remarkable achievements and I am humbled and grateful to each author for choosing to share their insights and talents with our team. I am further thankful to the authors for sharing with us their contributions and are grateful for their tireless dedication throughout the editing process.

I also owe much gratitude to each of GUULR's editors, who have invested countless hours in preparing the volume for publication—the volume is chiefly the product of your hard work, and without your efforts we would not have had the capacity to include many of the wonderful pieces of scholarship present in today's volume.

I invite you to immerse yourself in the thought-provoking content of Volume X. I trust that the diverse perspectives, critical analyses, and insightful discussions contained within will be both engaging and enlightening. Your feedback is invaluable to our team, and we encourage you to share your thoughts by reaching out to us at guundergraduatelawreview@gmail.com. I eagerly anticipate hearing from you and value your input as we continue to strive for excellence.

Sincerely,

Lindsey Gradowski

Editor-in-Chief

Georgetown University Undergraduate Law Review

Volume X, Issue I

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Constructing the American Melting Pot:
Immigration Policy, Racial Formation, and Ethnocultural Preservation

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Abstract

The United States is described as a "melting pot," where different identities 'melt together' into a diverse yet integrated society. True or not, this reputation is a product of centuries of immigration and integration of foreign-born individuals. Inherent to this legacy of inclusion, however, is a corresponding story of exclusion that has informed modern conceptions of race, ethnicity, and citizenship. This process is most evident in the 19th and 20th centuries when the U.S. developed its first comprehensive immigration policies. This article examines major immigration laws in this period, detailing their motivations and consequences, namely, the racial formation of different national and ethnic groups. This analysis reveals that U.S. immigration law has traditionally been a regime of exclusion, marked only by inclusion of non-white immigrants as sources of imported labor. That is, immigration policy has always responded to labor demands but often transcended its economic function for Anglo-Saxon ethnocultural preservation.

The Beginning: Chinese & Asian Exclusion

By 1852, four years after James Wilson Marshall found gold flakes in the American River, 67,000 people traveled to California seeking fortune.[1] Almost a third of these Gold Rush immigrants came from China to settle in western towns and work in mining camps. In the following decades, Chinese immigrants were employed as substitutes for slave labor and worked in low-paying industrial jobs like transcontinental railroad crews.[2] American citizens and European immigrants traditionally avoided these jobs but were forced to compete with the Chinese for work during the Great Depression of 1873. Chinese laborers soon outcompeted white men, as they were willing to work for lower wages in worse conditions. This created considerable anti-Chinese sentiment and set the stage for sixty years of Chinese exclusion.

This period of exclusion began with a series of state policies designed to mitigate the effects of labor competition but soon evolved into laws that limited the basic political rights of Chinese immigrants. For example, in 1850 California created a Foreign Miners' Tax that imposed a monthly tax of $20 on foreign-born miners working in the state[3]—a reasonable measure to protect domestic laborers. That same year, the California State Legislature also passed a bill prohibiting a "Black, or Mulatto person, or Indian... from [giving] evidence in favor of, or against a White man."[4] This law was upheld by the California Supreme Court in *People v. Hall*, a case in which three white men who were previously convicted of murdering a Chinese man were allowed to walk free because the testifying witness was Chinese. This law went far beyond regulating wage competition; it undermined the Sixth Amendment right to a fair trial for many non-white defendants and severely limited judicial remedy for anti-Asian violence in California. Thus, even the first laws concerning Chinese immigrants created distinctions of race, thereby allocating judicial power to the white class.

On the federal level, Chinese Exclusion began with the Chinese Exclusion Act of 1882, which prohibited all immigration of Chinese laborers for ten years.[5] While the bill was inherently protectionist, many of its supporters saw it as a means of racial and cultural preservation. For example, consider an 1882 issue of the Sacramento Daily Record Union that argues for the justification of Chinese exclusion. The authors stated that cheap Chinese labor will always undercut white labor, per the laws of political economy.[6] At the end of the column, they claim that the "Chinese cannot build up civilizations which we desire" and that "their exclusion is necessary to the settlement of California and the Pacific coast with Americans and maintenance of the Anglo-Saxon civilization." Evidently, supporters justified this bill on racial grounds, promoting not just the preservation of white labor but also preservation of Anglo-Saxon societies.

These sentiments are echoed in a number of congressional speeches opposing Chinese immigration. In an 1882 speech by Senator Miller of California, he remarks that the Chinese have "fixed" qualities that are incompatible with American democracy, claiming that 'Forty centuries of Chinese life has made the Chinaman what he is. An eternity of years

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[1]Ellen Terrell, *Chinese Americans and the Gold Rush,* The Library of Congress 28, 2021) https://blogs.loc.gov/inside_adams/2021/01/chinese-americans-gold-rush/.
[2]Peter Kwong, The New Chinatown, 13 (1998) Subsequent information on labor competition in this paragraph comes from the same source.
[3]California State Legislature, *Foreign Miner's License, Social History for Every Classroom*, SHEC: Resources for Teachers, https://shec.ashp.cuny.edu/items/show/1714.
[4]*People v. Hall*, 4 Cal. 399 (Cal. 1854)
[5]*An Act to Execute Certain Treaty Stipulations Relating to the Chinese, 47th Cong.* (1882).
[6]The Employment of Chinese, The Daily Record-Union (Sacramento), (1882), https://chroniclingamerica.loc.gov/lccn/sn82014381/1882-05-13/ed-1/seq-4/.

cannot make him such a man as the Anglo-Saxon."[7] Here, Miller presupposes unchangeable differences between races that emerged naturally throughout the course of human history. Similarly, Representative Maguire of California claims that he has "no prejudice against the Chinese people" but "[bases his] opposition upon [his] love for [the] Caucasian civilization."[8] Even more, in Miller's speech he expresses fears that Chinese immigrants will influence "impressionable" citizens, permanently altering the social and moral condition of the American people.[9] In an 1876 speech, Senator Mitchell of Oregon likewise remarks that "Pacific States and Territories [are] more likely to be trampled down, corrupted, and defiled by this species of immigration."[10] Looking beyond economic protectionism, these speeches frame the Chinese Exclusion Act as a tool to support ascriptive Americanism. They justify exclusion with racial and cultural claims of Chinese inferiority, thereby reinforcing the racial and historical identity of the white Anglo-Saxon majority.

In the years following the Chinese Exclusion Act, Congress passed additional immigration laws to strengthen Chinese exclusion. The 1888 Scott Act, for example, prohibited legally residing Chinese immigrants who left the United States from returning even if they obtained a "certificate of return" prior to their departure.[11] Consequently, 20,000 Chinese people who held these certificates were prohibited from re-entering the United States after leaving the country.[12] One of these individuals challenged the law in *Chae Chan Ping v. United States*, arguing that the certificates should be honored as contracts. In a unanimous decision penned by Justice Field, the Court upheld the law, citing the plenary power of Congress to legislate on issues of "national preservation," including immigration.[13] To emphasize the validity of the new immigration policy, Justice Field reiterated sentiments from California's constitutional convention, stating that "Chinese laborers had a baneful effect upon... public morals" and that "their immigration was... approaching an Oriental invasion... a menace to our civilization." This decision legitimized immigration laws that restrict racial or national groups on the grounds that their presence threatens the broadly defined concept of national preservation. It also solidified the extensive power of Congress over immigration policy and established the constitutionality of many exclusionary immigration laws to come.

The 1892 Geary Act likewise strengthened anti-Chinese immigration policy by extending the prohibitions of the 1882 Chinese Exclusion Act by an additional ten years and requiring all legally residing Chinese nationals to obtain a "certificate of residence."[14] According to the law, certificates were granted only if two white witnesses testified to an individual's immigration status, thereby further codifying differing political and judicial rights by race. Any Chinese laborer found without a certificate was arrested, deported, and in some cases subject to one year of hard labor. Three Chinese residents who were arrested for failing to obtain a certificate challenged the law in *Fong Yue Ting v. United States*.[15] Two of the petitioners arrived in the United States legally but failed to apply for a certificate, and the third was denied a license because his witnesses were Chinese, not white. The case made its way to the Supreme Court, where the petitioners alleged a violation of their Fifth Amendment due process rights. Justice Horace Gray upheld the law, again citing congressional

[7] *Chinese Immigration*, 47th Cong. 15 (1882) (Statement of Sen. Miller).
[8] The Chinese Highbinders, 53rd Cong. 2459-2531 (1893) (Statement of Rep. Maguire).
[9] Chinese Immigration, 47th Cong. 1483 (1882) (Statement of Sen. Miller).
[10] Immigration of Chinese, 44th Cong. 3099 (1876) (Statement of Sen. Mitchell)
[11] An act to execute certain treaty stipulations relating to the Chinese of 1882, H.R. 71, 47th Cong. (1882).
[12] The Immigration and Ethnic History Society, *Chae Chan Ping v. United States (1889)* (Aug. 1, 2019), https://immigrationhistory.org/item/chae-chan-ping-v-united-states-1889-aka-the-chinese-exclusion-case/.
[13] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
[14] An Act to Prohibit the Coming of Chinese Persons into the United States of 1892, H.R. ?, 52nd Cong. (1892).
[15] Fong Yue Ting v. United States, 149 U.S. 698 (1893). Subsequent information on *Fong Yue Ting* in this paragraph comes from the same source.

authority over immigration policy. However, there is a crucial difference between *Chae Chan Ping* and *Fong Yue Ting*. In the earlier case, the immigrants in question were seeking admission to the country, but in this case, they had been admitted lawfully and were residing in U.S. jurisdiction. Justice Brewer addressed this distinction in his dissent, arguing that resident aliens, unlike the temporary travelers in Chae Chan Ping, deserve full constitutional protection. The plurality, however, thought that the government's authority over immigration extended to deportation policy of non-citizens like the petitioners in this case. Thus, this decision suggested unfettered congressional authority over immigration policy, including efforts to limit the constitutional rights of immigrants who were legally admitted to the United States.

After this barrage of anti-Chinese legislation, immigration from other parts of Asia increased, especially from Japan. With Chinese labor supply fading out, "one exploitable labor force was supplanted with another when the immigration of Japanese workers began in the 1890s."[16] By the early 20th century, Japanese nationals comprised the largest Asian immigrant group in the West. Unsurprisingly, their success in the farming business produced a racist domestic reaction reminiscent of anti-Chinese sentiment, resulting in broader anti-immigration policies that affected not just Chinese but all Asian immigrants. For example, consider the Alien Land Laws passed by 15 states in the West and Midwest starting in 1913.[17] These laws prohibited "ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States."[18] While the language of the laws was race-neutral, it was commonly understood that the statute was intended to disenfranchise Japanese farmers.[19] Anyone who did not intend to become a citizen (i.e. could not become a citizen) was precluded from land ownership. Per the Nationality Act of 1870, federal law restricted citizenship to free whites and those of African descent.[20] Naturally, then, Japanese could not become citizens and were therefore targeted by this policy. Yet another assault on the constitutional rights of legally residing immigrants, this law was challenged in the Supreme Court in *Terrace v. Thompson*.[21] The Court upheld the law, emphasizing its neutral treatment of race and affirming that the exclusion of Japanese immigrants from land ownership was a natural, valid consequence of federal authority over naturalization law. This case demonstrates interactions between naturalization and immigration policy: racial naturalization requirements allowed subsequent legislation to deny basic rights to non-white immigrants.

On the federal level, restrictive immigration policies expanded from Chinese exclusion to broader Asian exclusion with the 1917 Immigration Act. This law created an "Asiatic barred zone" that prohibited immigration of workers from most of British India, Southeast Asia, and the Middle East, with exceptions for elite professions, family, and treaty-sanctioned immigration, including from Japan and the Philippines.[22] This barred zone was constructed not by any natural characteristic of its inhabitants but by latitudinal and longitudinal lines selected by lawmakers. This subjective geography was thus associated with the label "Asiatic," thereby contributing to "racial formation," defined by Omi and Winant as "the sociohistorical process by which racial identities are created, lived out, transformed, and destroyed."[23] In the United States, this label homogenized diverse Asian cultures into one perceived non-white foreign group. Further, it grouped all Asian

[16] Greg Hall, Harvest Wobblies: The Industrial Workers of the World and Agricultural Laborers in the American West, 1905-1930 33 (2001). Subsequent information in this paragraph about Japanese immigration comes from this source.
[17] Alien Land Laws, *Densho Encyclopedia*, https://encyclopedia.densho.org/Alien_land_laws/.
[18] Wash. Constitution, art II, § 33 (1889).
[19] Nicole Grant, White Supremacy and the Alien Land Laws of Washington State, The Seattle Civil Rights & Labor History Project, (2007), https://depts.washington.edu/civilr/alien_land_laws.htm.
[20] H.R. 2201, 41st Cong. (1870).
[21] Terrace v. Thompson, 263 U.S. 197 (1923).
[22] H.R. 10384, 64th Cong. (1917)
[23] Michael Omi and Howard Winant, The Theory of Racial Formation, in Racial Formation in the United States, , 109 (2015)

nations in with the legacy of Chinese exclusion, thereby solidifying their reputation of otherness and excluding them from the American identity.

It is important to note, however, that anti-immigration sentiment during this period was not limited to Asians. Many opponents of immigration were concerned with more than the racial or ethnic composition of the nation; they were also committed to the religious and cultural preservation of white Anglo-Saxon Protestants who hailed from western and northern Europe. For example, consider a statement titled "Restriction of Immigration" by Francis A. Walker, a late 19th century leading economist and former President of the Massachusetts Institute of Technology. He argues that immigration to the U.S. caused a decline in the native birth rate, as potential parents became reluctant to give birth to children who would endure the poor standards of living brought over by immigrants.[24] He also claims that the "ignorant and brutalized peasantry from the countries of eastern and southern Europe… [represent] the worst failures in the struggle for existence" and "degrade… American citizenship."[25] Specifically, he feared that nationals from Italy, Hungary, Austria, and Russia would soon make up half of U.S. immigration if restrictions were not put in place. Here, Walker alleges cultural inferiority of certain European nationalities to oppose immigration of persons that were considered racially white under U.S. law. This sentiment, shared by many opponents of immigration, frames immigration policy not just as a tool of racial but also ethnic and cultural preservation.

After Chinese and Asian exclusion, the next phase of U.S. immigration policy concerned national quotas that reflected this broader hostility towards immigration from all parts of the world. The first of these laws was the 1921 Emergency Quota Act, which was an "emergency" response to concerns of increased immigration following World War I.[26] It limited the annual number of immigrants from each country to three percent of the population of that nationality residing in the U.S. at the time of the 1910 census.[27] Importantly, the law did not limit immigration from the Western Hemisphere and did not change the prohibition of immigration from countries in the Asiatic barred zone. It also excluded descendants of slaves and indigenous groups, as well as people ineligible for citizenship per the Nationality Act of 1870. Essentially, the law regulated white immigration from Europe and former colonial outposts (and to a very minor extent, Black African immigration). Behind the supposed objectivity of official census data, the quotas were designed to limit immigration of "undesirable" ethnic groups from southern and eastern Europe.[28] This intention to preserve northern and western European stock became abundantly clear in congressional debates over proposed changes to the law three years later.

I. Beyond the Barred Zone: National Quotas

In 1924, an attorney representing the Allies Patriotic Societies proposed a change to the existing law that would set each national quota to two percent of the population of that nationality present in the United States during the 1890

[24]Francis A. Walker, Restriction of Immigration, Thirteen, June 1896, 4, https://www.thirteen.org/wnet/historyofus/web08/features/source/docs/C20.pdf.
[25]Ibid, 7.
[26]Emergency Quota Law (1921), *Immigration History*, Immigration and Ethnic History Society (2019) https://immigrationhistory.org/item/%E2%80%8B1921-emergency-quota-law/.
[27]H.R. 4075, 67th Cong. (1921).
[28]Closing the Door on Immigration, *National Park Service*, U.S. Department of the Interior, https://www.nps.gov/articles/closing-the-door-on-immigration.htm.

census.[29] The proposed formulation would dramatically reduce total immigration, with a comparatively greater reduction of immigrants from southern and eastern Europe—a point that sparked months of debate in Congress. Those who favored the proposed change argued that the 1890 census more accurately reflected the origins of the country, while others endorsed its disproportionate restriction of "undesirables" on grounds of ethnic and cultural inferiority. For example, Mr. Watkins of Pennsylvania claimed that lower naturalization rates and higher crime rates of immigrants from southern and eastern Europe justify lower quotas for those regions.[30] Conversely, opponents of the bill denounced the law for its discriminatory effect. Mr. Sabath, a Czech-born representative of Illinois, argued that the bill's "unjust and indefensible discrimination rests upon the theory that the northern and western Europeans belong to a superior race... and by implication that those coming from the southern and eastern Europe are the undesirables."[31] He called such conceptions of superiority "superficial pseudo-scientific theory" designed "to satisfy an inflated race ego." As laws expanded to regulate immigration across the globe, these debates revealed increasing disagreement over the nation's ethnic and cultural identity, perhaps indicating a particular sensitivity to the restriction of white immigrants. Despite this conflict, the proposed formulation was accepted and codified in the 1924 National Origins Quota Act,[32] which remained in effect for 40 years.

The new formulation, again based on official census data, feigned scientific objectivity, but a closer look at the 1890 census exposes data issues that cast further doubt on the motivations behind the law. Firstly, there were major gaps in census and immigration data leading up to 1890. Immigration, which was not classified by origin until 1899, was categorized by "races and peoples," not nationality.[33] Moreover, emigration was not recorded in 1890, and changes in national boundaries following World War I required re-allocation of quotas in European states. These problems were clear even to the statisticians in charge of the calculations, who openly expressed concern about the assumptions involved in the formulation and the viability of the conclusions. Despite these doubts, the law garnered enough support to remain in effect for 40 years. Seemingly, lawmakers were willing to overlook these shaky foundations to pass a bill that would restrict immigration from "undesirable" nations and reinforce the Anglo-Saxon majority in the United States.

Issues with racial and national classification in the 1890 census further elucidate preservationist motives of lawmakers and underscore the effects of the National Origins Quota Act on racial formation in the United States. At its core, the policy used the concept of national origins to justify the inclusion, exclusion, and heavy restriction of different migrant groups. It was premised on the conservation the demographic makeup of the country in the late 19th century. Despite its clear focus on national origin, the policy implicated race in many ways. For example, it constrained "native stock" to people descending from the country's white population, thereby excluding non-whites born in the United States.[34] This inherently subjective classification tethered conceptions of whiteness to the 'native' American identity. Conversely, the law also disaggregated race and nationality in unnatural ways. While immigration from countries in the

[29]The Debate in Congress, *Facing History and Ourselves*, https://www.facinghistory.org/resource-library/debate-congress. Subsequent information comes from this source.
[30]Representative Watkins (PA). "Immigration." *Congressional Record* (April 5, 1924), 5677. Immigration, 68th Cong. 5677 (April 5, 1924) (Statement of Rep. Watkins).
[31]Representative Sabath (IL). "Immigration." *Congressional Record* (April 5, 1924), 5655. Following quote comes from this source. Immigration, 68th Cong. 5655 (April 5, 1924) (Statement of Rep. Sabath).
[32]H.R. 7995, 68th Cong. (1924).
[33]Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, The Journal of American History 86, no. 1,: 71-80, (1999). https://doi.org/10.2307/2567407. Subsequent information in this paragraph comes from this source.
[34] Ibid, 72.

Asiatic barred zone was still prohibited, the law granted the minimum quota of 100 visas to China, Japan, India, and Siam.[35] However, these slots could only be filled by non-native citizens of these countries (i.e., white citizens) because racially "Asian" people were ineligible for U.S. citizenship.[36] This quirk in the law re-defined nationality for Asian countries, allowing their formal inclusion in quota allocations while limiting their contributions to exclusively white immigrants. Thus, the inconsistent definitions of "national origin" in the National Origins Quota Act inextricably tied race to nationality in ways that preserved white America.

The law also affected racial formation in the United States by implicitly and explicitly categorizing nationalities into decidedly white and non-white groups. By selecting the 1890 census as the basis for quota allocations, European nationalities were essentially ranked by hierarchies of desirability.[37] This fragmented European immigration, allowing for disproportionately high numbers of Anglo-Saxon arrivals. At the same time, the law limited quota-based immigration to people eligible for citizenship, which grouped diverse European nationalities into a white racial category that was accepted into the evolving American identity. This homogenization of European descent came with the accompanying racialization of nationalities that were excluded from the quota allocations.[38] Immigrants from Asia and the Western Hemisphere, as well as descendants of slave migrants and indigenous people, inherited foreign, non-white identities. This grouping was especially evident in a table presented to congress by the attorney who first proposed the national origins formulation. It presents a demographic analysis of the United States in 1920, broken down into 53 nationalities and four racial categories.[39] The first three racial groupings are (1) descendants of colonial stock, (2) foreign white stock, and (3) native-born stock (which, as previously mentioned, was calculated to include only white individuals). The fourth racial category is "colored races." This stark distinction between "white" and "colored" races was socially constructed and politically weaponized to support the National Origins Plan. Even though it reflects no natural difference between races, its acceptance by Congress indicates that many lawmakers saw such distinctions as objective reality.[40] Thus, racial encoding in the National Origins Quota Act reinforced artificially constructed races as natural differences among immigrants across the globe.

II. Policy Responses to WWIII

The next phase of U.S. immigration policy was designed to increase immigration, although strictly as a source of temporary imported labor for production during World War II. In response to war efforts, the United States ramped up industrial production and created 17 million new jobs.[41] The sustained exclusion of Asian immigrants, coupled with the shipment of armed forces overseas, created openings for new immigrant groups to fill agricultural and industrial labor shortages.[42] This occurred through a series of immigration policies, the most notable being the 1942 Mexican Farm Labor

[35] Herbert Hoover, "Proclamation 1872—Limiting the Immigration of Aliens Into the United States on the Basis of National Origin." *The American Presidency Project*, 22 Mar. 1929, https://www.presidency.ucsb.edu/documents/proclamation-1872-limiting-the-immigration-aliens-into-the-united-states-the-basis.
[36] Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924,* The Journal of American History 86, no. 1, 73, (1999). https://doi.org/10.2307/2567407.
[37] Ibid, 72.
[38] Ibid 69.
[39] John Bond Trevor, An analysis of the American Immigration Act of 1924, 58-59, (1924), ttps://nrs.lib.harvard.edu/urn-3:fhcl:921230.
[40]Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, The Journal of American History 86, no. 1, 73, (1999). https://doi.org/10.2307/2567407.
[41]Goodwin Doris, *The Way We Won: America's Economic Breakthrough during World War II*, *The American Prospect*, (2001), https://prospect.org/health/way-won-america-s-economic-breakthrough-world-war-ii/.
[42]Mae Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America, 4 (2004).

Program that created the Bracero Agreement between the United States and Mexico.[43] Under this agreement, the Mexican government sent young males to work on farms and in railroad construction sites in the southwest United States, ironically replacing the work done by Chinese immigrants decades earlier. Bracero workers were harshly deported when their six-month work visas expired unless their employers chose to extend them. The U.S. government provided them with transport to and from their place of employment and guaranteed wages and labor conditions comparable to those of American workers. Further, they were exempt from many existing immigration restrictions, including the head tax, literacy texts, and alien registration requirements. This notably different treatment of Bracero workers under immigration law sheds light on their purpose: they were imported cheap labor, excluded from any chance at permanent residence or American citizenship.

The temporary provisions of the Bracero Agreement further elucidate the exclusionary nature of the policy and suggest efforts to shield the American identity from Mexican influence. For example, delayed payments were used to ensure that Bracero workers left the United States at the end of their contract. One tenth of wages were withheld until the worker returned to Mexico, at which point it was sent to the Mexican government to be distributed to workers.[44] Although many Bracero workers never received this withheld payment, this provision was intended to incentivize repatriation. Transcripts from 1951 congressional hearings on farm labor investigations reinforce the importance and efficacy of delayed payments. In a statement by a representative of a California farming association, Mr. Keith Mets remarked that only three of 6,000 Bracero workers failed to return to Mexico when they withheld ten percent of their wages.[45] The following year, when the association did not deduct ten percent from their pay, 450 of 4,500 Bracero workers failed to return. By design, this payment model solidified Bracero workers as a temporary, dispensable labor force. Thus, the first major immigration policy aimed at the inclusion of new immigrants served a strictly economic function, constructing special incentives to guarantee the active exclusion of Mexican immigrants.

Discussions about potential sources of migrant labor during World War II further highlight the market-driven incentives behind these policies. Indeed, they reveal a preference for immigrants with the fewest political rights precisely because they could be deported. In a letter to the U.S. Ambassador in Mexico, the Acting Secretary of State remarked that "uncertainties caused by the lack of decision on the part of the Mexican government in regard to the proposed agreement... resulted in the very interested examination of possibilities for bringing in workers from Puerto Rico and the Philippines."[46] Puerto Ricans immigration is a particularly interesting point of comparison because of their elevated juridico-political status. As U.S. citizens, they were more costly because they were entitled to social welfare,[47] and they could not be deported when their labor was no longer needed.[48] This preference for non-citizen workers was made clear not just by lawmakers but also by employers. In a congressional hearings on farm labor, a representative of the Fruit Growers of California stated that they "cannot handle [Puerto Ricans] like Mexicans. A Porto Rican has much right to stay...The Mexicans can be deported if

[43] *1942: Bracero Program*, *Library of Congress Research Guides*, https://guides.loc.gov/latinx-civil-rights/bracero-program. Subsequent information about the Bracero Agreement comes from this source.
[44] Doris Meissner, *U.S. Temporary Worker Programs: Lessons Learned*, *Migration Policy Institute* (2004) https://www.migrationpolicy.org/article/us-temporary-worker-programs-lessons-learned.
[45] *Federal Agriculture Research: Hearings Before the Subcommittee on Farm Labor of the Committee on Agriculture*, 81st Cong. 176 (1950) (Statement of Keith Mets).
[46] United States Department of State, *Foreign Relations of the United States, 1947 Vol. VIII: The American Republics*, 835 (1972). https://history.state.gov/historicaldocuments/frus1945v09.
[47] Lilia Fernández, *Of Immigrants and Migrants: Mexican and Puerto Rican Labor Migration in Comparative Perspective, 1942–1964*, *Journal of American Ethnic History* 29, no. 3, 6–39 (2010). https://doi.org/10.5406/jamerethnhist.29.3.0006.
[48] Carmen Teresa Whalen, From Puerto Rico to Philadelphia: Puerto Rican Workers and Postwar Economies, 6 (2001).

they become county charges, but the others are here to stay and they are less efficient." This preference for comparatively powerless Bracero workers reinforces their purpose as imported labor. Further, it shows that U.S. immigration policy was designed to exclude migrant workers who could claim the right to American residency or citizenship.

The Bracero program also contributed to racial formation of Mexicans and Latinos in the United States. Formal Mexican presence in the U.S. began with the Treaty of Guadalupe, which offered U.S. citizenship to Mexicans who chose to remain in the territory conquered by the United States in the Mexican-American war. About 150,000 people accepted this offer, creating a Mexican American population of citizens by conquest.[49] This made it impossible for naturalization law to preclude Mexicans from citizenship based on racial ineligibility as it had done to immigrants from other nations.[50] The resulting racial ambiguity of Mexicans under U.S. law made the Mexican identity particularly vulnerable to immigration-induced racialization. In the 1920s, illegal immigration to the United States increased from all parts of the world, but Mexicans accounted for half of all deportation and thus became associated with illegality and illegitimacy.[51] This reputation was inherited by Mexican nationals, Mexican American citizens, and immigrants with similar racial makeup, thus advancing the racialization of Hispanics and Latinos. The Bracero Agreement contributed to this process of racial formation by importing and exporting over four million Mexican workers.[52] This codified cycle of deportation reinforced their "illegal" identities: even though they were racially eligible for citizenship, immigration policy made it clear that they were unwelcome.

In the same year as the Bracero Agreement came another monumental immigration policy: the Magnuson Act. This law repealed the Chinese Exclusion Acts, thus ending 60 years of exclusion and allowing Chinese immigrants to become citizens. While this change in policy was not motivated by labor shortages, it did respond to the demands of World War II. After a successful speaking tour in the U.S. by Chiang Kai-shek, the wife of China's leader,[53] President Franklin D. Roosevelt implored Congress to end Chinese exclusion. In a 1943 speech, he explained that the proposed legislation was "important in the cause of winning the war and of establishing a secure peace."[54] As a newfound ally in the war, China became a strategic geopolitical partner in the U.S. fight against the Japanese. Even more, President Roosevelt expressed regret at the "historic mistake" of Chinese exclusion and framed the Magnuson Act as a long-overdue correction of injustice. In congressional debates on the repeal of Chinese exclusion, Mr. Mencken likewise remarked that the bill would advance the "struggle of mankind against oppression," adding that failure to do so would be "a matter of humiliation to America."[55] The timing of the bill, however, calls into question the sincerity of these egalitarian claims. Chinese exclusion was not just mandated but continually affirmed through decades of discriminatory policy, and its repeal came only at a time when it was diplomatically advantageous.

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[49]Margaret E. Montoya, *Latinos and the Law*, *National Parks Service*, U.S. Department of the Interior, https://www.nps.gov/articles/latinothemestudylaw.htm.
[50]Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924, The Journal of American History* 86, no. 1,87 (1999). https://doi.org/10.2307/2567407.
[51] Ibid, 91
[52]*1942: Bracero Program*, *Library of Congress Research Guides*, https://guides.loc.gov/latinx-civil-rights/bracero-program.
[53]*Repeal of Chinese Exclusion (1943)*, *Immigration History*, Immigration and Ethnic History Society, (2019) https://immigrationhistory.org/item/1943-repeal-of-chinese-exclusion/.
[54]." *Congressional Record* 89:13 (October 11, 1943), 633-794. Message to Congress on Repeal of the Chinese Exclusion Laws, 78th Cong. (1943) (Statement of President Franklin D. Roosevelt).
[55]*Repeal of the Chinese Exclusion Acts: Hearings before the Committee on Immigration and Naturalization*, 78th Cong. 55 (May 20, 1943) (Stanwood Mencken).

Moreover, inconsistent application of the National Origins formulation and the exceptionally modest quota allocated to China casts further doubt on the sincerity of the measure. The Magnuson Act stipulated that the new annual quota for Chinese immigration would be calculated by the Immigration Act of 1924.[56] This law used the National Origins formulation, which set each national quota to two percent of the population of that nationality present in the U.S. 1890 census. The number Chinese nationals living in the United States at this time was 107,488,[57] and two percent of that figure is 2,150. However, the quota set for China following the Magnuson Act was only 105. This discrepancy was ignored, and many opponents of the bill expressed concerns that even this modest quota could have a significant impact on the racial composition of America.[58] To accommodate these concerns, lawmakers suggested that the bill "be drawn so as to have the Chinese quota apply to all Chinese no matter where they live."[59] This proposal was accepted in the final law, meaning that Chinese quotas were based on race unlike the European quotas that counted immigrants by nationality. In other words, ethnically Chinese people coming from any nation in the world were counted towards the maximum 105 annual visas. This inconsistent application of the National Origins formula is yet another example of artificial racial encoding in U.S. immigration law. Thus, even the policy accredited with repealing Chinese exclusion warped the definitions of national origin to preserve America's white identity.

III. Conclusion:

From the Gold Rush to World War II, U.S. immigration policy was characterized by a legacy of exclusion. While Asian exclusion was premised on the protection of domestic workers, its supporters justified the law with claims of racial and cultural inferiority. Similarly, the National Origins Quota Act inconsistently implicated race in the definition of "national origin" to favor immigration from "desirable" nations. Policy eventually shifted towards the incorporation of non-white immigrants during World War II. However, the harsh provisions of the Bracero Agreement and the modest quota granted to China by the Magnuson Act suggest insincere inclusion in exchange for significant economic and diplomatic gain. Behind a façade of objectivity, these immigration laws systematically excluded identities that were incompatible with the white Anglo-Saxon ascriptive American majority. Even more, they advanced racial formation of immigrant groups, labeling Europeans as "white," Asians as "foreign," and Mexicans as "illegal." While U.S. immigration policy has undergone significant changes in the past 80 years, it is important to recognize how its history contributed to race formation and ethnocultural preservation. In doing so, immigration law can become more reflective of the "melting pot" of diverse yet integrated cultures in the United States.

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[56] H.R. 3070, 78th Cong. (1943)

[57] *Colored Population in 1890*, Census Bulletin, Department of the Interior Census Office, (1892), https://www2.census.gov/library/publications/decennial/1890/bulletins/demographics/199-colored-population-african-chinese-japanese-indians.pdf.

[58] *Repeal of the Chinese Exclusion Act, 1943, U.S. Department of State*, https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal.

[59] Repeal of the Chinese Exclusion Acts: Hearings before the Committee on Immigration and Naturalization, 78th Cong. 172 (May 20, 1943) (Stanwood Mencken).

The Illegality of Legacy Admissions: U.S. legacy admissions policy and Article 26 of the Universal Declaration of Human Rights

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Abstract

Higher education admission policies remain hotly debated in the United States after the 2023 Supreme Court case *Students for Fair Admissions v. Harvard*. With the Supreme Court eliminating race-based affirmative action, there is a new focus on legacy admissions policies. Although scholars have focused on the applicability of the Equal Protection Clause, this article applies international law to legacy admissions policy. Article 26 of the Universal Declaration of Human Rights requires that "*higher education shall be equally accessible to all on the basis of merit.*" This article first argues that Article 26 has emerged as customary international law. It then articulates how customary international law creates a domestic U.S. legal obligation for meritorious admissions policies, and how legacy admissions violates that obligation. Thus, through a unique international law-based approach to U.S. higher education policy, this article argues that legacy admissions practices are illegal in the U.S. under international obligations.

Introduction

Legacy admissions—the preferential admissions boost for applicants with familial or close personal relations to alumni—is common in American higher education. Over the past years, higher education admissions processes have come under tremendous legal scrutiny. The most significant development, *Students for Fair Admissions v. Harvard* (2023), undermined decades of legal precedent by banning the practice of race-conscious affirmative action in higher education admissions. However, the majority opinion catalyzed a cascading collection of new legal theorizing.

A prominent component of this recent scrutiny focuses on the use of legacy preference in admissions decisions. This past July, lawyers for three groups—Chica Project, African Community Economic Development of New England, and Greater Boston Latino Network—filed a legal complaint with the U.S. Department of Education against Harvard's legacy admissions policy.[1] The Education Department acknowledged the scope of the investigation, releasing a statement that "the Office for Civil Rights can confirm that there is an open investigation of Harvard University under Title VI of the Civil Rights Act of 1964." In the *Students for Fair Admissions v. Harvard* decision earlier that summer, the majority opinion made clear that questions under Title VI, which prohibits discrimination on the basis of race, color, or national origin for any program or activity receiving Federal financing, shall be constitutionally interpreted under the Equal Protection Clause of the Fourteenth Amendment.[2] Thus, the lawyers challenging Harvard's legacy admissions practices will likely need to demonstrate that Harvard violates the two-step strict scrutiny interpretation of the Equal Protection Clause. Under this interpretative method, lawyers would argue that legacy admissions discriminate on the basis of race, and that Harvard's legacy admissions practice is not sufficiently and narrowly tailored to serve a compelling governmental interest.[3]

While the complaint filed with the Department of Education may ultimately prove effective, this paper focuses on a yet undiscussed aspect of the law which universities violate through legacy admissions processes: the international legal obligations of the United States. Under Article 26 of the Universal Declaration of Human Rights (UDHR), all governments must ensure merit-based access to higher education. Through a three-section causal argument, this paper will demonstrate how legacy admissions violates this obligation. First, a focus on the principles of international law will demonstrate that the UDHR is indeed a legally binding component of international law. Secondly, an examination of U.S. Supreme Court precedent will show that components of international law to which the United States has consented are enforceable under U.S. domestic law. Thirdly, this paper will articulate how legacy preferences violate the legal obligation for merit-based higher education admissions and will preempt two counterarguments that are likely to emerge against this legal theory. Finally, there is a brief discussion on political applicability within the context of the recent affirmative action case and the international relations perspectives on international law. In summary, this paper argues the legacy admissions processes used by higher education institutions across the country are illegal as violations of an international legal obligation which is both required and enforceable under U.S. domestic law.

The Universal Declaration of Human Rights as International Law

The first section of this article briefly defines and contextualizes international law, before addressing the specific international legal regulations which govern higher education admissions. Established in 1945 by the United Nations (UN) Charter, the International Court of Justice is one of the six principal organs of the UN is responsible for interpreting and adjudicating international law. Thus, in the 1945 Statute of the International Court of Justice (ICJ), to which all UN Member States are party, the framers were tasked with defining international law. Article 38(1) of the Statute defines the three agreed upon sources of international law and two subsidiary means for legal determination:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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[1] Saul, Stephanie. "Harvard's Admissions Is Challenged for Favoring Children of Alumni." *The New York Times*, July 3, 2023, sec. U.S. https://www.nytimes.com/2023/07/03/us/harvard-alumni-children-affirmative-action.html.

[2] *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College,* 600 U. S. ___ (2023). See footnote 2 on page 6 of the Opinion of the Court: https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

[3] For a detailed discussion on the legal application and nuance in *Students for Fair Admissions* see Lincoln, Caplan. "The Supreme Court Affirmative Action Rulings: An Analysis." *Harvard Magazine*, June 30, 2023. https://www.harvardmagazine.com/2023/06/harvard-affirmative-action-analysis.

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[4]

This paper first focuses on subsection a and b, although subsection d will provide important guidelines for interpreting the legal significance of the UDHR. These first subsections outline two sources of international law: treaties and custom. Treaties are legally binding agreements—Conventions, Protocols, Pacts, Accords, Bilateral Agreements, etc.—between two or more states. Custom, although often unwritten, is an equal source of law determined through both a history of state compliance and a belief in the legal significance of compliance. Although the UDHR is a written document, Declarations are considered separate from treaty law. Instead, this article argues that the UDHR is a source of customary international law.

In December of 1948, the UN General Assembly unanimously agreed upon Resolution 217A to adopt the Universal Declaration of Human Rights.[5] While there are several enumerated rights in the UDHR, Article 26(1) is of particular interest:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and *higher education shall be equally accessible to all on the basis of merit.*

The added italics in the second clause of the final sentence states a clear requirement for meritorious higher education accessibility. The first question, however, is whether this carries the weight of international law. As a non-binding Declaration, it is generally agreed upon that the UDHR is not a source of treaty law. At the time of its adoption, the President of the Assembly at the UN acknowledged that as a "declaration of rights" the UDHR did "not provide by international convention for States being bound to carry out and give effect to these rights."[6] While true that the UDHR was not written as a legally binding treaty document, treaties are only one source of international law. Grounded in significant scholarly writing and judicial precedent, there is a strong argument that the UDHR has attained the status of customary international law—an equally-enforceable source of law as outlined by Statute of the ICJ Article 38(1).

ICJ Statute Article 38(1) section d specifies that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are used to discern whether a rule has ascended to the status of international law. Given this requirement for *opinion juris,* John Humphrey—who helped write the UDHR and fully understood the non-treaty nature of the document—stated in 1976 that the UDHR "has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states."[7] Professor Louis Sohn, who helped draft the UN Charter, called the UDHR a "binding instrument in its own right" and Professor Myers McDougal, a prominent international legal scholar at Yale's Law School argued that the UDHR is an "authoritative legal requirement" because of its establishment as "customary international law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights."[8]

The initial unanimous approval of the UDHR, without dissent, supports their arguments for the customary nature of the UDHR. This unanimity demonstrates uniformity amongst states—a key component of establishing practice as international custom. In the United States Court of Appeals Case *Filártiga v. Peña-Irala* (1980), the Second Circuit commented on this phenomenon, stating that the UDHR specifically "no longer fits into the dichotomy of 'binding treaty' against 'nonbinding pronouncement,' but is rather

[4] "Statute of the International Court of Justice." The United Nations, 1945. https://www.un.org/fr/about-us/un-charter/statute-of-the-international-court-of-justice.
[5] "Universal Declaration of Human Rights." United Nations General Assembly, December 10, 1948. https://www.un.org/en/about-us/universal-declaration-of-human-rights.
[6] Lauterpacht, Hersch. "The universal declaration of human rights." *Brit. YB Int'l L.* 25 (1948): 354.
[7] Lillich 2.
[8] Lillich 3.

an authoritative statement of the international community."[9] In his article, the legal scholar Kerwin highlights this writing as a clear example of the UDHR being interpreted as an authoritative source of customary international law.[10]

In a 1996 article, Richard B. Lillich, professor and preeminent international law scholar, further discusses the court-based and legal interpretations of the UDHR which comprise the customary requirement of *opinion juris*.[11] Lillich notes that in 1965 Judge Waldock—international lawyer, judge for the European Court of Human Rights and the ICJ, and ultimately the President of the ICJ—concluded in an article that the UDHR was binding customary international law.[12] Three years later the Montreal Statement from the Assembly for Human Rights argued that the "Universal Declaration of Human Rights… has over the years become a part of customary international law," and the Proclamation of Tehran from the UN's International Conference of Human Rights called the UDHR a legal "obligation for members of the international community."[13]

In addition to a clear scholarly interpretation of the UDHR as customary international law, and invocation in international legal regimes, a similar interpretation has emerged in specific legal complaints and judicial decisions relating to the United States. In 1980 the United States brought a complaint to the ICJ against Iran and their involvement in the embassy hostage crisis. In the case materials the U.S. argued that Iran's treatment of hostages violated "certain fundamental human rights… now reflected in the Charter of the United Nations" and "the Universal Declaration of Human Rights."[14] The Court's opinion agreed with the interpretation presented by the U.S. that the UDHR enumerates human rights which are legally obligatory.

Legal scholars at times argue that only individual parts rather than the entirety of the UDHR have emerged as customary international law. However, beyond solely unanimous approval, there is a history of widespread educational state practice which reinforces the argument for Article 26 as a customary component of international law. In a Fall 2022 article on the global customary rights to education, Nate Schmutz, J.D., Ed.D, highlights a justiciable right to universal education in 107 countries, and an aspirational right in another 53 countries.[15] He argues that education has been an international human right since the creation of the UDHR, and that despite the U.S.'s failure to ratify subsequent education-related treaties such as the Convention of the Right of the Child, state practice and opinion juris both globally and within the United States created a universal right to equal education.[16] This uniformity is particularly true amongst the highly developed countries with which the United States is politically and economically categorized.[17] Thus, while there has not been specific writing on the customary nature of Article 26, there is a strong case that the state practice and opinion juris surrounding the UDHR and educational accessibility create a legally binding customary norm.

This section has briefly discussed the principles of international law to demonstrate that customary practice serves as a legally obligatory source of international law, and that the UDHR, which includes an Article 26 requirement that higher education be equally accessible on the basis of merit, is a source of customary international law. I now proceed with evidence that customary international law—including the UDHR and its higher education requirement—is a legally enforceable aspect of U.S. domestic law.

Customary International Law as U.S. Domestic Law

Although the previous section established that the UDHR serves as customary international law, this only concerns the legality of legacy admissions practices once it is demonstrated that customary international law is a legally enforceable aspect of U.S. domestic law. The precedent for customary international law's integration into U.S. domestic law comes from the Supreme Court Opinion in the 1900 case *Paquete Habana v. United States*.[18] The case's nuances about the rights of fishing vessels during wartime are less relevant than the larger constitutional question the court addressed: is customary international law legally enforceable in the U.S.

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[9] Kerwin, Gregory J. "The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts." *Duke Law Journal* 1983, no. 4 (1983): 876–99. https://doi.org/10.2307/1372469. Pg. 885.
[10] Kerwin 887.
[11] Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25Ga. J. Int'l & Compar. L. 1 (1996). Available at: https://digitalcommons.law.uga.edu/gjicl/vol25/iss1/2
[12] Lillich 2.
[13] Lillich 2.
[14] Lillich 3.
[15] Schmutz, Nate. "A CIL Right to Free and Compulsory Education." *Journal of Law & Education* 51, no. 2 (2022): 145.
[16] Schmutz 184.
[17] Schmutz 181.
[18] The Paquete Habana, 189 U.S. 453 (1903)

as domestic law? After reviewing a long history of custom regarding the rights of fishing vessels the court issued the following statement in their decision:

> International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations and as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.[19]

In their ruling, the Supreme Court opinion makes clear that customary international law is indeed international law, and that "international law is part of our law." Over a century later, this *Paquete Habana* decision still stands as legal precedent for questions of customary international law's significance to the domestic environment.

This general acceptance of customary international law as domestically enforceable has been extended to the specific custom of the UDHR. In addition to the *Filártiga* case discussed in the previous section, a 1988 survey found that the UDHR was referenced five time in cases at the Supreme Court, sixteen times in federal courts of appeals, twenty-four times in federal district courts, and several times across state courts.[20] While a more recent survey was not locatable, it is fair to presume that references to the UDHR have continued with the sustained customary legal relevance of the Declaration. Regardless, the UDHR has a consistent and long history of consideration as legal source for domestic jurisprudence in federal courts across the country.

Finally, it is worth noting the centrality of American ideals and normative construction in the development of the UDHR. A key principle of the contemporary international system is that states have the freedom to voluntarily ascribe to international legal regimes. In regard to the UDHR, however, it is impossible to argue that the U.S. did not voluntarily shape and ascribe to the human rights promises outlined in the Declaration. At the 1945 San Francisco conference which developed the UN Charter, U.S. Secretary of State Edward Stettinius invited forty-six civic and religious groups to advocate for the simultaneous development of a human rights bill.[21] At the same conference, President Truman told the delegates to "expect the framing of an international bill of rights" which "will be as much a part of international life as our own Bill of Rights is a part of our Constitution."[22] Former First Lady and UN General Assembly Delegate Eleanor Roosevelt served as the chairperson for the new UN Commission on Human Rights and oversaw the Declaration's drafting.[23]

Turning specifically to Article 26 of the UDHR, which focuses on the issue of education, the American Jewish Committee played a key role in the article's drafting,[24] and Eleanor Roosevelt herself stated that Article 26 was "drafted with a precision which left no opening for misunderstanding."[25] Johannes Morsink argues in his book on the drafting and intent of the UDHR that education was so important to a human-rights based international order that Article 26 and human rights education were "the first and primary purpose of the Declaration as a whole."[26] Given this direct involvement by American representatives and the U.S.'s affirmative vote for the UDHR, it would be intellectually fraudulent to claim that the United States—despite its rampant domestic inequality[27]—did not embrace the ideals and implications of the UDHR, and more specifically, Article 26, throughout the drafting and convention process.

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[19] Damrosch, Lori F. (Lori Fisler), and Sean D. Murphy. *International Law : Cases and Materials*. Seventh edition. St. Paul, MN: West Academic Publishing, 2019. Page 60.
[20] Hannum, Hurst. "The status of the Universal Declaration of Human Rights in national and international law." *Ga. J. Int'l & Comp. L.* 25 (1995). Page 304
[21] Morsink, Johannes. *The Universal Declaration of Human Rights Origins, Drafting, and Intent*. Philadelphia: University of Pennsylvania Press, 1999. https://doi.org/10.9783/9780812200416. Pg 2.
[22] Ibid 4.
[23] Ibid 5.
[24] Ibid 2.
[25] Ibid 268.
[26] Ibid 326.
[27] For an argument on the ways that international humanitarian law informed desegregation and the *Brown v. Board* decision, see Sloss, David L. "How international human rights transformed the US constitution." *Hum. RTs. Q.* 38 (2016): 426.

Legacy Admissions: unequal and non-meritorious

Having thus far established that the UDHR is a source of customary international law, and that customary international law is applicable in the U.S. domestic sphere, this article now discusses how legacy admissions violates the UHDR Article 26 requirement that "higher education shall be equally accessible to all on the basis of merit." By rewarding legacy status, which is not rooted in any claim of academic merit, the admissions process undermines the Article 26 requirement for merit-based equal accessibility.

Harvard University's admissions policies have become largely public through the *Students for Fair Admissions* case, providing insight into the admissions processes at Harvard, and, by implication, other prestigious universities in the United States. Between 2009 and 2015 at Harvard University, 34% of legacy applicants from the U.S. were accepted.[28] The total acceptance rate at the University during that time was 6%—a more than five-times increase in acceptance rate for legacy-status applicants. While some may argue that these legacy applicants happen to be particularly meritorious and deserving of admissions, researchers have aggregated Harvard's data to consider legacy status within the holistic admissions process. After modeling Harvard's admissions process, accounting for hundreds of applicant variables, a Duke University study found that "a white typical applicant [at Harvard] with a 10% chance of admission would see a five-fold increase in admissions likelihood if they were a legacy."[29] When measuring academic preparedness by GPA and SAT, white legacy, dean's interest,[30] and faculty children applicants in the bottom decile of academic preparedness were more frequently admitted than the total pool of applicants from all preparedness deciles.[31] It is clear that legacy status plays an outsized role in admissions likelihood at Harvard, undermining any semblance of merit based equality.

This phenomenon is not limited to Harvard University. A study from Opportunity Insights, a Harvard instituted, examined the role of legacy admissions at twelve Ivy-Plus schools—the eight Ivy League schools plus University of Chicago, Stanford, Duke, and Massachusetts Institute of Technology.[32] They found that across these schools, legacy applicants were three to five times as likely to be admitted as applicants with comparable non-legacy profiles. Their data reaffirms a 2007 study of thirty institutions which found that legacy applicants were three times as likely to be admitted as equally meritorious non-legacy applicants.[33] This unequal access to higher education, admissions determined not on the basis of merit but on legacy, is not limited to only the most prestigious institutions. In 2020, 787 colleges and universities reported using legacy preference in their admissions process—a widespread practice which flaunts Article 26's legal obligations.[34]

Having demonstrated that higher education is not equally accessible on the basis of merit, I address two counterarguments that may arise: one, an argument that higher education as a whole must be equally accessible on the basis of merit even if individual institutions are not, and two, that merit need not be the sole factor by which admissions is determined. The former of the two arguments has multiple weaknesses. First, the previously cited data about the widespread use of legacy preference demonstrates unequal accessibility as a broad higher education issue, not solely a specific institution issue. Secondly, such an argument would effectively adopt the contours of separate-but-equal theorizing—the implication being that some institutions can acceptably provide unequal access by ignoring merit so long as others remain equally accessible on the basis of merit. Such an argument would not stand if a legally protected category such as race were swapped for the Article 26 protection on the basis of merit. Additionally, with

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[28] Anderson, Nick. "What Gives You an Edge in Harvard Admissions? Check the Trial Evidence." *Washington Post*, October 18, 2018. https://www.washingtonpost.com/local/education/what-gives-you-an-edge-in-harvard-admissions-check-the-trial-evidence/2018/10/17/c8004068-d17d-11e8-8c22-fa2ef74bd6d6_story.html.

[29] Arcidiacono, Peter, Josh Kinsler, and Tyler Ransom. "Legacy and athlete preferences at Harvard." *Journal of Labor Economics* 40, no. 1 (2022): 133-156.

[30] The dean's interest list comprises any students the dean of admissions wishes to pay particular attention to. Often children of donors or prominent members of the university community.

[31] Ibid 145.

[32] Chetty, Raj, David J. Deming, and John N. Friedman. *Diversifying society's leaders? The causal effects of admission to highly selective private colleges*. No. w31492. National Bureau of Economic Research, 2023.

[33] Hurwitz, Michael. "The impact of legacy status on undergraduate admissions at elite colleges and universities." *Economics of Education Review* 30, no. 3 (2011): 480-492.

[34] Murphy, James. "Issue Brief 2: Legacy Preferences." The Future of Fair Admissions. Education Reform Now, Fall 2022. https://edreformnow.org/wp-content/uploads/2022/10/The-Future-of-Fair-Admissions-Legacy-Preferences.pdf.

graduation from the most selective tier of institutions leading to disproportionate business, academic, political, and judicial success for alumni, equality within these institutions is a necessity for equality within the entirety of the higher education system.[35]

As for the second counterargument, that merit need not be the sole metric for admissions, let us return to Eleanor Roosevelt's words. As she stated, the precise language of Article 26 left no room for misunderstanding. The text of Article 26 must be interpreted as a requirement that higher education remain equally accessible on the basis of merit, not accessible on a combination of merit and legacy status. It is clear from the data that legacy policies violate the guarantee of merit-based accessibility. In the precedent setting *Students for Fair Admissions* decision the Opinion of the Court stated, "Eliminating racial discrimination means eliminating all of it."[36] The same standard must now be held regarding the illegal violations of Article 26. Eliminating violations of equal accessibility on the basis of merit mean eliminating all of them—including legacy admissions preferences.

Political Applicability

Although this paper addresses the legal question of legacy admission—not race-conscious admissions policies—it is clearly responsive to the current U.S. legal context and ongoing debates around affirmative action policies. Thus, there may be significant implications to a "merit" based admissions obligation. Much of this paper focuses on the violative example of legacy—demonstrating what merit is *not*—rather than constructing a positive definition of meritorious components. However, a brief discussion on "merit" provides a foundation for future scholarship and helps preempt distortion of this article's intention. Merit should be considered as achievement within the context of afforded opportunity. While legacy status would not fit within this construct of merit, other innate characteristics are not necessarily outside the realm of acceptable meritorious consideration. In the United States, race, gender, sexuality, ethnicity, and socioeconomic status can all affect achievement by limiting afforded opportunity. For as long as this is true, to holistically understand merit and accomplishment it is reasonable to consider race, gender, sexuality, ethnicity, and socioeconomic statues, and the ways in which these factors may have affected a student's afforded opportunity. This argument is generally aligned with the legal theory in Justice Sotomayor's *Students for Fair Admissions* dissent.[37] Thus, Article 26 of the UDHR would not inherently prohibit the consideration of these characteristics which systemically affect cultural conceptions of merit.

Secondly, it is worth briefly acknowledging one other prominent component in international legal academia which lurks beyond this article. Rooted in international relations theory, there is often a debate about whether international law *should* exist, and whether international legal regimes *should be* considered legitimate in U.S. domestic law.[38] I consider this to be a political debate—important, albeit not the focus of this article. This article is not concerned with the political argument on whether we *should* or *should not* have international obligations, but rather the legal argument that we *do* have international obligations. Regardless of political arguments, the legal theorizing in this article makes clear that international law, as applicable to the U.S. domestic system, makes legacy preference an illegal practice in U.S. higher education admissions.

Conclusion

Through a unique international law-based approach to U.S. higher education policy, this article clearly argues that legacy admissions practices are illegal in the U.S. under international obligations. The legal arguments around legacy admissions policy in the United States are just beginning. Harvard's legacy admissions policy is facing race-based complaints, and Justice Gorsuch seemingly acknowledged the concern when he wrote in his *Students for Fair Admissions* concurrence that legacy admissions policies "while race-neutral on their face… undoubtedly benefit white and wealthy applicants the most."[39] In addition to the Equal Protection Clause arguments, international legal obligations prohibit legacy admissions policies in the United States. Article 26 of the

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[35] Chetty et al 1.

[36] *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College,* 600 U. S. ___ (2023). See Opinion of the Court page 15: https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

[37] *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College,* 600 U. S. ___ (2023). See Justice Sotomayor's Dissent: https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

[38] In contemporary international relations theorizing, debates over whether states should subscribe to international law underpin fundamental disagreements between realist, liberal, and constructivist schools of thought. Additionally, there is huge variety in scholars' opinions regarding whether states should and will follow international legal obligations they have committed to.

[39] *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College,* 600 U. S. ___ (2023). See Justice Gorsuch Concurrence page 15: https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

UDHR require that higher education institutions remain equally accessible on the basis of merit. Given the UDHR's status as customary international law, it is legally enforceable as U.S. domestic law under the Supreme Court precedent of *Paquete Habana*. Political debates will continue both about the definition of merit and the significance and applicability of international law. Nonetheless, it is clear the United States has a legal obligation to ensure equal access to higher education on the basis of merit—an obligation that is violated by legacy admissions preferences.

0s and 1s: A Danger to Democracy

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Abstract

Do we shape our For Your Pages, or do they shape us? Consider the events of January 6th, 2021, in which extreme Donald Trump supporters raided the Capitol building, leaving millions of Americans holding their breaths. Several people died during those riots, which raises the following question: why didn't America see it coming? The invasion of the Capitol took history professors, politicians, students, locals, and more by surprise, but there clearly had to have been a medium for the rioters to spread their message in secret. That medium is social media. However, the rioters did not make an effort to keep their plans secret; the algorithm did that for them. Social media algorithms isolate groups of people into polarized filter bubbles, where what is said in the filter bubble stays in the filter bubble. The extreme Trump supporters were only exposed to other extreme Trump supporters when they opened social media apps, which fostered the perfect breeding ground for conspiracy, hate, and violence. The extreme views of those Trump supporters were only reinforced by the constant influx of likes, comments, and posts that social media algorithms deluged into their feed.

This paper seeks to show that content-boosting social media algorithms pose a severe threat to the First Amendment and offers avenues of government intervention to combat that threat.

I open by breaking down the mechanics of algorithms both inside and out of social media, and then offer a nuanced understanding of filter bubbles and echo chambers. Then, I seek to prove that the very nature of filter bubbles is dangerous as it pushes people to extreme ends of the political spectrum. Next, I show how social media algorithms, in the process of creating polarized filter bubbles, directly undermine the First Amendment. Finally, I offer a potential solution that the government should consider implementing.

I. Background on Algorithms and Social Media

Algorithms are as old as math itself. At its most fundamental level, "an algorithm is a process or set of rules to be followed in calculations or other problem-solving operations, especially by a computer".[1] Algorithms are not inherently tied to social media or, on a more general scale, computers. They simply receive an input in the form of data, subject that input to a set of instructions, and produce an output. For instance, the age-old Pythagorean's Theorem, which states that (a^2) + (b^2) = (c^2) where a and b are legs of a right triangle and c is the hypotenuse, has an algorithm embedded into it. If two data points are inputted into the formula, an output will be produced. Algorithms can be used to solve a Rubik's Cube: depending on the colors filling each gridded side, a series of steps can be followed to yield a solved cube. Algorithms, essentially a series of instructions, dictate the world and are present on micro and macro scales, from tying shoes to making chief financial decisions.

Roberto Simanowski develops the idea of an algorithm as an "if-then constellation."[2] In any intro to computer science course, after learning how to output words to the terminal, students are taught about if-then statements: if a certain condition is true, do x, where x is simply an action or series of actions. For instance, an example of a potential if-then statement in a video game might look like the following: "if lives = 0, then print 'Game Over.'" So, Simanowski paints the image of an algorithm as a web of interconnected, complex if-then statements nested into each other. Nearly every action executed by a computer is the product of an algorithm instructing it to execute that action. As algorithms grow more complex, their web of if-then statements expands exponentially, making it less transparent what series of instructions are occurring behind the scenes.

Algorithms can be classified into five categories that judge them based on their explainability, predictability, and general intelligence. The simplest type, titled white box, involves algorithms that are a series of simple, transparent instructions that can be backtraced. Algorithms of the second classification, called gray box, are non-deterministic, meaning that the outcome cannot be accurately predicted prior to the execution of the algorithm. However, the products of algorithms of this category can be reasonably explained after its execution. The third category, black box, consists of algorithms that are beyond human comprehension and cannot be practically backtracked. These types of algorithms receive input, apply a complex set of instructions that humans cannot reasonably follow, and produce an output. The fourth type of algorithm, titled a sentient algorithm, is capable of passing the Turing Test and has matched human intelligence. The fifth and most powerful type, titled the singularity, has the capacity for recursive self-improvement, meaning that it can progressively learn without bounds or human intervention. Currently, no computer algorithms have passed the Turing Test, meaning that the highest capacity algorithms are black box algorithms.[3]

Algorithm processing, the application of instructions to a data set, can be broken down into two main categories: regression analysis and machine learning.

Regression analysis generates statistical predictions based on the patterns of data. The simplest example of regression analysis is generating a line of best fit for a set of data points on the x-y plane. By using the x and y components of each point and some multivariable calculus, a straight line can be generated that lies optimally close to each of the points. The "input" is the data points, the "instructions" are calculus-based formulas and summations, and the "output" is the equation of a line that can be used to predict where future points on the data set may lie. Regression analysis, on a general scale, serves two purposes: making predictions and detecting relationships between variables.[4] In the context of ad targeting, this may look like predicting the most optimal locations to place ads or detecting a correlation between certain fonts and ad success.

Machine learning algorithms are not programmed to make predictions or solve problems. Rather, they are programmed to learn how to make predictions and solve problems.[5] Chat GTP, for instance, does not have a specific set of if-then instructions embedded into it for each potential question that a user might ask. Rather, it is trained using massive amounts of data from the Internet, and through pattern recognition, it produces an optimized output. The series of instructions that a machine learning

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[1] Silva, Selena, and Martin Kenney. "Algorithms, Platforms, and Ethnic Bias: An Integrative Essay." *Phylon (1960-)* 55, no. 1 & 2 (2018): 11. https://www.jstor.org/stable/26545017.

[2] SIMANOWSKI, ROBERTO. "ALGORITHMS." In Data Love: The Seduction and Betrayal of Digital Technologies, 51. Columbia University Press, 2016. http://www.jstor.org/stable/10.7312/sima17726.12.

[3] Tutt, Andrew. "AN FDA FOR ALGORITHMS." Administrative Law Review 69, no. 1 (2017): 107. http://www.jstor.org/stable/44648608.

[4] Sylvia and Kenney, "Algorithms, Platforms, and Ethnic Bias," 11.

[5] Tutt, "An FDA for Algorithms," 87.

algorithm performs are not visible because they are developed by the program itself by noticing patterns in similar situations in the data it is trained on.

"Social media" has become a buzzword over the last decade as more companies seek to create their own platform for communication between family, friends, colleagues, and even strangers. Prior to the age of content-boosting algorithms, social media could be viewed as a series of systems "that allow people to enroll and construct a profile of themselves, choose other profiles with which they would interact, and view material posted by their chosen list of profiles."[6] However, with the recent surge of applicable computer algorithms, social media also shapes what a user might want to watch or buy.

Social media companies use both regression analysis models and machine learning in their algorithms for boosting content that will optimize engagement from the user. These algorithms utilize inputs such as whether or not the user liked the post, commented on it, liked comments on it, followed the creator, and how long they spent watching it relative to its total length. They are black box algorithms, meaning that they receive input and produce an optimized output, but it is unclear exactly what occurred in the process of creating the output. This has raised concerns over the idea that algorithms may be implementing biases against specific groups behind the scenes by using out-of-context data. Content-boosting algorithms are unique to each social media company, but they share a similar three-fold purpose: feed users more content that they have expressed interest in, keep users fully engaged, and offer constant affirmation through likes and comments from fellow users. In doing so, algorithms "focus interest and limit exposure to expressions and opinions beyond what a user has desired."[7] Taina Butcher uses this to make the argument that algorithms can be political: through classifying, ranking, and sorting data, algorithms can make the world appear in certain ways rather than others, which varies from person to person.[8]

Social media algorithms are ubiquitous in today's world. As of September of 2021, nearly four and a half billion people were using social media, and the average social media user was engaging with roughly seven platforms, numbers that have only gone up since then.[9] The dawn of social media came with Facebook and Twitter in 2004 and 2006, respectively. Both platforms started as websites on desktop computers, targeted at consumers in North America and Western Europe, where computers and data connectivity were affordable and common. However, in 2010, social media platforms focused their efforts on accommodating their services to mobile devices following the release of the iPhone in 2007. They also expanded their languages to offer their services to a larger and more diverse audience. By 2018, more than three quarters of Facebook usage took place on mobile devices rather than desktop computers. Social media was no longer a place to "go" during free time at home; rather, it followed the user on their mobile device wherever they went. This shift changed the role that social media played in the life of the average person. It became an extension of their being and a constant medium of expression. As Siva Vaidhyanathan puts it, "they became the operating systems of our lives."[10]

II. Understanding Filter Bubbles and Echo Chambers

A filter bubble is the result of an algorithmic selection process on social media, whereby users are solely exposed to content they have already indicated engagement towards.[11] Imagine a world composed of countless habitable bubbles that vary in size. Some are the size of states, others the size of neighborhoods. Within these bubbles, there might be sub-bubbles, and some bubbles and sub-bubbles might slightly overlap with each other. Life within a bubble is utopian–everyone's needs are met, there is not much disagreement, and the people are constantly entertained and engaged. People are allowed to leave their bubbles, but it almost never crosses their mind because life is great as is, and changing bubbles would likely ruin that. The aforementioned "bubbles" are filter bubbles, and the "world" they exist in is none other than Twitter–now X.

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[6] Vaidhyanathan, Siva. "SOCIAL MEDIA." In *Information: A Historical Companion*, edited by Ann Blair, Paul Duguid, Anja-Silvia Goeing, and Anthony Grafton, 777–82. Princeton University Press, 2021. https://doi.org/10.2307/j.ctv1pdrrbs.111.

[7] Vaidhyanathan, "SOCIAL MEDIA", 777.

[8] Bucher, Taina. *If...then algorithmic power and politics*. Oxford University Press, 2018.

[9] "Social Media Statistics Details." Undiscovered Maine, October 8, 2021. https://umaine.edu/undiscoveredmaine/small-business/resources/marketing-for-small-business/social-media-tools/social-media-statistics-details/.

[10] Vaidhyanathan, "SOCIAL MEDIA", 777-782.

[11] Morelock, Jeremiah, and Felipe Ziotti Narita. "Invisible Audience and Echo Chamber Effects." In The Society of the Selfie: Social Media and the Crisis of Liberal Democracy, 70. University of Westminster Press, 2021. http://www.jstor.org/stable/j.ctv282jfv5.7.

Vivian Roese argues that there are three dynamics caused by algorithms that users are usually not aware of. The first is the existence of siloed filter bubbles; these filter bubbles are created by user preferences and by their nature, naturally progress in the opposite direction of other filter bubbles. The second is that these bubbles are caused by metrics not visible to the public. By this, she means that users existing within a given bubble are oblivious to just how filtered their content is. One might recognize that the content on their feed is biased or that there are other opinions on the same subject, but it is incredibly difficult to recognize just the extent to which algorithm-promoted content is biased. The third is that people do not intentionally opt into filter bubbles; rather, they are catapulted into them based on their engagement with various content. The result of this is that people often do not know that they are in a filter bubble, which may lead them into believing that the opinions displayed within their bubble are widely accepted. This contrasts consuming forms of "classical media," in which people actively choose which newspaper to read or channel to watch.[12]

Vivian Roese also develops the concept of "media hypes," which are comparable to news waves by media outlets. Typically, a media hype arises out of a social media filter bubble, where the fact that everyone shares similar opinions often fuels the media hype exponentially. The main ingredient for a media hype is shareability, and the catalyst is a filter bubble. In short, a media hype refers to an exceedingly viral post that attained its virality through a filter bubble. Media hypes and filter bubbles have the power to reshape one's reality, convincing them of the mainstream ideas within their filter bubble.[13]

The term "echo chamber" is a buzzword often used synonymously with "filter bubble." However, there is a slight but distinct difference between the two. An echo chamber is a community of "discursive homophily," in which there exists "a significant disparity in trust between members and non-members."[14] A filter bubble shares most of the characteristics of an echo chamber, except that one does not choose to enter a filter bubble; an algorithm puts them there. On the other hand, an echo chamber is shielded from outside influences simply by the sheer close-mindedness of its members. To visualize an echo chamber, imagine a circle of people huddled inward with their backs turned to outside ideas, only willing to listen to ideas in their homophilic circle.

Willing entrance into echo chambers often results in the unwilling and unknowing entrance into a filter bubble. Reddit is a social media site that seldom relies on content-boosting algorithms; instead, it allows users to search for and explore forums upon their own initiative. Due to its lack of algorithms, Reddit does not foster filter bubbles, but it still allows people to dig their own path down rabbit holes and end up in echo chambers, radical one-sided forums. Once a Reddit user is in an echo chamber, their views will likely radicalize due to the extreme one-sidedness of the opinions they are absorbing. Then, when that user downloads an algorithm-heavy social media app such as TikTok, they will very quickly end up in a filter bubble mirroring the echo chamber on Reddit. However, unlike their experience on Reddit, this time the user will not dig the rabbit hole themselves; instead, they will be pushed down the rabbit hole by the algorithm and likely not even notice it. In this process, knowing entrance into an echo chamber can directly lead to unknowing entrance into a filter bubble. Now, that user's entire reality has been changed. The media that follows them on their mobile device is one-sided, radical, and deceiving in the sense that it may appear mainstream when it really might be an extreme end of the spectrum.

One might argue that filter bubbles are not actually constricting since a social media user can simply use the search function to search for content with opposing viewpoints. While this is true, it is highly unlikely and uncommon for a twofold reason. The first is that, as Roese mentioned, part of the nature of a filter bubble is that a user will not realize they are in one. A user cannot search for the opposing side if they do not actively realize it exists. When a person is scrolling through social media and watching political videos, it usually does not cross their mind to search for the opposing viewpoints because the filter bubble "filters" out that content. The second reason is that people are homophilic, especially on social media. People open social media because, subconsciously, they are seeking dopamine. They want to see things that they like, whether that is entertainment or politics they agree with. Algorithms are designed the way they are for a reason; the content they display is addictive and will keep users engaged, clicking, and watching.

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[12] Roese, Vivian. "You Won't Believe How Co-Dependent They Are: Or: Media Hype and the Interaction of News Media, Social Media, and the User." In *From Media Hype to Twitter Storm*, edited by Peter Vasterman, 326. Amsterdam University Press, 2018. https://doi.org/10.2307/j.ctt21215m0.19.

[13] Roese, "You Won't Believe How Co-Dependent They Are," 313.

[14] Morelock, Jeremiah, and Felipe Ziotti Narita. "Invisible Audience and Echo Chamber Effects." In The Society of the Selfie: Social Media and the Crisis of Liberal Democracy, 70. University of Westminster Press, 2021. http://www.jstor.org/stable/j.ctv282jfv5.7.

So, even if a person realizes they are in a filter bubble and that there is another side out there, it is unlikely that they will search for content of the opposing side because it is unpleasant compared to the content already on their feed.

III. The Danger of a Society of Filter Bubbles

This section aims to prove that politically polarized filter bubbles are dangerous by their nature. It will couple social science and empirical data to ultimately arrive at the aforementioned claim.

Lilliana Mason explores social identity theory and the effects that partisan polarization may have. First, ingroup bias is the idea that simply identifying with a group already establishes a baseline level of contempt for the opposing group for no logical reason at all. For instance, participants placed in Group X automatically assume a sense of superiority over participants placed in Group Y, despite the groups having zero meaning or merit. This effect is known as the "minimal group paradigm," which is the idea that group membership inherently causes people to be biased in favor of their group. So, while a Republican or Democrat may claim to align with their party's views, there is still some baseline level of bias simply because they have chosen to identify with that group. Second, when an individual is strongly aligned with a party, they are far more likely to take action on behalf of that party, simply because they identify with that side. A Republican or Democrat may have no idea what their party stands for and simply identify with that party because they were raised that way; however, if this identification is strong enough, they may take action and defend their party despite not knowing what they stand for. Third, intergroup emotions theory holds that when one feels that their party is being threatened, feelings of anger are automatically evoked before knowing the content of the threats or if the threats are justified. These three outcomes of strong partisan identity–bias, activism, and anger–deem filter bubbles dangerous.[15]

For instance, an Instagram user named Josh may be pushed into a conspiracy filter bubble after liking a few interesting Instagram Reels about outer space. Once Josh is stuck in an online community composed only of people who promote outlandish theories, he may subconsciously begin to identify as a "conspiracy theorist." Now, simply because he identifies with this group, he may experience the three aforementioned outcomes of bias, activism, and anger in favor of his group. This leads to filter bubbles no longer simply existing separately, but now existing in conflict with each other. The pride that each filter bubble takes in its own beliefs results in contempt for other filter bubbles, which in turn leads to severe polarization. For instance, if Josh aligns strongly enough with his filter bubble, and he believes that it is threatened, Mason suggests that Josh may couple anger and action to protect his filter bubble, which could lead to dangerous outcomes.

Mason also claims that the two mechanisms that drive social polarization are political identity strength and alignment with the views of one's own party.[16] Since filter bubbles tend towards more extreme views and they solely promote content that aligns with their views, they meet both of Mason's catalysts for social polarization.

A study by Matthew Levendusky reaches the conclusion that the consumption of one-sided media does not greatly affect a moderate American, but rather has the effect of pulling politically affiliated Americans closer to their extreme ends of the spectrum. While his study focuses on media in the form of TV channels, it can still be applied to social media, in which content-boosting algorithms solely display one side of a given story. In attempting to rationalize these results, Levendusky arrives at two causes. The first is that the lack of counterarguments in one-sided media presents arguments as stronger and more convincing than they actually are. The second is that by tarnishing the "other side," one-sided media causes its consumers to view the world with "partisan-colored glasses," and makes them more prone to reaching conclusions in line with their party.[17] By this logic, social media users who are subject to algorithms and already lean in a certain political direction are likely to end up with extreme political views.

A study conducted by Yuan Chang Leong, like that of Levendusky, explores the effect that consuming media from one's own party has on that individual's political standpoint. In the study, the brains of American participants with conservative-leaning and liberal-leaning viewpoints on immigration were scanned as the participants watched videos, campaign ads, and speeches from their own party related to immigration policy. The scans searched for "neural polarization," which refers to brain activity "that

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[15] Mason, Lilliana. "'I Disrespectfully Agree': The Differential Effects of Partisan Sorting on Social and Issue Polarization." *American Journal of Political Science* 59, no. 1 (2015): 130. http://www.jstor.org/stable/24363600.

[16] Mason, "The Differential Effects of Partisan Sorting," 136.

[17] Levendusky, Matthew S. "Why Do Partisan Media Polarize Viewers?" *American Journal of Political Science* 57, no. 3 (2013): 613. http://www.jstor.org/stable/23496642.

diverges between people who hold liberal versus conservative political attitudes."[18] Neural polarization can be tracked through the dorsomedial prefrontal cortex (DMPFC), which is the region of the brain concerned with the interpretation of narrative content. The study found that simply by consuming media from their own party related to immigration, participants' brains prompt negative responses towards the opposing party, which is evidence of neural polarization. The researchers found that media containing risk-related and moral-emotional language has a particularly strong effect on neural polarization in the DMPFC. For instance, a conservative media outlet may depict scenarios regarding immigration that evoke fear or concern such as highlighting instances of crimes committed by immigrants or utilizing moral-emotional phrases such as "protect our borders" or "preserve the American way of life." By the nature of these scenarios and language, signals are released in the consumer's brain that establish a negative association with the opposing side without even mentioning them. Since the DMPFC is responsible for constructing situation models, conservatives and liberals establish distinct and divergent cognitive frameworks when processing information related to immigration policy.[19] Simply consuming media from their own party generates greater separation between an American and their counterpart on the opposite and of the political spectrum.

Content-boosting social media algorithms, with the intent of driving more clicks and views, promote risk-related and moral-emotional content that captivates the user. The top comments under these posts, too, contain risk-related and emotional language, which is part of the reason the algorithm promotes the content in the first place. According to Leong's study, consuming this sort of content will develop a neurological negative reaction against the opposing filter bubble, even without mention of it, creating neural polarization.

In 2017, Stefan Mertens et al. conducted a study to map out the extremity of public views on refugees and immigration in relation to news consumption patterns. A representative sample of the adult population of Belgium, France, Sweden, and the Netherlands filled out an online survey breaking down their news consumption from television, radio, newspapers and online platforms. From there, the participants applied a thirteen-item scale to represent the extent to which they agree or disagree with claims about refugees and immigration. Based on the responses of six thousand adults, the study concluded that people who consume news online tend to hold the most polarized views on immigration, even among highly educated individuals. Mertens et al. claim that this is evidence that there are indeed filter bubbles at play among individuals who primarily consume online media.[20]

By combining Mertens's results, which indicate a tendency towards extremeness among online news consumers, with Leong's evidence of a negative neurological response against the opposing party, the following conclusion can be reached: social media algorithms, which solely expose users to their own viewpoints, are dangerous because they neurologically antagonize the opposing party to users, who are already prone to holding extreme views due to the medium being online news. Social media algorithms create a troubling reality: a society divided by filter bubbles where individuals hold extreme viewpoints and are polarized from the opposing filter bubbles. Mason's point that staunch members of a group are likely to blindly take action in favor of their group adds fuel to that fire. The reality of polarized filter bubbles that social media algorithms foster is only growing in tension as people more deeply immerse themselves into social media. The empirically collected evidence discussed in this section not only supports the idea that this reality exists, but further shows that it is dangerous. If algorithms continue to antagonize and push conservatives and liberals further in their respective directions, this "reality" will reach a messy boiling point.

Christopher A. Bail et al. conducted a study which showed that American liberals and conservatives who were exposed to opposing viewpoints on X actually ended up becoming more extreme in their views, resulting in increased political polarization.[21]

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[18] Leong, Yuan Chang, Janice Chen, Robb Willer, and Jamil Zaki. "Conservative and Liberal Attitudes Drive Polarized Neural Responses to Political Content." Proceedings of the National Academy of Sciences of the United States of America 117, no. 44 (2020): 27731–39. https://www.jstor.org/stable/26970956.

[19] Leong, "Conservative and Liberal Attitudes Drive Polarized Neural Responses to Political Content."

[20] Mertens, Stefan, Leen d'Haenens, and Rozane De Cock. "Online News Consumption and Public Sentiment toward Refugees: Is There a Filter Bubble at Play? Belgium, France, the Netherlands, and Sweden: A Comparison." In Images of Immigrants and Refugees in Western Europe: Media Representations, Public Opinion and Refugees' Experiences, edited by Leen d'Haenens, Willem Joris, and François Heinderyckx, 153. Leuven University Press, 2019. http://www.jstor.org/stable/j.ctvh1dkhm.10.

[21] Bail, Christopher A., Lisa P. Argyle, Taylor W. Brown, John P. Bumpus, Haohan Chen, M. B. Fallin Hunzaker, Jaemin Lee, Marcus Mann, Friedolin Merhout, and Alexander Volfovsky. "Exposure to Opposing Views on Social Media Can Increase Political Polarization."

This counterargument raises the concern that if social media companies adjust algorithms to burst filter bubbles and expose users to opposing viewpoints, then Americans would only become more starkly polarized. However, it is better for an individual to be exposed to opposing viewpoints and end up with extreme views than it is for that individual to not even know about the opposing views. In the former scenario, the individual has at least tasted both ends of the spectrum and purposefully chosen where his politics lie. On the other hand, the individual in the latter scenario never actually critically considered or crafted his own politics; rather, they were spoon-fed to him by an algorithm. A more polarized society in which individuals hear both sides of politics is better than an ignorant, less polarized society.

IV. Algorithms, the Marketplace of Ideas, and the First Amendment

The First Amendment, arguably one of the most fundamental protections that Americans have, includes the guarantee that Congress shall make no law "abridging the freedom of speech".[22] The freedom of expression has many justifications: it fosters a marketplace of ideas, it is instrumental to dialogue within a democracy, it is a means of channeling disagreement without violence, it is a catalyst to social progress, and it is encompassed by human dignity. This section focuses on showing how social media algorithms undermine free speech by jeopardizing one of its justifications, namely the marketplace of ideas.

The marketplace of ideas is a metaphor for speech based on free exchange within a market economy. In a marketplace, rational consumers can freely choose which products they would like to purchase after considering their pros and cons. In the ideal marketplace, low-value goods will get pushed to the side due to the lack of market appetite for them, while the better products will succeed due to their quality nature. Similarly, in a marketplace of ideas, the "bad" ideas will not prosper, while the "good" ones will grow in popularity. Stewart Jay expands on this idea by claiming that "unbridled speech allows the truth to prevail in the marketplace of ideas."[23] He argues that by allowing for the clash of ideas, ultimately, in a Darwinian fashion, the "best truth" will arise.

Social media algorithms forcefully limit the scope of one's "marketplace," which allows for multiple false "truths" to arise. Imagine Joey, an avid TikTok user who considers himself to be very liberal. When Joey scrolls through TikTok, the marketplace he is exposed to, which ideally would allow for the flow of diverse ideas, is made up entirely of other very liberal individuals. Therefore, the ideas that bounce around Joey's marketplace are homogeneous and do not provoke critical thought among their audience. The "best truth" that arises out of Joey's filter bubble is the "best truth" among extreme liberals, which may not be a viable truth on the larger scale of society. By tampering with the marketplace that each person immerses themselves in, social media companies hinder crucial discourse and the flow of speech. Further, if Joey had a revolutionary idea that could positively impact the world, his message would only be funneled to extreme liberals due to algorithm forecasting. If Joey's idea is unpopular in the marketplace of extreme liberals, it may get shot down without receiving a fair shot. Joey's idea may have been groundbreaking among an audience of moderate Americans, but his speech was limited to the filter bubble algorithms placed him in. Content-boosting algorithms hinder the "truth" from isolated filter bubbles and they limit an individual's expression by only displaying their ideas to their filter bubble. In doing so, social media companies obstruct free speech.

Jay discusses the nuance that the marketplace of ideas is not always a valid approach since in subjective fields like art or beauty, there is no "best truth."[24] However, with regards to politics, the marketplace of ideas is indeed a tenable approach; in fact, the marketplace of ideas is the foundation of democracy. By allowing for free dialogue, a diverse array of ideas can be discussed and the baseless ones will be weeded out, allowing for the successful ones to rise. Algorithms that foster filter bubbles disrupt this process, and should be deemed unconstitutional.

Bernard Williams discusses the initial expectations of the Internet as a "global village," an environment that carries both the advantages and disadvantages of a village and globalization. In a global village, one would be connected to people from around the globe, but still be able to engage in familiar connections, as one would in a village. Ideally, in a global village, one would be forced to hear opinions they disagree with, just as in an actual village one may encounter someone they disagree with while shopping or

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Proceedings of the National Academy of Sciences of the United States of America 115, no. 37 (2018): 9216–21. https://www.jstor.org/stable/26531294.

[22] U.S. Const. amend. I.

[23] Jay, Stewart. "The Creation of the First Amendment Right to Free Expression: From The ..." William Mitchell Law Review, 2008. https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1250&context=wmlr&httpsredir=1.

[24] Jay, "The Creation of the First Amendment Right," 876.

attending a carnival. However, algorithms filter out this aspect of a village and make it easy for large numbers of previously isolated extremists to find each other and talk only among themselves.[25] Social media algorithms directly contradict the "global village" that the Internet was supposed to foster. Rather than exposing users to diverse opinions from around the world, algorithms shelter users from those very opinions by placing them in filter bubbles.

Tarleton Gillepsie argues that social media has profited by selling the promise of participatory culture to users: unrestricted participation, boundless information, expression for all, and a diverse community. Social media companies sell the promise of a global village, but proceed to pipeline users into filter bubbles that "generate the 'right' feed...the 'right' social exchanges, and the 'right' kind of community."[26] The "right" that Gillepsie describes is what is "right" for profit. However, the profit margins of social media companies are not worth jeopardizing arguably the most important American right: free speech.

V. Courses of Action

Since social media algorithms present a clear threat to the First Amendment, action must be taken to mitigate their hindrance on the marketplace of ideas. The aim of this section is to explore a possible avenue that the government can take to do just that.

First, however, it is crucial to understand that algorithms are not inherently bad. If an Instagram user loves koalas, it is not wrong for Instagram to flood their feed with cute koala videos. While this would technically place that user in a koala filter bubble, that filter bubble is not a danger to the First Amendment. Dangerous filter bubbles are those that involve politics, as they polarize political parties and hinder free discourse between them. However, entirely disabling politically-oriented algorithms would not properly solve the issue. If algorithms were fully removed in all social media scenarios that involved politics, many important messages might get lost because they do not reach the right audience. Therefore, rather than cold-turkey removing algorithms from politics, social media companies should aim to depoliticize them. Algorithms can still be used to optimize engagement in political scenarios under the contingency that they do not form filter bubbles. For instance, it is fine for algorithms to promote content that has been recorded with a high-quality camera over content that has been recorded with a low quality device, since camera quality is not partisan. Algorithms can still be at play in political social media posts, but not in a manner that polarizes Americans.

Algorithm transparency and accountability are starting steps towards protecting Americans' First Amendment right from algorithms. Niklas Kossow defines algorithm transparency as "the principle that the factors that influence the decision of an algorithmic system should be transparent to the people employing or affected by the outcomes."[27] In the context of social media, this means letting users know which actions such as liking or commenting on a video lead to certain content appearing on their feed. An example of algorithm transparency in practice is Facebook's "Why am I seeing this ad?" option for pop-up ads. On someone's TikTok "For You" page, this may look like a "Why am I being recommended this?" option for all videos.[28] If it is clear to all social media users that they are subject to algorithms, they may also recognize that they are in filter bubbles and that there is another side out there, which lessens the impact that algorithms have on the marketplace of ideas. Algorithm accountability refers to the idea that institutions should be held responsible for decisions made by the algorithms that they use.[29] If social media companies were held responsible for dividing the American public and the consequences that follow, they would likely depoliticize their algorithms on their own without any government intervention.

However, algorithm transparency and accountability are not enough to counteract the invasions of the First Amendment by social media algorithms. A central federal agency should be created that primarily focuses on the ethics of algorithms and making sure that they do not interfere with the constitutional rights of Americans. Andrew Tutt argues that such a solution is warranted due to the complexity, opacity, and dangerousness of algorithms. A central federal agency will not only pool the most qualified experts, but will also offer guidance and flexibility as technology progresses. The agency, Tutt argues, should be able to regulate in an ex ante

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[25] Williams, Bernard. "Truthfulness, Liberalism, and Critique." Essay. In *Truth & Truthfulness: An Essay in Genealogy*, 216–17. Princeton, NJ: Princeton University Press, 2004.

[26] Gillespie, Tarleton. 2018. "Platforms are Not Intermediaries." GEO. L. TECH. REV. 2: 202.

[27] Kossow, Niklas, Svea Windwehr, and Matthew Jenkins. "Algorithmic Transparency and Accountability." Transparency International, 2021. http://www.jstor.org/stable/resrep30838.

[28] Reed, Alastair, Joe Whittaker, Fabio Votta, and Seán Looney. "Radical Filter Bubbles: Social Media Personalisation Algorithms and Extremist Content." Royal United Services Institute (RUSI), 2021. http://www.jstor.org/stable/resrep37297.

[29] Kossow, Svea, and Jenkins, "Algorithmic Transparency and Accountability," 10.

fashion like the FDA.[30] The agency should enforce the depoliticization of social media algorithms and apply an approach of strict scrutiny while analyzing how they interact with the First Amendment and marketplace of political ideas.

One may argue that such a federal agency is an overreach of the government into private corporations, or that it may lead down a slippery slope of heavier government interventions. In response to the first argument, it is time that the people shift their view on social media from being corporations to being extensions of their lives. Many Americans use social media as their primary medium of expression, source of information, or form of entertainment. Social media has become so deeply tied to the American lifestyle that there needs to be a radical change in how it is viewed. Social media companies are no longer ordinary companies and, while it may seem unorthodox, their unprecedented rise to prominence demands stricter scrutiny from the government since they are so deeply tied to the lives of Americans. In regards to the slippery slope argument, government intervention in social media companies would "loosen" free speech rather than restrict it. So, the direction of the slippery slope would not be in the direction of a dystopian society in which Americans do not have the right to speech. Instead, the federal agency would expand the right to free speech by removing algorithms' restrictions on it.

VI. Conclusion

A series of filter bubbles are a threat to democracy because "different sides of the political spectrum need to be aware of each other's standpoints to engage in fruitful debates…. and implement creative, innovative ideas."

Social media algorithms create filter bubbles by solely exposing users to a community that agrees with their ideas. Social identity theory, as well as empirical evidence, show that exposing someone only to media that they agree with, especially when the medium is through the Internet, pushes them into extreme political corners and contributes to political polarization on a neurological level. The very nature of social media algorithms generates a more divided America.

By solely exposing users to their own viewpoints, social media algorithms hinder the marketplace of ideas, a major justification for the First Amendment. If the scope of one's intellectual marketplace is forcefully limited by algorithms, then certain groups will only have access to certain "truths," and the user's own expression will only be funneled to a group of like-minded individuals. In doing so, social media companies obstruct the free flow of ideas and interfere with the First Amendment.

Due to the exponentially intensive role that social media plays in the life of the average American, it is time to reframe the way that these companies are viewed. A federal agency should be established that enforces algorithm transparency, algorithm accountability, and regulates algorithms in an ex ante manner, prioritizing the First Amendment right of Americans.

If action is not taken soon, dire consequences will follow the continuous creation of ever-polarizing filter bubbles by algorithms. The attack on the Capitol should serve as a warning for the detrimental effects that could follow in the coming years if algorithms continue to undermine the First Amendment. Which is worth more: the profits of multi-billion dollar companies, or the safety and free expression of America.

[30] Tutt, Andrew. "AN FDA FOR ALGORITHMS." *Administrative Law Review* 69, no. 1 (2017): 118. http://www.jstor.org/stable/44648608.

The Forest County Potawatomi's Gamble on Gaming:

A Historical-Legal Analysis of Tribal Gaming as an Engine of Political and Cultural Sovereignty

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Introduction

The Forest County Potawatomi Community currently operates one of the nation's most successful gaming operations, The Potawatomi Hotel and Casino in Milwaukee, WI. They are the pioneers behind the nation's first off-reservation tribal gaming facility,[1] proprietors of the largest tribal gaming operation in terms of square footage,[2] and the principal economic force driving Wisconsin's Forest County.[3] The Forest County Potawatomi therefore serve as a remarkable exemplar of tribal gaming's power to foster economic development, self-sufficiency, and self-governance. However, it is essential to acknowledge that while the Potawatomi have experienced remarkable success, this success is not equally shared among all tribal communities. The beneficial potential of tribal gaming largely depends on their state's political climate surrounding gaming, proximity to urban markets, and tribal support. This paper will explore the convergence of these factors, illuminating how they contributed to the Forest County Potawatomi's highly successful tribal gaming strategy. Through a critical lens, this study unveils the dynamic interplay between tribal gaming and tribal sovereignty. By delving into the nuances of the Forest County Potawatomi experience, this research seeks to illuminate broader insights into the transformative potential of tribal gaming as a catalyst for tribal empowerment and self-determination, while at the same time recognizing that further legislation is necessary to allow all tribal communities to enjoy this transformation.

A Note From the Author

As a white researcher, I neither can nor aim to speak on behalf of Indigenous communities. I recognize the systemic advantages I receive in a society that has historically marginalized and oppressed minority groups, notably Black and Indigenous populations. While this paper draws upon the expertise of scholars from various backgrounds, the interpretations and conclusions are inherently my own. I approach this topic with profound respect, acutely aware that I cannot capture the depth and breadth of feelings within the Forest County Potawatomi Community or other Indigenous groups. My intention in sharing my findings is to convey the profound richness of Indigenous histories, cultures, and

[1] Steven Andrew Light and Kathryn Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise,* 63 (2005).
[2] Randall Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 Journal of Economic Perspectives 185, 195 (2015).
[3] Wisconsin Department of Public Instruction, *Forest County Potawatomi: Tribal Statistics* (2017), https://dpi.wi.gov/amind/tribalnationswi/fcp.

viewpoints, always striving for accuracy. I wholeheartedly welcome feedback and further insights, as I want to underline the importance of continual learning and introspection in this field.

A Note on Terminology

Particular attention is given to the terminology employed to describe aspects of gaming operations and tribal sovereignty. I will use "tribal gaming" when referencing general tribal gaming operations. In contrast, "Indian gaming" is utilized when discussing more specific pieces of legislation like the "Indian Gaming Regulatory Act" or referencing regulatory bodies such as the "National Indian Gaming Commission." The term "Indian Country" has a specific meaning in U.S. law under 18 U.S.C. §1151, though it is generally used to describe all tribal lands in the United States. This paper will use the latter. The adjective "Indigenous" in this paper denotes peoples native to the United States who occupied these lands before colonization. This term is typically used interchangeably with "Native American."

The term "Potawatomi" is used to describe the Potawatomi peoples prior to specified federal tribal designations. Following these designations, the Potawatomi were categorized into several federally recognized bands. This analysis is primarily focused on the "Forest County Potawatomi Community," which is a band of the Potawatomi whose reservation boundaries are within Wisconsin's Forest County.

Defining Sovereignty

Through the latter half of the 20th century , the usage of the word "sovereignty" surged, but is rarely defined clearly or applied pragmatically. Its widespread and, at times, vague use raises concerns about its diminishing relevance and potency, especially for tangible applications within Indian Country. The federal legal doctrine of tribal sovereignty has undergone significant transformations throughout history and remains a contentious point in U.S. jurisprudence. The U.S. concept of tribal sovereignty intertwines with the curtailment of tribes' inherent self-determination rights. Originally, European colonizers superimposed their governance frameworks on tribes, treating them as distinct political entities. This definition was later complicated by U.S. Supreme Court decisions, which categorized tribes as "domestic dependent nations" under overarching U.S. sovereignty. Consequently, the federal government vowed, at least in law, to safeguard tribal sovereignty from undue state intervention.[4] Whereas the goal for other groups under federal antidiscrimination policies was often integration, for tribes, the intent was to preserve their cultural separateness and political autonomy. However, in federal jurisprudence, tribal sovereignty not only signifies the tribes' pre-constitutional political status but also encompasses the evolving federal Indian law that can sometimes constrict this status. U.S. legal instruments, while occasionally supportive, can equally compromise or even negate tribes' inherent rights to self-governance, with Congress's unilateral power to limit tribal sovereignty being a central area of dispute.[5]

However, without anchoring sovereignty in Indigenous priorities and values, the term is at risk of becoming a hollow construct, shaped only by the allowances of the dominant society. This issue necessitates the introduction of cultural sovereignty, a term championed by scholars Wallace Coffey and Rebecca Tsosie, which encapsulates tribes' prerogative to define their histories and identities. They describe it as "the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures," emphasizing that true cultural sovereignty is rooted more in self-determination than mere self-governance.[6] By the late 1990s, Indigenous scholar and activist Vine Deloria Jr. argued that "sovereignty," as a term, had become detached from its political essence – with the federal

[4] See supra note 1, 19-20.

[5] David Getches et al., *Cases and Materials on Federal Indian Law* (St. Paul, MN: West Academic Publishing, 2016), 2-3; in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[6] Wallace Coffey and Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan. L. & Pol'y Rev*,* 191-221, (2001); in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

government's definition of the term taking precedence over Indigenous perspectives.[7] Deloria's concerns are not unfounded; they stem from the United States' historical and continuing practice of disregarding and undermining Indigenous conceptions of sovereignty.[8] Still, as most scholars and activists recognize, it's undeniable that entities like the US Supreme Court and Congress profoundly impact Indigenous peoples' daily lives. In exploring tribal gaming law and policy, I lean on the federal legal doctrine to highlight the constraints upon Indigenous perspectives.

Federal Indian Policy throughout U.S. History

To understand the nuanced dynamics between the U.S. federal government and Indigenous tribes, especially concerning sovereignty, we must first delve deep into the complex historical development of Federal Indian law. This historical foundation underscores the imbalances and changing perceptions that have continually influenced the concept of tribal sovereignty. The story of the Potawatomi is a poignant example of these dynamics.

During the Pre-Constitutional Era, Indigenous American tribes were largely treated as sovereign nations by European colonizers.[9] However, while European nations diplomatically recognized tribes as sovereign entities, this designation did not prevent them from engaging in atrocities, encroachment, and violence against Indigenous peoples. Their recognition reflected their diplomatic perception and strategic interests, rather than an affirmation of Indigenous rights. As the U.S. navigated its relationship with tribes amidst westward expansion, the Articles of Confederation, America's first charter, delegated to the federal government the power of "regulating the trade and managing all affairs with the indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated."[10] In drafting the U.S. Constitution, however, there was little discussion surrounding what the role of Indigenous tribes would be in the new nation.[11] As such, the only mention of Federal Indian policy under the Constitution is in the notably brief "Indian Commerce clause,"[12] wherein the founders delegated Congress the power to "regulate commerce... with the Indian tribes."[13] However, Indigenous Americans were not part of this drafting process.

The late 18th and early 19th century witnessed rapidly changing policies regarding Indigenous Americans. After the Constitution's ratification, Congress swiftly exercised its authority to regulate commerce with the tribes. Under the guidance of President George Washington and Secretary of War Henry Knox, Congress passed the Intercourse Acts. This set the foundation for early U.S. policy toward Indigenous tribes. Washington's vision, as articulated in his 1791 address, championed justice, fair trade, land purchase due process, vocational training for tribal members, and safeguarding Indigenous rights.[14] Yet, as the century progressed, policies became more aggressive and detrimental to Indigenous communities. The 1830 Indian Removal Act, championed by President Andrew Jackson, enabled the federal government to exchange eastern tribal lands for territories in the West.[15] Despite framing this as "voluntary" migration,

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[7] Amanda Cobb, *Understanding Tribal Sovereignty: Definitions, Conceptualization, and Interpretations*, 46 American Studies*,115, 116* (2005).

[8] Vine Deloria, *Indian Law and the Reach of History* 4 Am. J. Comp. L. 1, 1, *(1977).*

[9] See supra note 1, 26.

[10] Articles of Conf. art. 9; Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* 30 (1962); in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[11] Id. at 41.

[12] Id. at 43.

[13] U.S. Const. art. 1,§ 8.

[14] Angie Debo, *A History of the Indians of the United States* 90-91(1984); in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[15] Indian Removal Act, ch, 148, § 4, 1830 (repealed 1975).

Jackson's policy leaned heavily on coercive measures, often using military force to achieve these removals.[16] Several states during this period exhibited open hostility toward tribes, with Mississippi even attempting to dissolve the Choctaw government.[17] These aggressive removal policies culminated in the Trail of Tears, where thousands of Native Americans from various tribes were forcibly relocated – the Potawatomi among them.[18]

The United States Supreme Court was also engaging in a rapid development of its Federal Indian policy throughout the early 19th century – most notably in a series of cases known as the Marshall Trilogy. Through three landmark cases, Chief Justice John Marshall articulated a convoluted jurisprudence that still influences Federal Indian law today. In the first case, *Johnson v. M'Intosh* (1823), the Court determined that while tribes had a "title of occupancy" to their lands, the "complete ultimate title" belonged to the U.S., granting the federal government the exclusive right to acquire tribal territories.[19] This decision was influenced by a Eurocentric perception of Indigenous tribes as "fierce savages," describing in the case a fear that leaving lands with them would render the territories a "wilderness."[20] The subsequent case, *Cherokee Nation v. Georgia* (1831), further refined tribal sovereignty. The Court recognized the Cherokee Nation as a distinct political entity but stopped short of considering it a "foreign state." Instead, tribes were designated as "domestic dependent nations," likening their relationship with the U.S. to that of a "ward to a guardian."[21] This precedent laid the foundation for the trust doctrine, which, to this day, holds significant sway in matters like tribal gaming.[22] In *Worcester v. Georgia* (1832), the Supreme Court took a stance that seemingly bolstered tribal sovereignty, while undermining their capacity to exercise that sovereignty. The Court emphasized that M'Intosh only provided the discovering nation an exclusive right to purchase and settle upon tribal lands, but did not undermine the tribe's right to self-determination.[23] However, the decision also emphasized the supremacy of federal over state power in tribal matters.[24] With this in mind, legal scholars like Nell Jessup Newton argue that this decision was more indicative of shifting federal-state power dynamics than a genuine endorsement of tribal sovereignty.[25] The Marshall Trilogy left a convoluted legacy: Indigenous peoples were at once "fierce savages" and "wards," tribes were both "domestic dependent nations" and their "own territories."[26] This ambiguous framework and unclear definition of tribal sovereignty set the stage for subsequent forced removal efforts, the allotment of tribal land into reservations, and attempts at forced assimilation.

The formation of what is now known as the Forest County Potawatomi Community is representative of the aforementioned developments in Federal Indian policy. In 1833, state officials pressured the Potawatomi people to relinquish their remaining territories in northern Illinois and southeastern Wisconsin at a treaty council in Chicago.[27]

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[16] National Archives, "President Andrew Jackson's Message to Congress 'On Indian Removal' (1830)," (June 25, 2021), https://www.archives.gov/milestone-documents/jacksons-message-to-congress-on-indian-removal.

[17] See supra note 14, 117-118.

[18] David Getches et al., *Cases and Materials on Federal Indian Law* (St. Paul, MN: West Academic Publishing, 2016), 154; in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[19] *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. 543 (1823), 20.

[20] Id. at 21.

[21] *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), 30.

[22] Nell Jessup Newton, *Introduction to Symposium: The Indian Trust Doctrine After the 2002-2003 Supreme Court Term*, 39 Tulsa L. Rev. 237 (2003); in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[23] *Worcester v. Georgia*, 31 U.S. 515 (1832), 30-31.

[24] Id at 31.

[25] Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984), 202; in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[26] *Worcester*, 31.

[27] Milwaukee Public Museum, "Potawatomi Treaties and Treaty Rights," Nations in Wisconsin, https://www.mpm.edu/educators/wirp/nations/potawatomi/treaties-treaty-rights, 2022.

Known as the Second Treaty of Chicago, this agreement was the sole instance in which the Potawtomi ceded ancestral lands.[28] The tribes party to the treaty council had their own disagreements about its provisions. Several Potawatomi factions from areas north of Milwaukee vehemently alleged that the Menominee had, without proper jurisdiction, sold lands along Lake Michigan's western shore in 1831 that were traditionally under Potawatomi stewardship. The U.S. treaty commissioners, in a rare acknowledgment of these grievances, conceded to include provisions within the 1833 Treaty to compensate the Potawatomi.[29]

The Illinois and Wisconsin Potawatomi faced a series of challenges and negotiations following the Second Treaty of Chicago, significantly impacting their territorial rights and way of life. After the treaty, they were granted 5 million acres in Iowa and monetary "compensations." However, these terms were overshadowed by a more sinister clause: the forced relocation of the Potawatomi from Wisconsin by 1838 – a period remembered as the Potawatomi Trail of Death.[30] While many were pushed toward a reservation in Kansas, some opted for northern Wisconsin, settling in Forest County. In 1851, the U.S. federal government made a last-ditch effort to remove the Potawatomi from Wisconsin, but many remained. Throughout the late 19th century, the Potawatomi primarily sustained themselves by working in white-owned logging enterprises. By 1907, Wisconsin's Potawatomi population numbered 457. During this time, the U.S. government favored the Kansas-based Potawatomi with its annuity distributions, while neglecting the Wisconsin band entirely.[31] Finally, in 1913, the U.S. Congress federally recognized the Forest County Potawatomi Community, leading to an allocation of $447,339. With these funds, they secured land in Forest County, which now forms their 15,000-acre reservation.[32] This reservation did not emerge from a treaty, and the Potawatomi were stripped of hunting, fishing, or gathering rights on the territories they had ceded to the United States. Over time, the tribe has progressively reclaimed some of its ancestral lands, marked by key acquisitions in Milwaukee, including the seven-acre site of the Potawatomi Bingo Hotel and Casino.[33]

In the mid-20th century, federal policy shifted towards a termination strategy, aiming to disassemble tribal communities and federal support programs. In 1953, Congress expressed its intent to integrate Indigenous Americans into broader American society, ending their unique status and wardship.[34] This policy led to the relinquishing of federal authority over 109 tribes, which effectively terminated their federal assistance and protections. Subsequently, responsibilities like healthcare and education, traditionally provided by the federal government to tribes, were transferred to states. During this era, states and the federal government came together to sell tribal lands, reduce tribal jurisdiction, force Indigenous children into residential schools, and replace tribal economic initiatives with a push for off-reservation employment.[35] Furthermore, under Public Law 280, states gained unilateral civil and criminal jurisdiction over certain

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[28] Second Treaty of Chicago, *Treaties of the Potawatomi*, Forest County Potawatomi Cultural Center, Library, and Museum, Crandon, WI, curated by Michael Alloway Sr..

[29] See supra note 27.

[30] *The Trail of Death*, Forest County Potawatomi Cultural Center, Library, and Museum, Crandon, WI, curated by Michael Alloway Sr..

[31] See supra note 27.

[32] Forest County Potawatomi Education and Culture, *100-Year Land Ownership for FCP*, Potawatomi Traveling Times (December 15, 2012), https://www.fcpotawatomi.com/wp-content/plugins/fcpview/?pdf=https%3A%2F%2Fwww.fcpotawatomi.com%2Fwp-content%2Fuploads%2F2015%2F04%2FDECEMBER-15-2012.pdf.

[33] See supra note 27.

[34] H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953); in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[35] Charles Wilkinson and Eric Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 151-154, (1997); in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

tribes. The statute allowed states to extend this authority over these tribes without needing tribal approval.[36] While not all tribes experienced termination, the overarching assimilationist goals negatively impacted the well-being and status of Native American communities nationwide.

In the midst of termination policies, the Forest County Potawatomi Community endured particularly harsh consequences. According to U.S. Census records, the community grappled with alarming rates of poverty and housing instability that surpassed the general Forest County population. A housing stock assessment for the years 1939-1990 revealed that, while a new housing unit was developed for roughly every 1.6 persons in Forest County at large, the ratio plummeted dramatically within the Potawatomi community, where a new unit arose for every 20.25 individuals.[37] This gross disparity led Forest County Potawatomi Attorney General Jeff Crawford to compare the conditions faced by the Potawatomi people to those of a "third world nation" wherein they were forced to reside in "tar and paper shacks."[38]

The country's push for assimilation led to Potawatomi children being abruptly taken from their homes by state officials, many of whom were relocated to the Lac Du Flambeau Boarding School some 70-miles northwest. Potawatomi elder Billy Daniels Jr.'s memories offer a glimpse into this grim period. Detailing his uncle Jim Daniel's experiences, Daniels shared,

> They came after the kids on the reservation. They didn't ask the parents or tell them they were taking them; they just picked the kids up. They would put them in a car and drive off. They had to learn English; you were disciplined for speaking Indian. The kids all wore the same kind of clothes and cut their hair short. You had to march to eat, march to your classroom. On weekends, you had to march to church whether you were a Christian or not."[39]

Following this harrowing chapter in the Potawatomi's history, a shift in federal policy emerged, setting the stage for renewed efforts toward tribal self-determination and economic self-sufficiency.

The civil rights movement, along with growing resistance from Indigenous tribes against termination, ushered in transformative yet seemingly conflicting shifts in federal Indian policy. In 1968, President Lyndon Johnson unveiled a federal Indian policy focused on partnership and empowerment, offering Native Americans the choice to remain on their ancestral lands with their sovereignty intact or to integrate into mainstream American cities with the necessary skills for an equitable existence.[40] By the late 1970s, however, there was a budding political resistance against the federal government's apparent support for tribal self-determination. This resistance intensified during the Reagan administration, bolstered by his broader effort to devolve federal power to state and local governments. Reagan slashed funding for tribal communities.[41] By the 1990s, historical federal policies had created an economic landscape that constrained tribes' capacity to fully leverage their limited sovereignty. The rise of tribal gaming, largely in response to Reagan's cuts to Indian

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[36] Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 558. was repealed and amended in 1968 to require tribal approval; Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right?*, 90 J. Crim. L. & Criminology 1317, 1322 (2000).

[37] North Central Wisconsin Regional Planning Commission, "Forest County Potawatomi Comprehensive Plan," adopted November 2011, 35.

[38] Jeff Crawford (Forest County Potawatomi Attorney General) in discussion with the author, June 29, 2023.

[39] Billy Daniels, transcribed by Abbey Thompson, *FCP Elder: Billy Daniels Jr.*, Potawatomi Traveling Times, (December 15, 2012), https://www.fcpotawatomi.com/wp-content/plugins/fcpview/?pdf=https%3A%2F%2Fwww.fcpotawatomi.com%2Fwp-content%2Fuploads%2F2015%2F04%2FDECEMBER-15-2012.pdf.

[40] Lyndon B. Johnson, *Public Papers, 1968-1969, Part I 335*(1970). However, it's important to recognize that, as Light and Rand (see supra note 1) note on page 181, this apparent-repudiation of termination policy was "premised on a revival of the trust relationship between the federal government and the tribes."

[41] See supra note 1, 34; Samuel Cook, *Ronald Reagan's Indian Policy in Retrospect: Economic Crisis and Political Irony,* 24 Pol'y Stud. J. 1, 11-27 (1996).

subsidies and the government's push for tribal economic independence, offered a potential solution to the enduring "Indian problem."[42] The implementation of tribal gaming policies meant addressing tribal issues without heavily investing federal resources. This period of federal Indian policy polarized tribal perspectives; while some hailed it as a golden age for tribal sovereignty, others saw it as a thinly veiled revival of the Termination Era, depriving tribes of their already scarce funding sources.

The Rise of Tribal Gaming

In many North American Indigenous cultures before colonization, gambling served as a means of wealth redistribution and circulating possessions within communities. Tribal games of chance, encompassing activities akin to dice and shell games, as well as games of dexterity like archery and races, have historically been wagered on. These games were often linked to religious beliefs, sacred rituals, and mythology.[43] However, utilizing gambling as a means of generating profit is a relatively modern development. The backdrop to this move was a century-long depressed reservation economy.[44] In the late 1970s and early 1980s, driven by the Reagan administration's push for tribal self-sufficiency and dwindling funding for Indian programs, tribes began to open high-stakes Bingo establishments as revenue generators. Although Bingo was permitted in most states, stringent regulations frequently resulted in legal disputes, presenting challenges for tribes seeking to initiate tribal gaming operations.

In response to restrictive state laws, the Seminole tribe in Florida proactively filed a lawsuit to prevent the state from applying gaming regulations on their reservation. The federal court ruled in favor of the Seminole tribe, emphasizing their immunity from such state regulations.[45] Empowered by the decision, the Barona group of the Capitan Grande Band of Mission Indians established a Bingo operation in San Diego County, California. When the local sheriff threatened shutdown and arrests based on state Bingo laws, the Barona tribe pursued legal action. The court upheld the tribe's right to operate, noting that as California allowed Bingo, tribal operations did not breach state public policy. Following these rulings, over 80 U.S. tribes launched gaming operations, predominantly focused on Bingo.[46] By 1988, the tribal gaming industry amassed over $110 million, even without traditional casino offerings.[47] Despite these successes, state interference in tribal gaming persisted, keeping the issue of state jurisdiction over tribal lands unresolved.

At the forefront of this continued legal battle were the Cabazon and Morongo bands of Mission Indians in Riverside County, California, who operated Bingo halls and card clubs. While California did permit charitable Bingo games, it imposed restrictions on jackpot amounts and the allocation of gaming profits. Contesting California's application of these regulations on their reservations, the tribes' legal challenge culminated in the 1987 U.S. Supreme Court landmark ruling: *California v. Cabazon Band of Mission Indians*. The Supreme Court concluded that given the civil/regulatory (as opposed to criminal/prohibitory) nature of California's gambling laws, they could not be imposed on tribal gaming operations.[48] The Court also emphasized the federal goal of promoting tribal self-sufficiency and economic development, especially since these gaming operations were the primary revenue source for many tribal governments. Consequently, the Court determined that the tribal and federal interests in self-governance and economic autonomy

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[42] William Eadington, *Indian Gaming and the Law vii* (2002).

[43] Kathryn Gabriel, *Gambler Way: Indian gaming in Mythology, History and Archeology in North America* (1996); as cited in Light and Rand's *Indian Gaming and Tribal Sovereignty: The Casino Compromise.*

[44] Cook, see supra note 41, 11-27.

[45] *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 315-315 (5th Cir. 1981).

[46] *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982).

[47] Sioux Harvey, "Winning the Sovereignty Jackpot: The Indian Gaming Regulatory Act and the Struggle for Sovereignty," in *Indian Gaming: Who Wins?* (UCLA American Indian Studies Center ed., 2000), 16-17.

[48] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

surpassed California's concerns about potential criminal influences in tribal gaming. This pivotal judgment not only confirmed the tribes' rights but also set the stage for subsequent Congressional discussions on legislation pertaining to Indian gaming.[49]

In anticipation of the pending *Cabazon* decision, Congress initiated discussions about potential legislation for a regulatory framework concerning Indian gaming. The subsequent Indian Gaming Regulatory Act (IGRA) of 1988 aimed to establish a comprehensive structure that harmonized tribal autonomy and economic development with state interests in crime control and broader gambling regulation.[50] Furthermore, it aimed "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences" and to ensure the tribe remains the primary beneficiary of the gaming operations. The Act also underscores the necessity of establishing an "independent Federal regulatory authority for gaming on Indian lands" through the formation of the National Indian Gaming Commission (NIGC) and other federal standards, recognizing these as pivotal measures to address congressional concerns and protect gaming as a vital source of tribal revenue.[51]

IGRA defines gaming activities through a three-class structure, Class III gaming being the most highly regulated.[52] Class III gaming encompasses all house-banked card games and slot machines. For a tribe to offer Class III gaming, they must secure a compact with the state where the facility is to be located.[53] IGRA imposes specific guidelines on how tribes can utilize the revenues from their gaming operations. Such net revenues are designated for five primary purposes: funding tribal government operations or programs; supporting the general welfare of the tribe and its members; fostering tribal economic development; donating to charitable organizations; and aiding the functioning of local government agencies.[54] Additionally, tribes may choose to distribute their gaming profits as per capita payments to tribal members, provided that they are in compliance with a series of procedures. Before any such distribution can occur, the tribe must develop a detailed plan outlining the utilization of these net revenues, ensuring alignment with IGRA's five sanctioned expenditures. This plan then requires the endorsement of the Secretary of the Interior, who must be convinced that the allocations adequately cater to both tribal governmental operations and their broader economic development endeavors. Only after this verification can the tribe disburse the per capita payments. Legal precedents, such as those set in *Maxam v. Lower Sioux Indian Community* and *Ross v. Flandreau Santee Sioux Tribe*,[55] reinforce this process. In both instances, the courts ruled that tribes implicitly waived their sovereign immunity by entering into a state-tribal gaming compact. This waiver meant the courts could assess the tribe's adherence to IGRA's stipulations. Given that neither tribe in these cases had secured the Secretary's approval for their per capita payment plans, the courts barred them from initiating these distributions.[56] This underlines the inviolability of the process detailed in IGRA.

IGRA initially empowered tribes to sue states that failed to negotiate Class III gaming compacts in good faith. However, the courts nullified this tribal power to sue states in the *Seminole Tribe of Florida v. Florida* decision in 1996, which deemed such lawsuits unconstitutional on state sovereignty grounds.[57] Furthermore, in the 2017 case *New Mexico v. Department of the Interior*, the 10th Circuit limited the ability of the Department of Interior to intervene in the event that a

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[49] See supra note 2, 192.
[50] Id.
[51] 25 U.S.C. §2702.
[52] See supra note 1, 36.
[53] See supra note 2, 192.
[54] Id., 194.
[55] *Maxam v. Lower Sioux Indian Community*, 829 F. Supp. 277 (D. Minn. 1993); *Ross v. Flandreau Santee Sioux Tribe*, 869 F. Supp. 1401 (D.S.D 1992); as cited in Steven Andrew Light and Kathryn Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise,* 63 (2005).
[56] See supra note 1, 61-62.
[57] Id., 55-56.

state fails to negotiate a gaming compact in good faith.[58] These decisions introduced a wave of ambiguity and legal conflicts, particularly in states such as South Dakota, where substantial non-Indian gaming posed competition for tribes. However, not all state-tribal negotiations were contentious. Some states, like Michigan, ceded regulatory authority to tribal commissions, while tribes in Minnesota and Mississippi secured compacts without expiration dates, ensuring long-term stability.[59] By the end of the 1990s, around 140 reservations, housing approximately half of the reservation-based American Indian population, had solidified Class III compacts.[60]

Following *Seminole Tribe of Florida v. Florida*, tribes were largely susceptible to their respective state's political climate and attitudes toward tribal gaming. The ruling curtailed their ability to legally challenge states that failed to negotiate in good faith.[61] This landscape resulted in stark disparities in tribal gaming revenue. Those in states that negotiated a Class III gaming compact reaped the benefits, while others, whose states declined negotiations, found themselves devoid of legal remedies and economic opportunity. During the fiscal year 2013, 252 tribal gaming facilities that earned $25 million or less accounted for 56% of all operations but only generated 7.4% of total Indian gaming revenue. In contrast, 78 facilities that earned $100 million or more, while constituting only 17% of facilities, garnered a staggering 71% of the sector's revenues.[62] Location also played a crucial role, with tribes having access to urban population centers inevitably performing better.[63] These glaring discrepancies underscore the shortcomings of the so-called "casino compromise" within IGRA, thereby establishing a compelling argument for new legislation to address and rectify the inequalities born from the judicial restrictions imposed by the *Seminole* and *New Mexico* decisions.

The Rise of Tribal Gaming in Wisconsin

Before 1965, Wisconsin prohibited all forms of gambling under Article IV, Section 24 of its state constitution. Over the following two decades, four crucial amendments altered this stance. In 1965, the state legislature carved out an exception for residents participating in promotional contests. Charitable bingo games and raffles were then introduced in 1973 and 1977, respectively. By 1987, legislative amendments allowed for the establishment of a state-operated lottery aimed at property tax relief and greenlit privately managed pari-mutuel on-track betting.[64] Following the *Cabazon* decision and subsequent passage of IGRA, the state legislature empowered then-Governor Tommy Thompson to negotiate compacts on behalf of the state. By 1989, Governor Thompson had negotiated agreements with six tribal entities.[65] In 1990, treaty negotiations stalled due to apparent political opposition to tribal casino development. Wisconsin Attorney General Donald Hanaway contended that, while casino gaming wasn't "unconstitutional" within the state, it was still "illegal." His interpretation was that the term "lottery" in the state's constitution did not encompass casino gaming. Citing Attorney Hanaway's opinion, Governor Thompson opted to restrict further negotiations to lotteries and on-track betting

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58 *New Mexico v. Dept. of the Interior*, No. 14-2219 (10th Cir. 2017).

59 See supra note 2, 193.

60 Id.

61 Kevin K. Washburn, Recurring Problems in Indian Gaming, 1 WYO. L. REV. 427, 430 (2001).

62 See supra note 2, 195.

63 Washburn, 435.

64 Angela Miller, "Tribal Gaming in Wisconsin," Informational Paper 86, (Madison, WI: Wisconsin Legislative Fiscal Bureau, January 2019), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0086_tribal_gaming_in_wisconsin_informational_paper_86.pdf.

65 Wis. Cont. art. IV, § 24(3); in Kathryn Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 Marquette *L. R.* 971, 971-1008 (2007).

only.[66] Thompson's refusal to negotiate compacts was not only in violation of the recent *Cabazon* decision, but also the "good faith" negotiation requirement of IGRA, which was still in place at the time.

In response, the affected tribes took the issue to the Supreme Court on the grounds that the State of Wisconsin's failure to negotiate a gaming compact violated both the *Cabazon* decision and IGRA. The Court sided with the tribe, positing that the voter-authorized state lottery removed any remaining barriers against state-operated games with a few exceptions. This decision meant that casino games were not prohibited in Wisconsin under the broader understanding of "lottery."[67] Thus, the state was obligated to negotiate Class III gaming compacts with the tribes. Thus, by 1992, Governor Thompson entered into agreements with all eleven tribes. These were designed to expire in seven years, limiting the Class III games to Blackjack and machine gaming.[68]

The tribal gaming scene in Wisconsin grew rapidly during the early 1990s, echoing the broader national trend following IGRA and the *Cabazon* decision. An audit revealed that between 1992 and 1996, tribal net gaming profits in the state exceeded $945 million.[69] The revelation of such vast earnings led to a heated debate among state politicians. Some state politicians, particularly those in the Republican Party, believed the tribes should pay more to the state government.[70] Governor Thompson proposed more than tripling the $350,000 in regulatory costs that the tribes paid to the state each year.[71] Thompson's spokesperson, Kevin Keane, lambasted the tribes for their alleged underpayments, stating, "they've made $1 billion in net gaming profits and they're upset that the Governor expects them to pay more of a fair share back to the state. It's laughable."[72] These tensions revealed that the capacity of tribes in Wisconsin to exercise their right to game was very much contingent upon the will of Wisconsin's politicians and judges.

In 1991, the Forest County Potawatomi achieved a significant milestone: they opened a 45,800-square foot bingo hall in Milwaukee, making it the nation's first off-reservation gaming operation.[73] This unique establishment was enabled by provisions within IGRA, which though generally prohibiting gaming on newly acquired Indian lands after 1988, carved out an exception if certain criteria were met, including concurrence from the State's governor.[74] In the following year, federal officials acknowledged that the Potawatomi tribe had trust ownership of the land their bingo hall was built on before IGRA's enactment, which provided them the opportunity to offer Class III gaming off-reservation.[75] This expansion effort wasn't without its challenges. An agreement that would have seen the Forest County Potawatomi expand their downtown bingo hall in Milwaukee in exchange for annual payments was rejected by the Bureau of Indian Affairs (BIA) in 1999.[76] This rejection was viewed by many as a violation of tribal sovereignty. Amid these developments, a survey commissioned by the Forest County Potawatomi in 2000 revealed a disparity in public sentiment: while a

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66 Id.

67 *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 652 (W.D. Wis. 1990).

68 See supra note 64, 3.

69 Wisconsin Legislative Audit Bureau, *Wisconsin Gaming Board Audit 26* (1997).

70 Kathryn Rand and Steven Light, *Do 'Fish and Chips' Mix?: The Politics of Indian Gaming in Wisconsin*, 2, Gaming Law Rev. 129, 136 (1998).

71 Cary Spivak, "Thompson Seeks Third of Casino Profits," Milw. J. & Sent., Dec. 30, 1997; in Rand and Light, 136.

72 *Higher Than Tribes Said: State Indians' Gaming Profits $1B in 5 Years*, *Wis. State J.*, (Aug. 1,1997); in Rand and Light, 136.

73 Light and Rand, 63.

74 Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2719 (1994).

75 Richard P. Jones, *Tribes Push Casinos on Many Fronts*, Milw. J. & Sent., Sept. 18, 2000; in Steven Light and Kathryn Rand, *Are All Bets Off?: Off-Reservation Indian Gaming in Wisconsin*, 5, Gaming Law Rev., 351, 352-355 (2001).

76 Light and Rand, 352-355.

significant majority supported on-reservation tribal gaming, two-thirds were against the establishment of additional casinos off-reservation – thus posing a threat to further off-reservation gaming developments.[77]

Meanwhile, the Menominee tribe had operated a small casino on their reservation in Keshena since 1992. However, they sought greater economic sustainability by proposing an off-reservation casino in Kenosha, a city near the Wisconsin-Illinois border.[78] By 1998, they had entered into negotiations to buy the Dairyland Greyhound Park for $45 million, aiming to transform it into the Paradise Key Casino, which would have been second in scale globally only to the renowned Foxwoods and Mohegan Sun tribal casinos in Connecticut.[79] Attempting to follow the precedent set by the Potawatomi, the Menominee's efforts to establish their own off-reservation casino have been mired in a prolonged struggle. The political landscape of Wisconsin has added layers of complexity to these efforts. Governors like Scott McCallum (2001-2003) and Scott Walker (2011-2019) have remained adamant against adding new off-reservation tribal casinos. Such firm stances highlight how the fate of tribal gaming initiatives in Wisconsin, under IGRA's provisions, remains heavily contingent on the disposition of the sitting governor and their approach towards tribal sovereignty. Local receptivity towards casino development also determines how tribal gaming initiatives can change

Looking back at tribal gaming developments in the state generally, in 1992, the legislature sought to restrict the state's gambling laws, holding that the term "lottery" did not encompass casino games.[80] This decision set the stage for a proposed constitutional amendment that sought to ban casino games entirely. The following year, in 1993, voters ratified this amendment, effectively enshrining the exclusivity of bingo, raffles, parimutuel on-track betting, and the state lottery into the state constitution. Furthermore, the amendment made clear that the legislature could not authorize any other forms of gambling.[81] Governor Thompson, leveraged this powerful amendment in the 1998 compact negotiations with the tribes. Though Thompson was not interested in eliminating tribal gaming in the state, the newfound legal clarity provided him with significant political capital. He capitalized on the delicate position of games sanctioned by the 1992 compacts to negotiate several concessions, including the abrogation of certain treaty hunting/fishing rights, state taxation on reservation cigarette and gasoline sales, and substantial annual revenue sharing with the state, amounting to around $24 million.[82] These negotiations were contentious and exploitative, but culminated in an agreement that allowed tribes to maintain a near-monopoly on casino-style gaming for the next half-decade.

However, the landscape shifted again with the election of Governor James E. Doyle in 2002. Facing a significant budget deficit, Doyle turned to tribal gaming as a potential revenue source. He proposed a significant increase in the tribes' yearly contributions to the state, raising the annual payments from the existing $24 million to a staggering $100 million.[83] In return, tribes were offered long-term compacts and the inclusion of more casino-style games. Doyle praised the tribes for their contribution in the state's challenging times. Accusations flew in the state legislature, with legislators insinuating that Doyle had given tribes favorable compact terms in exchange for campaign contributions.[84] This turmoil prompted comments from both tribal and state representatives, expressing their confusion and frustration over the

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[77] Andy Hall, "Survey: Public Supports Tribes' Right to Casinos But Recent Efforts to Add More Casinos Might Jeopardize That Support", *WIS. ST. J.*, Feb. 24, 2000; in Steven Light and Kathryn Rand, *Are All Bets Off?: Off-Reservation Indian Gaming in Wisconsin*, 5, Gaming Law Rev., 351, 352-355 (2001).

[78] Steven Light and Kathryn Rand, *Are All Bets Off?: Off-Reservation Indian Gaming in Wisconsin*, 5, Gaming Law Rev., 353, 352-355 (2001).

[79] William Claiborne, "Taking Odds on Major Indian Casino Proposal," *Washington Post*, March 12, 2000; in supra note 78, 352.

[80] Kathryn Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90, Marquette Law Rev., 991, 971-1008 (2007).

[81] See supra note 64, 1.

[82] See supra note 80, 971.

[83] Rand, 993.

[84] Rand, 994.

evolving rules and political dynamics impacting the state-tribal compacting process. Doyle eventually vetoed the legislative approval requirement, framing it as a measure to protect the state's financial interests and the taxpayer's burden. This move was met with resistance by state Republicans.[85] With political avenues exhausted, detractors brought their claims to the Wisconsin Supreme Court, thus underscoring the issue's susceptibility to political turmoil.

After the 2003 amendments to the state-tribal compact, several legal battles reached the Wisconsin Supreme Court. The cases, namely *Panzer v. Doyle* (2004)[86] and *Dairyland Greyhound, Inc. v. Doyle* (2006),[87] subsequently clarified and reinforced Wisconsin's oversight and regulations concerning tribal gaming operations. The *Panzer v. Doyle* litigation was initiated in 2003 by petitioners Senator Mary E. Panzer, State Assembly Speaker John G. Gard, and the Joint Committee on Legislative Organization. They contended that Governor James E. Doyle had overstepped his authority by consenting to specific provisions in the 2003 amendments to the Forest County Potawatomi Community gaming compact.[88] On May 13, 2004, the Wisconsin Supreme Court, by a 4-3 majority, determined that the Governor had indeed exceeded his bounds with the 2003 Potawatomi amendments.[89]

A significant portion of the Court's ruling dwelled on the scope of authorized games. The 2003 amendments had expanded the game repertoire beyond what was approved in the original 1992 compact. The Court reasoned that most of these additional games clashed with the Wisconsin Constitution and state statutes, but permitted those that did not. The Court did not resolve the apparent controversy about games permitted under the original compact, like electronic games of chance and blackjack, leaving some gray areas in the decision.[90] The Court also had reservations about the indefinite duration of the compact stipulated in the 2003 amendments. They argued that by agreeing to a potentially "perpetual" compact, the Governor effectively curtailed the Legislature's oversight, creating a compact without any time-bound restrictions. Thus, they concluded that this was beyond the Governor's delegated authority.[91]

The most contentious aspect of the decision was the waiver of the state's sovereign immunity. Sovereign immunity is the doctrine mandating that states cannot be sued or otherwise held liable in a court of law without their consent. The Court referenced previous rulings which emphasized that waiving such immunity is the prerogative of the Legislature, not the Governor. Hence, Governor Doyle lacked authority to sanction the state's sovereign immunity waiver in the 2003 amendments.[92] After this decision, the state and the Forest County Potawatomi revisited the compact, leading to further amendments in 2005, particularly concerning the state's waiver of sovereign immunity.[93] In 2009, as a result of the *Panzer* ruling, the Lac Du Flambeau tribe eliminated similar provisions. Despite these challenges, several tribes retained sovereign immunity clauses found to be unconstitutional under *Panzer* and have not yet been compelled to amend those provisions, underscoring the need for robust statutory guidelines in this area.[94]

In *Dairyland Greyhound Park, Inc. v. Doyle*, the Wisconsin Supreme Court addressed Dairyland Greyhound Park, a Kenosha-based privately-owned dog racetrack. The Park experienced dwindling profits which they attributed to the proliferation of tribal casinos. This decline in profits prompted Dairyland to challenge their expansion.[95] The crux of

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[85] Id., 994-995.

[86] *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666.

[87] *Dairyland Greyhound, Inc. v. Doyle*, 2006 WI 107, 719 N.W.2d 408.

[88] Rand, 995.

[89] See supra note 64, 29.

[90] See supra note 64, 29.

[91] See supra note 80, 996.

[92] See supra note 80, 995.

[93] 2005 Amendment to Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, signed by FCP Chairman Harold Frank and Wisconsin Governor Jim Doyle.

[94] See supra note 64, 30.

[95] See supra note 78, 353-360.

Dairyland's lawsuit, initiated in 2001, was to prevent the Governor from extending or amending tribal gaming compacts that permitted casino gambling. This attempt was grounded in the 1993 amendment to the Wisconsin Constitution, which essentially prohibited all forms of gambling, with exceptions limited to bingo, raffles, on-track betting, and the state-run lottery. Dairyland, therefore, posited that the Governor was constitutionally restricted from extending or renewing any Indian gaming compacts beyond these limited forms of gambling.[96]

However, the Wisconsin Supreme Court ultimately ruled on July 14, 2006 against Dairyland's assertions, declaring that the 1993 constitutional amendment did not annul the original tribal gaming compacts. These original compacts had anticipated future amendments, even those expanding the scope of gaming. Therefore, the Court found that both the renewal of these compacts and any amendments therein, including those broadening gaming activities, were constitutionally safeguarded under the Contract Clauses of both the Wisconsin and U.S. Constitutions.[97] This pivotal decision clearly articulated that while this amendment did not affect the original compacts signed before 1993, it could be relevant to new gaming compacts that Wisconsin might consent to in the future.[98] Notably, however, the *Dairyland* decision did not delve into other unresolved aspects of the *Panzer v. Doyle* ruling, such as the duration or sovereign immunity provisions of the 2003 amendments.[99] At the heart of this case, the Court emphasized Wisconsin's contractual obligations with tribes, holding that the state could not renege on its prior commitments. As the decision stated, the real question was whether Wisconsin would break treaties by walking away from these obligations. The case emphasized the state's overarching relationship with its tribes, suggesting that while tribes might have found success in negotiating compact terms, their efforts could still be vulnerable to challenges in state courts.

In 2015, Governor Scott Walker declined the Menominee Nation's application for an off-reservation casino in Kenosha – yet another loss in their nearly three-decades-long battle. The Menominee Tribe had long sought to establish a casino at the Dairyland Greyhound Park dog track, viewing it as a way to alleviate their community's poverty. Governor Walker, however, while contemplating a presidential run in 2016, deemed the financial risk associated with the project too vast for the state.[100] This risk emerged from an existing compact with the Forest County Potawatomi, which would have required Wisconsin to repay millions of dollars to the Potawatomi Tribe if a Kenosha casino was approved, given that it was within 30-50 miles of the Potawatomi's Milwaukee-based gaming facility.[101] As such, the tribe's 2005 compact, negotiated with Governor Doyle, necessitated that the state reimburse Potawatomi for any losses associated with a nearby competing facility approved by the state. Despite these challenges, the Menominee have not wavered in their dedication to the project. An October report from the Wisconsin Legislative Reference Bureau further bolstered the tribe's hopes, indicating that the state's potential financial liabilities from such a casino project would be significantly less than in 2015.[102] However, the journey toward actualizing this casino dream remains complex.

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[96] See supra note 64, 31.

[97] U.S. CONST. art. I, §10, cl. 1; WIS. CONST. art. I, §12; as cited in Kathryn Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90, Marquette Law Rev., 999, 971-1008 (2007).

[98] See supra note 80, 999.

[99] See supra note 64, 32.

[100] Todd Richmond, Walker Rejects Menominee Tribe's Kenosha Casino, Green Bay Press Gazette, (Jan. 23, 2015), https://www.greenbaypressgazette.com/story/news/2015/01/23/wisconsin-gov-scott-walker-rejects-menominee-tribes-kenosha-casino/22218169/.

[101] 2005 Amendment to Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, signed by FCP Chairman Harold Frank and Wisconsin Governor Jim Doyle.

[102] Wisconsin Legislative Reference Bureau, Memorandum to Senator Van Wanggaard and Senator Bob Wirch on Proposed Kenosha Casino, Wisconsin Legislative Reference Bureau, (Oct. 17, 2022), https://www.scribd.com/document/603133198/Wisconsin-Legislative-Reference-Bureau-report-on-Kenosha-casino-costs?irclickid=VujwZ41-XxyNW4dx3Gxcz3pHUkDS2tRuk1cvXY0&irpid=2003851&utm_source=impact&utm_medium=cpc&utm_campaign=affiliate_pdm_acquisition_Bing%20Rebates%20by%20Microsoft&sharedid=EdgeBingFlow&irgwc=1#.

Although gaming revenues in Wisconsin showed significant growth between 1992 and 2019, new obstacles have emerged. Regional gaming competition, for instance, has surged, with new casinos expected in both Wisconsin and Illinois.[103] Moreover, the Potawatomi's skepticism has not waned. Potawatomi spokesperson George Ermert voiced concerns about how the Kenosha casino's revenue would be allocated. "Considering the Menominee's partnership with the Florida Seminole, it's crucial to question the revenue that will genuinely stay in Wisconsin," he stated. Recalling long-standing tensions, Ermert highlighted the land disputes tracing back to the Second Treaty of Chicago in 1833, emphasizing the fact that the city of Kenosha is within the Potawatomi's ancestral territory. "Our opposition isn't merely against another casino," Ermert clarified, pointing out the Potawatomi's support for the Ho-Chunk's Beloit casino initiative. "The Beloit project stands on Ho-Chunk treaty land and will be entirely managed by them," he added.[104] The escalating regional gaming competition and lingering concerns raised by the Potawatomi cast doubt on the sustainability and equitable distribution of gaming revenues in Wisconsin's evolving casino landscape.

This ongoing debate is colored by previous legal wrangles and agreements. Before his departure, Governor Scott Walker negotiated amendments in 2018 to the Forest County Potawatomi compact,[105] permitting the tribe to reduce its state payments by up to $250 million should a new casino jeopardize their earnings. This deal aimed to resolve lingering legal ambiguities and cap the state's potential financial risk, which could have soared to a staggering $500 million.[106] With the Potawatomi's primary concern being potential profit loss due to proximate casino establishments, this agreement proved pivotal. It reflected prior arrangements between the state and the Potawatomi from 2003, which restricted rival tribes from initiating casinos within a 50-mile radius of the Potawatomi establishment. This restriction, however, was later confined to 30 miles by the BIA.[107] As the debate around the Kenosha casino continues, these past agreements and decisions will undoubtedly play a crucial role in determining the project's future.

The intricacies of the Kenosha casino debate are emblematic of historical state-tribal dynamics, The Menominee tribe's persistence in seeking to establish an off-reservation casino juxtaposed against the relative success of the Potawatomi paints a stark picture of disparity. Despite the Potawatomi compact's restrictions, several state-tribal compacts with similar provisions continue unhindered, shedding light on the unpredictable, and often inequitable, nature of state interventions. As the Kenosha casino story continues to evolve, it remains a testament to the urgent need for a more consistent and just approach—one that genuinely acknowledges and champions the sovereignty and aspirations of Native American tribes.

The development of tribal gaming in Wisconsin highlights the challenges and flaws within federal Indian law and legislation. The history of federal Indian law has demonstrated a concerning trend: whenever power related to tribal gaming is devolved from the federal government to the states, the states have leveraged this authority to curtail tribal sovereignty. Through its state-tribal compact requirement, IGRA implicitly diminished tribes' sovereign right to game. More significantly, this devolution of power undercuts the tribes' ability to harness gaming as a medium to reinforce their

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[103] Scott Hurley, Menominee casino in Kenosha County would cost state less than in 2015, report says, FOX 11 News Madison, (Oct. 26, 2022), https://fox11online.com/news/local/menominee-tribe-casino-kenosha-county-village-bristol-hard-rock-international-forest-county-potawatomi-milwaukee-wisconsin-legislative-reference-bureau-report-state-senator-van-wanggaard-bob-wirch.

[104] Frank Vaisvilas, Here's Why Menominee Nation's Bid for a Casino in Kenosha is Drawing Both Support and Opposition from Tribes in Wisconsin,Green Bay Press Gazette, (Aug. 16, 2022), https://www.greenbaypressgazette.com/story/news/native-american-issues/2022/08/16/kenosha-casino-hard-rock-menominee-bid-draws-divide-tribes-wisconsin/10327929002/.

[105] 2018 Amendment to Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, signed by FCP Chairman Ned Daniels, Jr. and Wisconsin Governor Scott Walker.

[106] Patrick Marley, "Potawatomi Could Withhold up to $250 Million to State if a Competing Casino were Built 30 Miles Away," MILW. J. SENT., November 17, 2018, https://www.jsonline.com/story/news/politics/2018/11/27/wisconsin-would-have-pay-up-250-million-potawatomi-under-casino-deal/2126658002/.

[107] Id.

cultural sovereignty, as revenues generated from such ventures often play a pivotal role in cultural preservation and community empowerment. IGRA's mandate, which requires state-tribal compacts for gaming, effectively curtails tribes' inherent sovereign rights.

The Forest County Potawatomi's Success

The Forest County Potawatomi Community's engagement with tribal gaming serves as a testament to the industry's potential in strengthening both political and cultural sovereignty. As Attorney General Jeff Crawford has aptly remarked, "Indian gaming has been an economic miracle for our tribe. It has done in ten years what years of Indian policies by the federal government failed to do." Before their foray into gaming, the Forest County Potawatomi faced dire socioeconomic circumstances. The advent of gaming revenues became a marked turning point. Following the opening of their Milwaukee Bingo Casino in 1992, the Forest County Potawatomi ascended rapidly in the tribal gaming sector, maintaining a revenue and subsequent state payment structure that stands unparalleled within the state.[108]

Gaming revenues are strategically allocated.[109] Initially, the emphasis was on meeting the basic needs of the community. Elders were prioritized, ensuring they had access to both food and medical care. The next focus was the younger generation, ensuring they were nourished and had necessary educational resources. As a result of these efforts, high school graduation rates witnessed a remarkable increase.[110] Concurrently, the tribe financed robust housing programs and a state-of-the-art health and wellness center, with gaming revenues. Also, in leveraging their gaming revenues, they acquired farms with the ambition of achieving food sovereignty. They have aspirations to become energy self-sufficient and transition away from non-renewable energy sources like coal and nuclear power.[111] This approach not only reflects their commitment to protecting their environment but also their resolve to strengthen their sovereignty in all domains. The economic benefits of their gaming enterprise are undeniable. A tribe once plagued with poverty can now afford to issue per capita payments to each of their tribal members.[112]

The tribe's political and territorial sovereignty has also been strengthened by their venture into tribal gaming, as exemplified in their successful opposition to Exxon Corporation's proposed mine in Crandon, WI. In the mid-1970s, when Exxon discovered vast deposits of zinc and copper, the impending ecological and cultural impact on the neighboring tribal lands of the Forest County Potawatomi was profound. The envisioned mining operations presented a grave threat to the quality of local water sources like the sacred Wolf River. Local communities and the tribes, acutely aware of the mine's potential devastation on wild rice beds and fisheries, rallied against the project. Their efforts were multifaceted and meticulous – with Indigenous groups and local hunting and fishing advocates becoming unlikely allies.[113]

As the controversy raged, tribal gaming emerged as a significant revenue source for the Potawatomi. They hired top-tier lawyers and consultants, mounting a formidable opposition against the mining conglomerates. Their leveraging of gaming revenues to amplify their voice in the political arena proved instrumental. The tribe's tenacity, combined with

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[108] Wisconsin Department of Administration, "Revenue Audit Program," *Wisconsin Division of Gaming: 2018-2022 Report*, https://doa.wi.gov/Gaming/Gaming%202018-2022%20Report%20FINAL%20012023.pdf.

[109] Jeff Crawford (Forest County Potawatomi Attorney General) in discussion with the author, June 29, 2023.

[110] National Center for American Indian Enterprise Development, "2020 Native American 40 Under 40: FCP Chairman Brooks Boyd," https://www.ncaied.org/40-under-40/the-national-center-announces-2020-native-american-40-under-40-award-recipients/.

[111] See supra note 109.

[112] Mario Koran, "'We've got to get gaming out of our blood': Pandemic Shock Pushes Wisconsin Tribes to Diversify Economy," Great Lakes Now, (Apr. 7, 2022), https://www.greatlakesnow.org/2022/04/pandemic-shock-pushes-wisconsin-tribes-to-diversify-economy/.

[113] Gussie Lord, "Successful Tribal Opposition to Mining Projects in the Upper Midwest," *American Bar* Association: Natural Resources and Environment, Volume 34, Number 2 (Fall 2019); see also Zoltan Grossman, *Unlikely Alliances: Native Nations and White Communities Join to Defend Rural Lands* (Seattle, WA: University of Washington Press, 2017); and Michael O'Brien, *Exxon and the Crandon Mine Controversy: The People vs. Giant Companies, A True Story of People Winning!* (Middleton, WI: Badger Books, 2008).

local activism, prevailed.[114] "While Nicolet scaled back its budget, the Potawatomi were building a powerful record against the mine," remarked historian Michael O'Brien.[115] This well-funded resistance culminated in a significant victory for the affected Indigenous communities. In a landmark move, the Mole Lake Sokaogon Band and the Forest County Potawatomi collectively acquired the contentious mining site for $16.5 million.[116] The success story of the Forest County Potawatomi is a rare deviation from the prevailing challenges faced by many Indigenous communities.

Given the gaming industry's reliance on the capital market, even the most successful tribes experienced significant reductions in revenue due to unforeseeable cuts to their customer-base. As such, the Potawatomi have demonstrated an interest in diversifying their economy beyond gaming.[117] As early as 2005, the Potawatomi tribe took a significant step towards economic diversification by partnering with the San Manuel Band of Mission Indians, the Oneida Tribe of Indians of Wisconsin, and the Viejas Band of Kumeyaay Indians of California. Together, they opened the 13-story, 233-suite Residence Inn by Marriott in Washington, DC, just a short walk from significant landmarks such as the Smithsonian National Museum of the American Indian and the United States Capitol.[118] This business initiative was the first of its kind and set a precedent for tribes that prospered in the gaming sector, showcasing that they were capable of expanding beyond the gaming realm and tapping into other lucrative markets. The impetus for such ventures is clear: the tribal gaming industry, being intrinsically political, is susceptible to sudden disruptions and shifts, a fact that became all the more evident during the COVID-19 pandemic.

When the pandemic hit, major gaming tribes in Wisconsin faced immediate economic challenges. The Potawatomi Hotel and Casino laid off 1,600 of its Milwaukee workers.[119] In response to this crisis, the Forest County Potawatomi entered negotiations in 2022 to modify their gaming compact with the state. These amendments not only permitted on-site sports betting, which is exclusively allowed in tribal operations within Wisconsin, but also introduced major protective measures for the tribes. A disaster clause was added, ensuring a reduced revenue-sharing requirement with the state in situations where operations might be involuntarily suspended, as was the case during the pandemic.[120] Their current agreement now extends until 2061. In examining the relative success of the Forest County Potawatomi, the shortcomings of IGRA and the current judicial framework impacting tribal gaming become strikingly evident. The considerable economic disparities observed, not only between states, but also among tribes within individual states highlight the inherent limitations of the "casino compromise" as a federal Indian policy, underscoring its inadequacy in ensuring equitable growth and prosperity for all tribal nations.

Discussion and Conclusion:

The Forest County Potawatomi have successfully leveraged tribal gaming to strengthen their cultural and political sovereignty, an outcome that has eluded many tribes. As federal funding to tribal initiatives was systematically reduced under the Reagan administration, many lawmakers hoped that tribal gaming would be the perfect fix for Indian County's persistent economic struggles. Yet, for numerous tribes without thriving gaming operations — be it due to complications

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114 Id., 9.

115 Michael O'Brien, *Exxon and the Crandon Mine Controversy: The People vs. Giant Companies, A True Story of People Winning!* (Middleton, WI: Badger Books, 2008), 157.

116 Id.

117 See supra note 109.

118 See supra note 1, 103.

119 Cary Spivak, "Potawatomi Casino Complex Laying Off 1,600 Employees as COVID-19 Continues to Hurt Business," *Milwaukee Journal Sentinel*, July 17, 2020, https://www.jsonline.com/story/news/local/2020/07/17/potawatomi-hotel-casino-lays-off-1-600-furloughed-employees/5460435002/.

120 2022 Amendment to Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, signed by FCP Chairman Ned Daniels, Jr. and Wisconsin Governor Tony Evers.

with state-tribal compacts, geographical constraints, lack of tribal support, or other reasons — this financial avenue remains closed.[121] For those tribes unable to tap-in to the transformative effects of gaming operations on tribal sovereignty, the existing political and legal landscape is eerily reminiscent of the Termination Era. Left without federal funding and no private means by which to generate revenue, many tribes find themselves doubly marginalized. Even worse, the precedent set by cases such as *Seminole of Florida v. Florida* and *New Mexico v. The Department of the Interior* leaves them with no redress for these injustices.

The emergence of tribal gaming as a matter of federal Indian law and policy presents an essentially capitalist remedy to issues caused by colonialism.[122] In order for tribes to harness the economic benefits of tribal gaming, they must participate in the capitalist system. This framework poses a paradox for tribes: to leverage tribal gaming revenues as a means to amplify their sovereignty, they are compelled to engage with and strengthen the very capitalist system that historically sought to diminish that sovereignty in the first place. Throughout the eras of removal, allotment, assimilation, and termination, there was a methodical effort - both from state and federal institutions - to obliterate the distinctness and sovereignty of Indigenous communities. The means varied: from the overt coerced removals and assimilation strategies, to the subtle disintegration of institutions pivotal to indigenous sovereignty. In this landscape, tribal gaming emerges not merely as an economic strategy but as a tactical maneuver within the broader capitalist market, compelling tribes to compete amongst themselves, as exemplified in the ongoing controversy surrounding the Menominee's proposed Kenosha tribe. For tribes espousing alternative economic paradigms, submitting to capitalist tenets via tribal gaming might be perceived not merely as an economic choice but as an affront to their inherent sovereignty. However, the capitalist dimension of tribal gaming is not without nuance. As the Forest County Potawatomi and Sokaogon Chippewa's resistance to the Crandon mine illustrates, tribes can strategically channel their gaming revenue to counter the forced industrialization and environmental degradation that capitalist ventures often foster. Thus, while tribal gaming undeniably operates within the institution of capitalism, it can also be harnessed as a potent tool against the more deleterious facets of capitalist expansion.

The Forest County Potawatomi's experiences within the tribal gaming sector provide an important case study, not because they represent the norm, but rather because they are the exception. The Indian Gaming Regulatory Act and its surrounding legal decisions have largely fallen short in making tribal gaming a universally successful springboard for tribal sovereignty. This unstable and unclear legal territory epitomizes broader trends throughout U.S. history, wherein the status of Indigenous Americans remains in limbo between sovereign and subordinate. As we look ahead, the clarion call for a coherent legal stance on tribal issues resonates louder than ever. The foundational Marshall Trilogy, despite its historical significance, falls critically short in providing a jurisprudence that can protect tribal sovereignty in a contemporary context. As the tribal gaming industry continues to grow, there's a burgeoning need for legislative reforms, especially ones that address the state-tribe compact prerequisite in the IGRA. Reforms are imperative to ensure that the transformative potential of tribal gaming can be a reality for all tribes, not just the exception.

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[121] See Naomi Mezey, "The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming," *Stanford Law Review,* Volume 48, Number 3 (February 1996).

[122] See Ward Churchill, *Marxism and Native Americans* (Boston, MA: South End Press, 1999).

To Deny the Freedom of Denial: Holocaust Denial and the First Amendment

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Abstract

In light of the recent dramatic rise of antisemitism in the United States, this paper analyzes the possibility of restricting Holocaust denial in the context of the First Amendment. Examining a law modeled after Section 130 of the German Penal Code—the most comprehensive statute targeting Holocaust denial—it quickly becomes apparent that a number of Supreme Court rulings would present roadblocks to a similar proposed law in the United States.

First, a statute banning Holocaust denial must survive strict scrutiny analysis—a test that will prove challenging. It requires restrictions on speech to be narrowly tailored to achieving a compelling government interest; while preventing Holocaust denial may serve a compelling government interest, crafting a law narrow enough to avoid encompassing protected speech is a difficult task. Furthermore, Supreme Court precedent addressing viewpoint discrimination, stemming from the landmark case of *R. A. V. v. St. Paul*, suggest another avenue through which the Court might strike down a statute resembling §130.

There is a delicate balance between combating hate speech and protecting the fundamental liberty that is free speech, and while the United States must swiftly address antisemitic violence, it becomes clear through an analysis of First Amendment case law that banning Holocaust denial is neither a viable option nor a precedent that the Court would be well advised to set. This article presents an underexplored angle to discussions on the limits of free speech in a world that is becoming increasingly cognizant of the implications of its history.

"For the survivor who chooses to testify, it is clear: his duty is to bear witness for the dead and for the living. He has no right to deprive future generations of a past that belongs to our collective memory. To forget would be not only dangerous but offensive; to forget the dead would be akin to killing them a second time."

— Holocaust survivor Elie Wiesel, *Night*[1]

"And [Hitler] didn't kill six million Jews. That's just like factually incorrect. But for the ADL [American Defamation League], I want to say there's a lot of good Nazis that were just fighting for their country and for them all."

— Kanye West, December 1, 2022[2]

[1] Elie Wiesel, *Night* (1956; repr., New York: Hill and Wang, a Division of Farrar, Straus and Giroux, 2006).

[2] Jamie Burton, "Kanye West Hitler Remarks in Full—What Ye Said about Nazis to Alex Jones," Newsweek, December 2, 2022, https://www.newsweek.com/kanye-west-hitler-comments-full-nazis-alex-jones-transcript-1764113.

I. Introduction

It seems unimaginable that a genocide that wiped out two-thirds of the population of European Jews could ever be forgotten, much less denied.[3] The phrase "Never Forget" is a commandment to ensure the preservation of the memory of the six million Jews that were killed in the Holocaust.[4] Yet a recent study, touted as the "first 50-state survey of Holocaust knowledge among millennials and Generation Z," revealed that eleven percent of adults in the United States have never heard of the Holocaust, and one-third believe that the death count was under two million.[5] Among millennials and Gen Z respondents, the results were even more alarming: eleven percent believe Jews *caused* the Holocaust.[6] Despite the unwavering belief some might hold in John Stuart Mill's theory that the marketplace of ideas will force disfavorable political beliefs out of societal relevance, the recent evidence of Holocaust unawareness indicates that Holocaust denialism seems unlikely to dissipate without directed intervention.[7] And given that the last generation of Holocaust survivors who can bear witness to their experiences will soon die, there is little hope of this improving on its own.

Many countries have recognized the dangers of Holocaust denial and the resurgence of Nazism and taken action to combat these distortions of history—Germany and Austria prosecute overt Nazi references such as the display of swastikas, Israel and Hungary do not allow the purchase of Hitler's *Mein Kampf*, and sixteen nations have laws of various strength prohibiting Holocaust denial.[8] But the United States, with its commitment to liberal free speech, has no such laws. Neither Congress nor any state has enacted legislation banning Holocaust denial, and the Supreme Court has never decided a case squarely about the legality of speech denying the Holocaust.

However, the Court has consistently ruled to allow hate speech and falsehoods. On the spectrum between protecting a fundamental tenet of liberty and protecting its citizens from offense, the United States has almost always erred on the side of liberty. The elevation of speech over truth has forced our society to make concessions. As a result, public statements such as Kanye West's blatant glorification of Nazis and denial of the genocide Hitler orchestrated are entirely protected from legal recourse.[9] There is no argument that this is ideal, though proponents of Mill's theory might deem it a necessary evil. But while Holocaust denial has proven to cause antisemitic discrimination and contributed directly to hatred against Jewish Americans, there exists no window through which the courts can effectively restrict it without violating decades of First Amendment precedent. Further, even the narrowest of categorical bans would lead the Supreme Court down a slippery slope of viewpoint discrimination that nine unelected officials are hardly justified in presiding over.

II. Background

The term "Holocaust denial" is open to different interpretations. Some countries limit the definition of the term to strict "denial" in the literal sense, while others expand it to include hateful pro-Nazi rhetoric. For the purposes of this paper, I refer to the internationally accepted working definition, created by the International Holocaust Remembrance Alliance and adopted by the United Nations General Assembly:

> "Holocaust denial is discourse and propaganda that deny the historical reality and the extent of the extermination of the Jews by the Nazis and their accomplices during World War II, known as the Holocaust or the Shoah. Holocaust denial refers specifically to any attempt to claim that the Holocaust/Shoah did not take place. Holocaust denial may

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[3] "Remaining Jewish Population of Europe in 1945," United States Holocaust Memorial Museum, accessed December 4, 2022, https://encyclopedia.ushmm.org/content/en/article/remaining-jewish-population-of-europe-in-1945.

[4] Dov Wilker, "'Never Forget' Remains an Apt Slogan for Democracy," American Jewish Committee, September 9, 2017, https://www.ajc.org/news/never-forget-remains-an-apt-slogan-for-democracy-0#:~:text=Written%20by&text=in%20Holocaust%20education%2C%20we%20use.

[5] Courtney McGee, "Study Shows Americans Are Forgetting about the Holocaust," NBC News, April 12, 2018, https://www.nbcnews.com/news/us-news/study-shows-americans-are-forgetting-about-holocaust-n865396.

[6] Claims Conference, "First Ever Fifty State Survey on Holocaust Knowledge of American Millennials and Gen Z Reveals Shocking Results," Claims Conference, January 14, 2021, https://www.claimscon.org/millennial-study/.

[7] Mill, John Stuart, On Liberty, Dover Publications, 2022.

[8] Michael J. Bazyler, "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism," Yad Vashem, https://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html.

[9] Burton, "Kanye West Hitler Remarks," 1.

> include publicly denying or calling into doubt the use of principal mechanisms of destruction…or the intentionality of the genocide of the Jewish people. Forms of Holocaust denial also include blaming the Jews for either exaggerating or creating the Shoah for political or financial gain as if the Shoah itself was the result of a conspiracy plotted by the Jews."[10]

This definition covers a wide array of speech, nearly all of which is currently protected in the United States. But it is protected only through presumption—because there is no precedent of constitutional challenges to legislation strictly banning Holocaust denial, we can only attempt to predict how the Supreme Court would rule in a hypothetical case of a law limiting such speech.

Given the breadth of its definition, restrictions on Holocaust denial can take many shapes. Congress, states, or municipalities could enact legislation addressing false statements about the Holocaust, or prohibit people from justifying Nazi actions. They could choose to cover only speech by public officials, or to divert their attention to artistic expression. In light of the many possibilities, and the likely similar Court approach that would address each one, the discussion will focus on a hypothetical law that mirrors the prohibitions enacted in Germany.

Section 130 (§130) of the German Penal Code, titled "Incitement of the Masses," criminalizes certain hate speech.[11] While §130 does not refer to the events of the Holocaust directly, it has been used to address neo-Nazi sentiment and propaganda in Germany and was designed specifically in response to the Holocaust. Other European nations have crafted similar legislation based on §130, marking it as a clear model to consider; further, Germany's history has led its government to impose the strictest limitations on hate speech. I will analyze the constitutionality of a hypothetical US law modeled on §130 to help consider the range of legal claims that one could raise against Holocaust denial restrictions in the United States. The hypothetical statute modeled after German §130, which I refer to as the proposed statute, is below:

Whosoever, in a manner capable of disturbing the public peace:

a. Incites hatred against Jews or calls for violent or arbitrary measures against them;
b. Approves of, denies, or downplays an act committed under the rule of Nazis; or
c. Approves of, glorifies, or justifies Nazi tyranny;

Shall be found guilty of a misdemeanor.

III. Historical Limitations on Restricting Incitement and Fighting Words

To analyze the proposed statute in the eyes of the United States Constitution, we must first consider the type of speech it constrains. Undoubtedly, Holocaust denial is false speech. But in the recent case of *United States v. Alvarez* (2012), the Court ruled that "false speech" alone is an insufficient reason to allow restriction.[12] Instead, limitations can only be placed on limited categories of speech; those relevant to Holocaust denial are incitement and fighting words.

The phrasing of Subsection A of the proposed statute—"incites hatred"—suggests that case law addressing incitement speech might be an appropriate framework. But the Supreme Court's definition of incitement indicates otherwise. In the 1969 case of *Brandenburg v. Ohio*, the Court determined that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is **directed to inciting or producing imminent lawless action** and is **likely to incite or produce such action**."[13] Simply "inciting hatred," therefore, would fall short of this standard: "lawless action" as laid out in *Brandenburg* refers to a crime punishable by law. Simple hatred falls outside of this category and into the umbrella of protected speech.

Furthermore, to regulate Holocaust denial under the narrow exception to free speech described in *Brandenburg*, the government would be tasked with proving that approving of, downplaying, denying, or justifying Nazism is *likely* to cause imminent lawless action. While Holocaust denial is antisemitic and dangerous rhetoric, most of the time, Holocaust denial does not cause *immediate* violence. Also of note is the operative verb in *Brandenburg*'s definition: "directed." Here, the Court made clear that the

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[10] "What Are Holocaust Denial and Distortion?," International Holocaust Remembrance Alliance, 2022, https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-holocaust-denial-and-distortion.
[11] "Section 130," Sharing Electronic Resources and Laws on Crime, United Nations Office on Drugs and Crime, January 23, 2019, https://sherloc.unodc.org/cld/en/legislation/deu/german_criminal_code/special_part_-_chapter_seven/section_130/section_130.html.
[12] United States v. Alvarez, 567 U.S. 709 (2012).
[13] Brandenburg v. Ohio, 395 U.S. 444 (1969) (emphasis added).

speech could not just *lead* to lawless action, perhaps unintentionally or as a consequence of its original intention. Instead, to be restricted as incitement, it must *call for* that action. For instance, the courts could prosecute leaders of a neo-Nazi rally explicitly calling for members to attack the local synagogue under *Brandenburg*. But that same leader simply expressing his neo-Nazi views with no direct call to action could not face prosecution even if there was an uptick in antisemitic violence as a result of his speech.

A second consideration is whether statements of Holocaust denial can be viewed as "fighting words," another category of speech the Supreme Court has allowed the government to restrict. Fighting words, as defined in the 1942 case of *Chaplinsky v. New Hampshire*, are words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[14] Unlike incitement, the effect does not need to be immediate, nor does the speaker need to display an intention to cause harm. This is a lower standard, and one that the proposed statute has a higher chance of meeting. An argument can be made that statements that "incite hatred against Jews" can provoke one to retaliate. But in reality, there is no evidence to support this regarding "the average person"—who is likely *not* Jewish—reacting to statements of Holocaust denial.

Recent statements by Kanye West serve as a perfect example. One of the most vocal celebrities in the world—his 30 million Twitter followers more than double the global population of Jews—publicly claimed, "I see good things about Hitler," "I am a Nazi," Hitler "didn't kill 6 million Jews," and "the Holocaust is not what happened, let's look at the facts of that."[15] Under the proposed statute, West's statements would violate all three prohibitions and he would be found guilty in court. One would be hard-pressed to find a more blatant denial and justification of the Holocaust by a public figure in American history. Certainly, given the current accessibility of social media and the speed at which it travels, this reached a wide audience. But while it has caused outrage among even many of his followers, there has been no documented retaliation against West violent enough to "cause a breach of the peace." Even if a few instances of physical confrontation were to arise from it, the perpetrators would not be representative of the "average person," as described in *Chaplinsky*.

Brandenburg and *Chaplinsky* establish that for a restriction on such speech to be constitutional, it must be "**likely** to incite or produce [lawless] action" or be "**likely** to provoke the average person to retaliation."[16] The proposed statute attempts to fit within this narrow rule by nodding to the threat of danger in its parameters: it begins, "whosoever, in a manner capable of disturbing the public peace." But the language of the statute does not go far enough. While *Brandenburg* and *Chaplinsky* require the disruption to be "likely," the proposed §130 only extends as far as "capable." Thus, the proposed statute cannot be further considered without a fundamental change to its language.

Revising the scope of the proposal to substitute the focus on "capable" with "whosoever, in a manner **likely to disturb** the public peace" narrows the scope far enough to allow us to revisit whether the proposed §130 can fit within the narrow gap left open by *Brandenburg* and *Chaplinsky*. Still, Holocaust denial, absent immediate threats, does not go as far as to make *future* violence or retaliation likely—it instead addresses *past* actions that can no longer be prevented. Therefore, courts cannot categorize Holocaust denial into the buckets of facially unprotected speech that are incitement and fighting words.

IV. Historical Limitations on Restricting Hate Speech

If Holocaust denial does not automatically merit the label of incitement or fighting words, then calling it "hate speech" is the consolation prize. Hate speech has no formalized definition in United States law, but Justice Samuel Alito touched on it in the majority opinion of *Matal v. Tam* (2017): "speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful."[17] Denying the Holocaust, blaming Jews for its occurrence, praising Hitler, justifying the deaths of six million, or calling for antisemitic hatred is demeaning to Jews—many of whom, due to their unique history, consider themselves members of either a religion, race, ethnicity, or a combination.[18] Hate speech, then, is an appropriate description. But the

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[14] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[15] Burton, "Kanye West Hitler Remarks," 1.
Daniel Van Boom, "Why Ye Has Been Locked out of Instagram Again," CNET, November 3, 2022, https://www.cnet.com/culture/why-ye-has-been-locked-out-of-instagram-again/.

[16] *Brandenburg*, 395 U.S., 5.
Chaplinsky, 315 U.S., 6.

[17] Matal v. Tam, 582 U.S. (2017). Alito, J., majority.

[18] Pew Research Center, "9. Race, Ethnicity, Heritage and Immigration among U.S. Jews," Pew Research Center's Religion & Public Life Project, May 11, 2021, https://www.pewresearch.org/religion/2021/05/11/race-ethnicity-heritage-and-immigration-among-u-s-jews/.

government cannot ban hate speech simply because it is false. Even the Court's definition of hate speech in *Matal* was followed by the caveat that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[19]

Because hate speech does not fall into one of the buckets of unprotected speech like incitement or fighting words, restrictions on it such as the proposed statute would be considered content-based. The Court laid this out explicitly in *Reed et. al. v. Town of Gilbert, Arizona, et. al.* in 2015, where it defined content-based restrictions as those that apply "to particular speech because of the topic discussed or the idea or message expressed."[20] In this instance, the proposed statute targets only speech about Jews and the Holocaust. Denying the Holocaust is a "message expressed," and given that it cannot be assumed to cause violence, a ban would ostensibly be because of that message. That does not mean it is unfeasible entirely—but in *Reed*, the Court further laid the foundation that "distinctions drawn based on the message a speaker conveys, therefore, are subject to strict scrutiny" review.[21] This necessitates a close analysis of the three prongs of strict scrutiny.

V. Strict Scrutiny Analysis

Justice David Souter, dissenting in *Alameda Books v. City of Los Angele*s (2002), quipped that "strict scrutiny leaves few survivors."[22] Strict scrutiny, the highest level of constitutional review, is rarely a gauntlet that a law can withstand. It is applied when the government desires to infringe on a fundamental constitutional right or pass a law with a discriminatory effect against a protected class. Strict scrutiny requires the government to prove that the law is necessary to achieve a "compelling state interest," is "narrowly tailored" for that purpose, and employs the "least restrictive means" possible.[23] All three conditions must be met for the law to stand. Here, while the proposed statute might satisfy the first two prongs, it is likely to fail on the third.

To satisfy the first prong of strict scrutiny, the Court would need to find a relevant compelling government interest that the statute attempts to address. Historically, courts have ruled that the government has a compelling interest in protecting public safety, preventing violence, establishing national security, and respecting fundamental rights, among other considerations.[24] The justification for the proposed statute, thus, could be twofold: first, curbing racial discrimination has historically been considered a compelling interest, and second, antisemitism is rising in prevalence and the government has little choice but to intervene in a timely manner in order to curb the rising tide of resulting, but nonimmediate, threats to public safety.[25]

One of the "few survivors" of strict scrutiny has been in cases of affirmative action in college admissions.[26] The first such case, *Regents of the University of California v. Bakke* (1978) recognized two government interests as compelling: "remedying past discrimination by the institution that is using race in its decision making, and the promotion of diversity in the educational setting in higher education."[27] While this precedent is in limbo—the Court is likely to at least strip affirmative action permissions, if not retract them completely, in the upcoming decision of *Students for Fair Admissions v. President and Fellows of Harvard College* (2022)—it will not be because the interest is no longer compelling, but because the Court will find that the statute fails to meet the other components of strict scrutiny.[28]

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[19] United States v. Schwimmer, 279 U.S. 644 (1929), Holmes, J., dissenting.
Matal, 582 U.S.

[20] Reed v. Town of Gilbert, 576 U.S. (2015).

[21] *Reed*, 576 U.S.

[22] City of L.A. v. Alameda Books, 535 U.S. 425, 122 (2002). Souter, J., majority.

[23] Ruth Ann Strickland, "Narrowly Tailored Laws," Middle Tennessee State University, 2014, https://www.mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws.

[24] Strickland, "Narrowly Tailored Laws," 8.

[25] If the threats were to be immediate, restrictions on the speech would be constitutional under *Brandenburg* and not subject to strict scrutiny review at all.

[26] *Alameda Books*, 535 U.S. Souter, J., majority.

[27] Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
Christina Rodriguez, "Equal Protection," The Hechinger Report, 2022, https://hechingerreport.org/affirmative-action/.

[28] Nina Totenberg, "Can Race Play a Role in College Admissions? The Supreme Court Hears the Arguments," NPR, 2022, https://www.npr.org/2022/10/31/1131789230/supreme-court-affirmative-action-harvard-unc.

The proposed statute does not address diversity in higher education as *Bakke* did, but it does contribute to remedying racial discrimination given that the Court has recognized Jews' categorization of themselves as a race. A unanimous majority held, in *Shaare Tefila Congregation v. Cobb* (1987), that "Jews can state a §1982 claim of racial discrimination, since they were among the peoples considered to be distinct races, and hence within the protection of the statute at the time it was passed."[29] Essentially, despite being primarily Caucasian, Jews can claim protection under a law intended to protect minority races. Justice Byron White, writing for the Court, considered the intention of the original statute of protecting "persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" in conjunction with the history of discrimination against the Jewish people.[30] Thus, if preventing racial discrimination is a compelling interest—and it has proven to be through both affirmative action cases and the repeated labeling of race as a "suspect class" entitled to automatic strict scrutiny review—then preventing antisemitism is equally compelling.[31] The Court would only need to further determine that Holocaust denial constitutes antisemitism, and that hardly requires a stretch of the imagination.

Chilling antisemitic speech is also a compelling interest of the government because of the increasing threat presented by antisemitism to public safety. According to the Anti-Defamation League—an organization towards which Kanye West directed his vitriol—antisemitism in the United States is at an all-time high. In 2020, "crimes targeting Jews comprised 54.9% of all religious bias crimes."[32] Then in 2021, there were "2,717 incidents of assault, harassment and vandalism" fueled by hatred of Jews. That marks the highest number of incidents reported since the ADL began tracking this statistic.[33] In the past month alone, antisemitic hate crimes in New York City have spiked by 125%.[34] While definitive statistics have not yet been compiled for the entirety of 2022, there are clear indicators that public statements of antisemitism and Holocaust denial—even those that do not rise to the level of *calling* for violence—such as those made by West empower antisemites to outwardly express their prejudice. The vile thoughts that antisemites had previously kept private because of societal expectations have begun to surface as the dam of public acceptance has burst.

For instance, the politically liberal and inclusive suburb of Montclair, New Jersey, saw an outward display of antisemitic hate speech just one day after West's controversial interview with Alex Jones. On December 2nd, police found swastikas and insults such as "Jew whore" on a local playground.[35] Four days after that, a Montclair train station was defaced with a painted Nazi star.[36] While Montclair has seen a few similar incidents in the past, it seems more than coincidental that there were two such incidents just days after West's interview, despite the fact that he did not directly call for such violence.[37] The rising frequency of such attacks warrants, if not compels, government action to address antisemitism.

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[29] Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

[30] *Shaare Tefila*, 481 U.S. White, J., majority.

[31] Cornell Law School, "Suspect Classification," LII / Legal Information Institute, n.d., https://www.law.cornell.edu/wex/suspect_classification.

[32] "AJC Deeply Troubled by FBI Hate Crimes Data Showing Overall Increase, Jews Most-Targeted Religious Group," American Jewish Committee, August 31, 2021, https://www.ajc.org/news/ajc-deeply-troubled-by-fbi-hate-crimes-data-showing-overall-increase-jews-most-targeted.

[33] Anti Defamation League, "Audit of Antisemitic Incidents: Year in Review 2020," American Jewish Committee, April 2021, https://www.adl.org/2020-audit-h.

[34] Snejana Farberov, "Anti-Semitic Hate Crimes in NYC Soared 125% in November: NYPD," New York Post, December 6, 2022, https://nypost.com/2022/12/06/anti-semitic-hate-crimes-in-nyc-soared-125-in-november/.

[35] Talia Wiener, "Antisemitic Graffiti, Including Swastikas and Other Hate Speech, Found in Edgemont Park," Montclair Local News, December 6, 2022, https://montclairlocal.news/antisemitic-graffiti-including-swastikas-and-other-hate-speech-found-in-edgemont-park/.

[36] Julia Martin, "Gold Stars Painted at Montclair Train Station Appear to Be Another Antisemitic Incident," North Jersey Media Group, December 7, 2022, https://www.northjersey.com/story/news/essex/montclair/2022/12/07/antisemitic-imagery-montclair-nj-train-station/69709052007/.

[37] These incidents occurred in my hometown. In 2021, there were reported acts of antisemitic bullying in a local middle school, but the school failed to address them. In another incident, when attempting to honor a Jewish activist for Holocaust remembrance day, the high school's administration chose Meir Kahane, a controversial figure with white supremacist ties, instead of one of the countless options that were more noble. Again, the high school issued a weak apology but refused to take further action, despite the demands of its Jewish Student Union and a local synagogue. Evidently, even the areas that pride themselves on being "progressive" exclude Jews from the narrative when attempting to combat discrimination. While the ultimate conclusion of this paper will be that speech such as the swastikas and Nazi stars

The acceptance of neo-Nazism in society perpetuated by a lack of government action thus far has also led to direct violence against Jews. The 2017 "Unite the Right" rally in Charlottesville, North Carolina saw hundreds of white nationalists and neo-Nazis descend onto the city in defense of confederate statues.[38] They shouted "Jews will not replace us" as their violent rampage killed one and injured thirty-five.[39] The attackers were clear in their rejection of Jews as Americans and even clearer in their unadulterated hatred towards the Jewish community. If government inaction permits antisemitism to rampage freely among nationalists like these, then the threats to public safety will only become more frequent over time. The urgency of this is further emphasized by the fact that currently, the hateful speech of a Holocaust denier can be combated with the direct stories of a survivor, but the next generation will no longer have this privilege. Considering that there is no shortage of antisemitic hate in the United States and that Jews can claim protections under not one, but two, protected classes, it is fair to assume that the proposed statute's restriction of antisemitic speech addresses a compelling government interest, and thus the first prong of strict scrutiny is met.

The second prong of strict scrutiny review is that the proposed statute must be narrowly tailored to achieve the compelling interests described above: preventing antisemitic prejudice and protecting public safety. Simply put, any portion of the statute that restricts speech must be written in a way that protects only these interests; other aspects of the law would not be important enough to justify the First Amendment muzzle. While the proposed statute covers a variety of speech, it is fair to assert that all of them are antisemitic. Furthermore, the caveat that the speech be "likely to disturb the public peace" ensures that the targeted speech is not simply private conversation with no possibility of affecting others. It is certainly reasonable to claim that approving of Nazis, inciting hatred against Jews, and denying the Holocaust perpetuate antisemitism and instances of prejudice against Jews; therefore, holding Americans liable for such actions would serve to reduce those same happenings. Thus, the law is narrowly tailored.

The final hurdle that the proposed statute must clear is the most fatal to laws undergoing strict scrutiny review: the component of "least restrictive means." Here, the law's case for survival crumbles. The question at hand is whether the government has another avenue through which to stifle antisemitic conduct that avoids infringing on free speech—it is fairly straightforward that a legislature could simply choose to address antisemitic *conduct* but not the speech itself. For example, the government could strictly enforce vandalism and public nuisance laws. Perhaps the legislature could enhance the sentences of those who participate in or incite violent actions against Jews specifically because of their religion and race, integrating antisemitism further into already existing hate crime laws.[40] In fact, the House of Representatives is currently considering a bill that aims to accomplish something similar: in 2021, Tennessee Representative David Kustoff introduced the "Preventing Anti-Semitic Hate Crimes Act" to "facilitate the expedited review of anti-Semitic hate crimes," expand education on antisemitic hate crimes, and increase the maximum sentencing guidelines for a repeat offender of such crimes.[41]

Because of these available alternatives—which are not plagued with free speech concerns—the proposed statute is not the least restrictive option. Hence, it falls victim to the third prong of strict scrutiny. Likely, the Supreme Court would therefore be disinclined to uphold it.

VI. Viewpoint Discrimination

The Court, in addition to considering the prongs of strict scrutiny, has also been wary of upholding statutes that extend beyond simple categorical restrictions and into the territory of viewpoint discrimination. For instance, in a case where the compelling interest of the speech restriction relates to preventing violence, the law must not extend beyond doing exactly that—preventing violence. If the law targets one viewpoint over another, it cannot stand even if its original intention *was* to prevent violence.

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cannot effectively be restricted under our Constitutional framework, steps need to be taken to protest against antisemitism and garner national support for the issue, ensure that Holocaust education is robust and widespread, and protect Jews under racial discrimination laws as laid out in *Shaare Tefila Congregation v. Cobb*.

[38] Ian Shapira, "White Supremacists Made Charlottesville a Symbol of Racism. Black Residents Say It Still Is.," Washington Post, August 11, 2020, https://www.washingtonpost.com/local/white-supremacists-made-charlottesville-a-symbol-of-racism-black-residents-say-it-still-is/2020/08/11/7455df10-da61-11ea-809e-b8be57ba616e_story.html.

[39] Nicole Sganga, "What to Know about the Civil Trial over Charlottesville's Deadly 'Unite the Right' Rally," CBS News, November 19, 2021, https://www.cbsnews.com/news/charlottesville-unite-the-right-rally-trial-what-to-know/.

[40] The United States Department of Justice, "Hate Crime Laws," United States Department of Justice, October 15, 2018, https://www.justice.gov/crt/hate-crime-laws.

[41] David Kustoff, "Preventing Anti-Semitic Hate Crimes Act," Pub. L. No. H.R.3515 (2021).

Here, the proposed statute runs into the buzzsaw that is *R. A. V. v. St. Paul* (1992).[42] In *R. A. V.*, the Court addressed the constitutionality of an ordinance that "prohibits the display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'"[43] The case emerged from the petitioner, R. A. V., burning a cross in the yard of a black family. In a unanimous opinion, the Court held that, while R. A. V.'s conduct could have been prosecuted under arson or trespassing, the St. Paul ordinance was facially invalid because even a statute attempting to limit "constitutionally proscribable content" could not differentiate based on the political message of the symbol.[44] The First Amendment, as explained by Justice Antonin Scalia, "does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[45] Any restrictions on violent or intimidating speech can solely target those qualities, but not the speech associated with them.

Scalia's majority opinion in *R. A. V.* justifies the holding in two ways. First, a statute such as St. Paul's is discriminatory on the basis of viewpoint—the purpose of *Chaplinsky* was to allow restrictions on speech that causes danger, but the question of what causes danger can be answered only by the potential impact of the speech and not the political motivations for saying it. Essentially, the determination of what constitutes "fighting words" cannot be made because of a subject matter the court decides is provocative or hateful; it must come from an independent likelihood of causing harm.[46] Furthermore, content discrimination—"on the basis of race, color, creed, religion or gender"—in the language of a statute is never necessary to achieve a compelling government interest.[47] If St. Paul wanted to protect minorities from the harm of someone burning a cross in their yard because they recognized that it intended to intimidate them, the city could simply make a law criminalizing speech intended to intimidate. It would be, and was, nonessential to include the caveat that the intimidation is based on race. And given that the "unnecessary" component was a restriction on a message—pure speech—the Court concluded that the law was not narrowly tailored *or* least restrictive.

This discussion of speech as separable from conduct in *R. A. V.* encompasses the difference between the restrictions permitted by *Brandenburg* and *Chaplinsky*, and the Court's presumed inclination to strike down the proposed statute. The first two cases make no note of content, allowing governments to ban speech solely for the reason that it is likely to cause harm. But both the statute that the city of St. Paul attempted to implement in *R. A. V.* and the proposed statute do more than that—they limit speech not just because of its likelihood to breach the peace, but because of its capability to breach the peace *for the reason* that it discriminates against a racial group.[48] With this in mind, the Court would likely strike down the proposed statute because of its inherent discrimination against antisemitic viewpoints.

VII. Prima Facie Evidence of Intimidation

To remain squarely within the bounds of the *R. A. V.* decision, a legislature could not issue a categorical ban on Holocaust denial. Instead, it would need to more neutrally ban speech intended to intimidate, regardless of the viewpoint. *Virginia v. Black* (2002) reached the same conclusion regarding cross burning: a state cannot ban cross burning because of racism, but it can ban cross burning with an intent to intimidate.[49] In parallel, if denying the Holocaust in a specific instance was found to have an underlying purpose of intimidation, only then could it be restricted. However, the Court would then also have to recognize the possibility of banning the opposite. If, for instance, affirming that the Holocaust *did* happen was somehow done in a way that intended to intimidate, the Court would have to weigh that with equal seriousness as it would in the case of Holocaust denial. Otherwise, the Court would be taking a position on whose speech carried more value, and discriminating based on that judgment. While this example does not appear too controversial because the vast majority of Americans can agree that Holocaust denial, and more generally racism and antisemitism, are harmful, there are much less clear-cut examples. For instance, discrimination on the basis of religion and discrimination on the basis of sexuality are often at legal odds with each other. Laying a pride flag with the message

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[42] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). Scalia, J., majority.

[43] *R. A. V.*, 505 U.S.

[44] *R. A. V.*, 505 U.S.

[45] *R. A. V.*, 505 U.S. Scalia., J, majority.

[46] "*R. A. V. v. St. Paul*, 505 U.S. 377 (1992)," Justia Law, n.d., https://supreme.justia.com/cases/federal/us/505/377/.

[47] "R. A. V.," Justia Law, 15.

[48] David A. May, "R.A.V. V. St. Paul," Middle Tennessee State University, n.d., https://www.mtsu.edu/first-amendment/article/270/r-a-v-v-st-paul.

[49] Virginia v. Black, 538 U.S. 343 (2003).

"Fuck the Bible" by the yard of an Evangelical Christian would plausibly offend them, as would planting a cross with the inscription "Fuck the Gays" by the yard of a same-sex couple. For the Court to conclude that one of those is protected speech but not the other would be arbitrary, subjective, and entirely based on the personal values the justices decide are important. Instead, the speech could only be restricted if the Court were to find it was intended to intimidate the homeowners.

While it is a compelling interest for the government to protect Jews from antisemitism, the very intention of the First Amendment is that individuals *can* hold and express antisemitic beliefs, even if they lie at odds with the government's position. The discussion of viewpoint discrimination in *R. A. V.* means that to protect those views, the government cannot issue harsher restrictions on antisemitism than it does on *anti*-antisemitism simply because one view is more "correct."[50]

Still, there is a clear flaw in this logic. Namely, the difference between publicly denying the Holocaust and publicly confirming its reality is distinctive enough to justify categorizing them differently: the latter does not often, if at all, intend to intimidate, but denying the Holocaust *is* often intended to intimidate. *Virginia v. Black* tackles this exact argument; the majority concluded that cross burning *specifically with the intent to intimidate* could be restricted, but cross burning is not prima facie evidence of intent to intimidate.[51] Therefore, the burden would be on the victim to prove that the perpetrator held that intention, and only then could a court prosecute. Holocaust denial appears to be no different—it cannot be assumed that a denier intended to intimidate.

However, Justice Clarence Thomas offered a convincing rebuke of the majority that is worth considering. In his dissent in *Black,* he cited his own 1995 concurrence in *Capitol Square Review and Advisory Bd. v. Pinette* to argue that cross burning is "a tool for the intimidation and harassment of racial minorities."[52] His reasoning is based in history. The Ku Klux Klan has been around for ages with the specific intention of terrorizing black Americans, and one of their signature methods of harassment was burning a cross in their yard. Therefore, that sight would *always* intimidate a black American.[53] Crucially, any reasonable person would understand that burning a cross in someone's yard would likely cause intimidation; therefore, a perpetrator like R. A. V. could not claim to be doing it without at least the *knowledge* that it would intimidate.

Though it quickly becomes apparent that the scenarios are distinguishable, the historical implications of Holocaust denial are similar to those of cross burning. Part of the reason that Jewish people are considered a protected class is *because* of the history of discrimination against them, with the Holocaust serving as the most prevalent and convincing example in recent history. Most Americans, but Jews in particular, recognize the danger that would arise if the Holocaust is ever forgotten. Indeed, the wide use of the phrase "Never Forget" demonstrates the fear that if the Holocaust is ever forgotten, it could then be repeated. As a result, when Holocaust denial gains traction and antisemitic hatred becomes more socially acceptable as a result, it sparks true fear in American Jews. When Kanye West declared his disbelief that Hitler killed six million Jews and the next few days were filled with antisemitic attacks in ordinary, typically peaceful, towns, it *did* serve to intimidate. One would find it difficult to come up with an example of public Holocaust denial that did *not* intimidate, in intent or in practice.

However, there is a clear distinction between cross burning and Holocaust denial. Even if we lean towards applying Thomas' argument that there *can* be prima facie evidence to intimidate, we must still consider the difference between speech and conduct. Cross burning is an intimidating action in itself—it damages property and is also considered arson. Although its *message* is speech, the concurrent action is conduct that can constitutionally be regulated. But with Holocaust denial, the act itself is only speech: Kanye West's statement, for instance, was just that—a statement. In that way, just speaking out in denial of the Holocaust is not comparable to burning a cross, even if both serve to intimidate a racial group.

Considering specifically the language of the proposed statute, "approving of" or "justifying" Nazis is speech distinct from conduct, giving it far more constitutional protection than cross burning has. Therefore, even if the Court were to adopt Justice Thomas' view that there are certain symbolic actions that are so ladened with historical significance that they *do* constitute prima facie intimidation, the fundamental distinction between the *act* of burning a cross and the *words* used to deny the Holocaust likely dooms any statute that targets the latter.

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[50] *R. A. V.*, 505 U.S. Scalia, J, majority, 15.

[51] *Black*, 538 U.S. O'Connor, J, majority, 17.

[52] *Black*, 538 U.S. Thomas, J., dissenting, 17.
Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995). Thomas, J., concurring.

[53] *Black*, 538 U.S. Thomas, J., dissenting, 17.

VIII. Concluding Remarks

For a statute to withstand the mountain of case law, it must take aim at intimidating speech in a way that is viewpoint neutral. Such a law would be a significant departure from the proposed statute. Still, an adept legislator could achieve the desired effect of the statute while maintaining constitutionality. While a one-sided law like the proposed statute imposes viewpoint-based restrictions on speech, a statute banning *all* Holocaust-related speech intended to intimidate would be viewpoint neutral and likely survive judicial review.

Considering the rarity of Jews spouting hate speech to intimidate Nazis, the statute would not have much practical effect on the opposite side of the issue. In that sense, it would accomplish what the proposed statute intended to do. Still, it would be considerably weaker than the proposed statute. For one, the burden of proof would be on Jews to establish that Nazi speech was intended to intimidate them. While in many cases, that would be possible or even trivial, it would be difficult to establish that simply stating that the Holocaust was, "just like factually incorrect," as Kanye West did, would rise to that level.[54]

Stripping the proposed law of any viewpoint specificity would sacrifice efficacy for constitutionality. But there are doubts about whether even a law as direct as the proposed statute would function as intended. In Germany, where bans on Holocaust denial have been strictly enforced, modern technologies have diluted the power of §130. For instance, Neo-Nazis in the United States and in Germany have begun to use music to spread their ideology, with specific and identifiable songs serving as dog whistles.[55] Since the chosen songs offer no direct references to Nazi ideologies, even §130 in Germany cannot effectively regulate their promotion and influence. The music reaches many ears, particularly those of the younger generations—the very generation that is least informed on the Holocaust's history. Despite the best efforts of the German government, antisemitism spreads quite easily by its most determined promoters. Choosing to sacrifice the fundamental right of free speech to prioritize protecting a historically oppressed group of people, then, has become not a sacrifice but a concession. In the United States, where the umbrella of protected speech is far wider than in Germany, the loss of liberty resulting from a law similar to §130 would be even greater—this is not a concession the United States can ever make.

[54] Burton, "Kanye West Hitler Remarks," 1.
[55] Bazyler, "Holocaust Denial Laws," 2.

Misinformation and Lies in Election Speech: Is Protecting Truth in Politics an Impossible Feat?

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I. INTRODUCTION

Former President Trump's involvement in the January 6th insurrection attempt on the United States Capitol has sparked near-endless debate amongst political leaders, news outlets, media, and leading scholars of the law. Much of the discourse has centered on whether the 45th president's speech on the day of the attack directly incited violence and to what extent he should be culpable for injuries of law enforcement officers present on that day.[1] However, legal concerns also include the broader ramifications of the President's public challenge of the 2020 presidential election's results. Since the insurrection attempt, Trump has been indicted four times and is facing 91 charges in total.[2] These charges primarily concern Trump's role as a conspirator and obstructor; however, the accusations stem from both his refusal to acknowledge that a fair election had occurred and his speech that reflected this conviction. Such public statements claiming fraudulent election practices sow doubt in America's democracy and actively undermine the principles the country was founded on.

Partisan political speech has long been fraught with debatably false statements about opponents. However, in the last decade, these lies seem to have had a much larger impact on public opinion; recent data indicates record-high levels of public distrust in the government[3] and an ever-shrinking market of 'reliable' news sources.[4] As such, many states have sought to mitigate this increasingly problematic issue of political misinformation in the digital age by crafting legislation that targets 'false' election speech. However, debates about whether these laws directly infringe upon First Amendment rights are more prominent than ever.

Three noteworthy viewpoints concerning political misinformation have emerged. The first assumes the right to free speech, as enumerated in the First Amendment, is absolute everywhere; therefore, it insists that there should be virtually no legal repercussions for misinformation in political speech. The second argues that states should regulate electoral lies by adhering to the narrowly defined historical categories of defamation, fraud, true threats, and obscenity. The third claims the Court should create a *new* category of restricted speech reserved solely for election-based falsehoods, defined as "electoral exceptionalism."[5] To complicate this discussion, the Supreme Court has ruled somewhat irregularly on whether empirically false speech is protected under the Constitution,[6] especially in purely political settings; these decisions have resulted in further confusion regarding lower court rulings.

This paper will focus primarily on the third of these viewpoints, namely, electoral exceptionalism, as it is often misunderstood or overlooked. This paper will argue that electoral exceptionalism offers a potential path forward for the Court and the American people in this modern age. Section II will begin by briefly summarizing the recent emergence of 'electoral exceptionalism' as defined by constitutional law professors at the University of Virginia and New York University School of Law, Frederick Schauer and Richard Plides respectively. Symposiums written by other prominent legal scholars will be analyzed for their contribution to the electoral exceptionalism debate. Next, current legislation at the state level will be categorized into eight groups[7] and studied for constitutionality. Readers should pay particular attention to how state laws seek to criminalize lies in electoral speech and how liability is applied in each case. Extensive research conducted by University of North Carolina law professor David S. Ardia and doctoral fellow Evan Ringel will help shed light on this debate.

Section III will consider the case study of former Congressman George Santos, his recent expulsion from the United States House of Representatives, and the ways in which his career is relevant to the electoral exceptionalism debate. Several other First Amendment Supreme Court rulings will then be analyzed by comparing the levels of scrutiny used and the rhetoric behind each opinion. The Court's precedent has been reasonably consistent in cases where First Amendment protection is applied to lies told by a private individual. However, questions regarding electoral speech or speech that could interfere with the voting process have been

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[1] RICHARD L. HASEN, CHEAP SPEECH 1 (2022)

[2] Donald Trump faces 44 federal charges and 47 state charges. The majority of these regard the falsifying of classified documents and business records. The indictment Trump faces in Georgia alleges that he, along with his 19 coconspiritors "refused to accept that Trump lost, and they knowingly and willfully joined a conspiracy to unlawfully change the outcome of the election in favor of Trump" Derek Hawkins, Breaking Down the 91 Charges Trump Faces in His Four Indictments, WASHINGTON POST (Aug. 3, 2023),https://www.washingtonpost.com/politics/2023/trump-charges-jan-6-classified-documents/.

[3] Pew Research Center, Public Trust in Government: 1958-2023, PEW RESEARCH CENTER - U.S. POLITICS & POLICY, (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/.

[4] Hasan, *supra* note 1, at 1.

[5] Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment,* 77 Tex. L. Rev. 1803, 1803-1836 (1999).

[6] David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation,* 20 No. 3 *First Amendment Law Review* 291, 293 (2022).

[7] *Id*. at 300-301.

decided less consistently. These cases will be compared while acknowledging their unique historical backgrounds, the social milieu of the time, and pertinent concurrences and dissents.

Section IV will weigh some possible paths forward in election misinformation legislation. Hundreds of laws currently exist that target this speech, often in what appear to be unconstitutional ways; although the majority of these laws have not been enforced as of yet,[8] their existence may have unforeseen impacts on future election proceedings. Additionally, local journalism has declined at a stunningly rapid pace. All of these factors have resulted in the public adopting a much more nationalized and often polarized view of the political landscape. This perfect storm of components, coupled with a complacent Court, may signal a significant shift in how American democracy functions.

I. "Electoral Exceptionalism"

A. A New Category of Speech

The debate concerning election misinformation and the constitutionality of regulating such speech has greatly increased in the past several decades. Legal scholars Schauer and Plides discussed their position on the newly dubbed "electoral exceptionalism" in a symposium in 1999.[9] The authors described the foundational theory for their term, claiming:

> Although First Amendment doctrine is undeniably stringent with respect to most of the issues that could arise in the context of an election, the First Amendment does allow civil and criminal restrictions on, inter alia, some lies, some threats, some invasions of privacy, some indecency, some misrepresentations, some verbal assaults, and some incitements to unlawful violence. The First Amendment might be thought to allow similar restrictions on certain aspects of electoral communication.[10]

To summarize, electoral exceptionalism is the belief that speech concerning political elections deserves similar treatment as a distinct category (obscenity, for example) under the First Amendment. Schauer and Plides argue that several past court rulings imply a separate category of the law already exists (yet to be acknowledged by the Court) that solely concerns election speech. If the Court recognized this category, it could be policed in a manner that is more strict than what typically is applied to First Amendment cases while remaining constitutional. Many First Amendment purists and critics of this reasoning claim Schauer and Plides are simply advocating for "weaker First Amendment protection in the context of elections," but the authors hold that this critique is an oversimplification.[11] Instead, the concept of electoral exceptionalism should be viewed as an upholding of First Amendment ideals, although perhaps in a less individualistic manner.

Many rights enumerated in the Constitution are commonly believed to exist to protect individual interests from governmental intrusion. However, a different school of thought—namely, a structural conception of rights—conflicts with this idea: a structural conception of rights. In this view, as Schauer and Plides state, "rights are means of realizing various common goods, rather than being protections for individualist interests against collective judgments about those common goods."[12] If applied, this perspective could significantly alter how the Court approaches which areas of speech are afforded absolute First Amendment protection.

Plides, co-writing with Issacharoff in a separate symposium, stresses the immense importance that election-centered law plays in a democracy. Warren's court "[made] democracy the focal point of American constitutional law," despite minimal direction in the Constitution describing the actual workings of elections.[13] As free speech expert and law professor Stewart Jay writes, "the Court had not once acted to protect First Amendment rights"[14] for over a century after the creation of the Bill of Rights. Additionally, when the First Amendment first began to be recognized by the Court, it was still met with strong hostility, especially when invoked in defense of political nonconformists.[15]

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[8] *Id.* at 294.

[9] Schauer & Plides, *supra* note 5, at 1805.

[10] *Id.* at 1803, 1807-1808.

[11] *Id.* at 1806.

[12] *Id.* at 1814.

[13] Samuel Issacharoff, & Richard H. Pildes, *Election Law as its Own Field of Study: Not by 'Election' Alone*, 32 No. 4 Loy. LA. L. Rev. 1173, 1174 (June, 1999).

[14] Jay, Stewart, *The First Amendment: The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34: Iss. 3 Wm. Mitchell L. Rev. 773, 774 (2008).

[15] *Id.*

In actuality, the Framers of the Constitution did not include (or, debatably, aimed to preclude) several aspects of American democracy viewed as integral today, such as political parties and the right to an equal vote. Historians have claimed the Founders believed in instilling an "aristocratic conception of democracy"[16] for the new nation. These values directly contradict most modern, popular beliefs of what the Constitution upholds. Examining the underlying assumptions about democracy is instrumental in evaluating whether America's current system is truly effective—and also calls the public to evaluate more thoroughly what they deem to be democratic 'success.' Plides and Issacharoff continue their argument:

> "Elections" can look legitimate with full access and fairly counted ballots. But… ideas about social life and political representation should inform the antecedent and far more decisive questions… Moreover, expanding the focus from elections to democratic self-governance enables us to begin forging connections between election law and the next frontiers of self-government.[17]

After more intimately examining what values currently uphold America's electoral system, a broader discussion considering the constitutionality of electoral exceptionalism still continues. Schauer and Plides claim numerous laws currently exist that 'restrict' speech in the electoral process. These include, but are not limited to, what is allowed to be expressed on ballots, restrictions on electioneering, and even the 1842 decision to require states to elect representatives for Congress from determined districts. These practices were all chosen and enforced because they were believed to propagate a "better"[18] democratic system. Americans have historically been fairly supportive of the reality that "elections are extensively regulated, state-structured processes… designed to achieve specific instrumental purposes."[19] The electoral exceptionalism theory relies on applying similar regulations to public officials and candidates' speech, specifically.

Despite the fact that the Court has not enacted electoral exceptionalism as a new category of exempted speech, states have, in fact, begun to craft legislation criminalizing false political speech. Perhaps because of the lack of guidance from the Court, many of the current statutes at the state level are wildly inconsistent in terms of liability applied and the kind of speech they target. Several cases have arisen in opposition to these statutes, claiming that they chill unavoidable political speech or imbue unnecessary bureaucracy into a process that should not be slowed with unnecessary litigation.[20] This situation then begs the question: is there a strategy for crafting constitutional laws that ban speech that has been deemed harmful to American democracy? A solution becomes more apparent after examining current state statutes and their deficiencies.

B. Current Legislation: A Closer Look

Currently, roughly 125 statutes at the state level criminalize some aspect of electoral speech, whether by targeting the pure content of speech or by criminalizing coercion, intimidation, or fraud, and therefore, speech indirectly.[21] Most of these statutes remain largely unenforced, but they often fail to pass constitutional muster when held under strict scrutiny[22] in court. As previously mentioned, the statutes apply differing levels of liability to the speaker in question and, therefore, are more or less likely to hold up against criticism. Regulations in place at the state level generally fall under one of eight categories: speech about candidates, speech about ballots, speech about voting requirements, political advertisements, endorsements, incumbency (or lack thereof), intimidation, and fraud.

One issue with many election speech regulations is the liability levels imposed upon the speaker, as law scholars Ardia and Ringel explain. Thirty-three states currently have statutes expressing that false speech must be spoken with "reckless disregard"[23] to be considered criminal. Two states impose liability on a "constructive knowledge" basis: whether the speaker should have known the material was false based on general knowledge. The final category is "strict liability," which seventeen states currently enforce, that

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[16] Issacharoff & Plides, *supra* note 13, at 1176.

[17] *Id.* at 1183.

[18] Schauer & Plides, *supra* note 5, at 1873.

[19] Schauer & Plides, *supra* note 5, at 1818.

[20] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).

[21] Ardia & Ringel, *supra* note 6, at 294.

[22] Tiers of scrutiny balance governmental interest with the state's interest in enacting a law, the most restrictive of these being "strict scrutiny." Judges must determine whether the governmental interest concerning the prohibited conduct is "compelling" and whether the statute is "narrowly tailored" to suit those needs. This tier is most often utilized in cases concerning fundamental rights, racial discrimination, or religious rights, and it is notoriously difficult to convince the Court the interest is strong enough.

[23] Ardia & Ringel, *supra* note 6, at 304.

claims the candidate's knowledge of falsity has no impact on criminality.[24] These liabilities are often highly subjective and difficult to enforce in court. What one individual considers 'common knowledge' is a foreign concept to another, and similarly, speech "empirically false" to one speaker could be construed as reasonable to another. These distinctions can become particularly difficult to parse in the context of high-profile cases.

II. Pertinent Context and Precedent

A. A Case Study

Of the many types of content that some state legislation seeks to criminalize, false or misleading statements about the candidates themselves are perhaps the hardest to police. One of the most striking examples of such falsehoods from a public servant has recently received national attention. On December 1st, 2023, George Santos was expelled from the United States House of Representatives in a decisive 311 to 114 bipartisan vote, making him the third individual since the 19th century to have done so.[25] Santos was charged with 23 federal counts of criminality by the House Ethics Committee for "fraudulent schemes to obtain money for himself and for the Committee."[26] The former congressman was also accused of "knowingly and willingly [making]... fictitious and fraudulent statements"[27] because of his repeated misrepresentation of fundraising totals and use of contributors' billing information to donate funds to his personal bank account. However, there has been clear evidence of Santos' wrongdoing since his campaign, where he claimed to have graduated from Baruch College before attending New York University's M.B.A. program for a degree in international business. He later admitted he had received no post-secondary education.[28] He similarly lied to his constituents by claiming he had founded a nonprofit for rescue animals despite the organization never appearing on the Internal Revenue Service. Additionally, Santos' familial connections have been called into question after he claimed ties to the Holocaust and 9/11 before retracting or partially altering these statements in later interviews.[29]

The media and the general public have regarded each falsehood with appropriate shock and betrayal; however, several reports have pointed out that much of the general upheaval has been caused purely due to the scandalous aspects of Santos' wrongdoings. Vanessa Friedman, writing in the *New York Times*, claims that George Santos' fall from grace perhaps would have been less publicized if it were not for *where* these funds were diverted to, namely, shopping sprees at Ferragamo, Hermès, Sephora, and for purchasing personal botox injections. In Friedman's opinion, the American public has become impervious to governmental corruption unless the evidence is particularly glamorous or comical.

For the world of electoral exceptionalism, it is important to note that not one of the blatantly incorrect statements George Santos made to influence his constituents' votes has been the source of any criminal charges. In this sense, Santos and Trump have striking similarities. Both have publicly claimed major elections were "stolen" from them (as Santos stated on January 5th, 2021, mere hours before Trump expressed similar sentiments). The "robbed" congressman insisted, "They did to me what they did to Donald J. Trump," and demanded a recount of his 2020 race for the United States House of Representatives.[30]

Corruption and the diversion of contributor funds are undoubtedly illegal, and therefore, George Santos' investigation by the House Ethics Committee and expulsion from Congress are clearly positive signs for American democracy. However, it is discouraging that verifiably false information used to defraud Santos' constituents' votes is not nearly as justiciable as his financial corruption. As Friedman explains, materialism became Santos' "smoking gun, the indefensible revelation of moral weakness," not his blatant lies or misinformation.[31] This has not been the first time the United States justice system has excused a public servant with a penchant for falsehoods.

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[24] *Id.* at 306.

[25] Vanessa Friedman, The Undoing of George Santos, THE NEW YORK TIMES (Dec. 1, 2023), https://www.nytimes.com/2023/12/01/style/george-santos-hermes-ferragamo.html.

[26] "Read the New George Santos Indictment," THE NEW YORK TIMES, 5 (Oct. 10, 2023), https://www.nytimes.com/interactive/2023/10/10/nyregion/santos-indictment-new-charges.html.

[27] *Id.* at 5.

[28] Michael Gold & Grace Ashford, *George Santos Lost His Job, the Lies, Charges and Questions Remaining*, THE NEW YORK TIMES, (May 13, 2023), https://www.nytimes.com/interactive/2023/nyregion/george-santos-lies-charges.html#lies.

[29] Friedman, *supra* note 25.

[30] Gold & Ashford, *supra,* note 28.

[31] Friedman, *supra* note 25.

B. Political Lies Through the Lense of *Alvarez*

The Court's stance on political misinformation has been determined through decades of sparse precedent. Many of these decisions have been litigated in recent years, including *United States v. Alvarez*—a landmark case for free speech with a decisive 6-3 verdict. In 2007, Xavier Alvarez was elected to a local California water district board and claimed during introductions to have served as a Marine for 25 years before supposedly retiring in 2001. He then boasted of his numerous accomplishments: "Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[32] Unfortunately, these statements were false. No governmental records exist to support Alvarez's claim of recognition or even military service, which meant he blatantly violated the Stolen Valor Act. The Stolen Valor Act is a federal statute that criminalizes false claims of United States military honors, and Alvarez was consequently convicted and sentenced to three years probation with a 5,000 dollar fine for breaching the law.[33] Alvarez appealed on First Amendment grounds, and the Court of Appeals for the Ninth Circuit reversed his decision. The case continued to the Supreme Court, where the Justices supported the overturning with a bold opening statement: "Lying was his habit."[34]

Despite this admission, the majority opinion claimed that "exacting scrutiny"[35] was necessary when reviewing the statute. The Justices invalidated the Stolen Valor Act on the basis that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar."[36] They continued this reasoning by claiming that any speech that did not fall under one of the defined categories could only be restricted if it presented "some grave and imminent threat."[37] Clearly, the plurality believed that Alvarez's statements represented no such threat.

Breyer's concurrence, with Kagan joining, did give merit to the concerns of some electoral exceptionalism advocates. The Justices claimed more finely tailored legislation could pass constitutional muster and uphold the state's concerns of falsehood while still supporting the majority's holding that the Stolen Valor Act was overbroad. Nonetheless, in this ruling, the Court held that blatant, verifiably false information would still be protected under the First Amendment, even in purely political settings.

C. The Court and Misinformation During Campaigns

Brown v. Hartlage, occurring several decades prior to *Alvarez*, helped set the groundwork for the Court's efforts to determine the constitutionality of certain election-based falsehoods. Decided in 1982, *Brown v. Hartlage* was litigated between two candidates for a Kentucky county commissioner seat after "both parties promised to take a reduced salary if elected,"[38] statements which violated Kentucky's Corrupt Practices Act.[39] The incumbent, Hartlage, lost the reelection bid and petitioned that the election be declared void in keeping with the Act. When the case reached the Supreme Court, the Court found that there were multiple justifications for Hartlage's motion: the Act prohibits candidates from buying votes, it allows less affluent individuals to run for office without immense campaign donations, and it is an "application of the state's interests and prerogatives with respect to factual misstatements."[40] The Court then surprisingly asserted that "demonstrable falsehoods are not protected by the First Amendment to the United States Constitution in the same manner as truthful statements," a statement they seemingly disregarded when deciding *Alvarez*. Despite these supporting arguments for the law's application, the Court ruled that the state did not have a compelling interest in regulating against the First Amendment in such a way. The Court conceded:

> Some kinds of promises made by a candidate to voters, and some kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty, but there are constitutional limits on the state's power to prohibit candidates from making promises in the course of an election campaign.[41]

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[32] Facts and Case Summary - U.S. v. Alvarez, UNITED STATES COURTS, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-us-v-alvarez#:~:text=Alvarez%20said%20at%20a%20public,times%20by%20the%20same%20guy.%22.
[33] *United States v. Alvarez*, 567 U.S. 709 (2012).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Brown v. Hartlage*, 456 U.S. 45 (1982).
[39] Ky. Rev. Stat. § 121.055 (1982).This document is current through the 2023 regular session.
[40] Hartlage, 456 U.S. at 45, 46.
[41] *Id.*

However, this statement begs the question of which "promises" *would* be found unconstitutional if not those claiming to accept or deny taxpayer funds for personal salary as a campaign strategy. The Supreme Court has not been entirely clear in its response, but its limits for policing misinformation become slightly more defined in *Susan B. Anthony List v. Driehaus*.

Driehaus, a Democrat and former congressman in Ohio, ran for reelection to the United States House of Representatives in 2010. Susan B. Anthony List, a pro-life organization, stated that the Representative had voted for "taxpayer-funded abortion" in his support of the Affordable Care Act. Driehaus contested this assertion and reported the statements to the Ohio Elections Committee for review. Ohio law at the time "prohibit[ed] persons from disseminating false information about a political candidate in campaign materials during the campaign season
'knowing the same to be false or with reckless disregard of whether it was false or not.'"[42] According to this statute, the statements in question must be held under review and could continue onto an adjunct hearing, referred to a prosecutor, and face six months in prison if convicted. Driehaus lost his election several weeks following the complaint and withdrew the petition. The S.B.A. nonetheless filed suit against Ohio for violating both the First and Fourteenth Amendments, having "chilled"[43] their speech, and claimed they had never believed their statements to be false.

The Court ruled unanimously to defend the S.B.A.'s right to free speech and cited several reasons for their decision, the first being that the statute "swept broadly." Perhaps more egregiously in the Court's eyes, the "petitioners' intended future conduct is also 'arguably . . . proscribed.'"[44] These two facts, coupled with the fact that *any* individual could report a misleading statement to the committee with no actual knowledge of falsity, brought about the unanimous decision in the S.B.A.'s favor. However, it is important to note that in this plurality opinion, the Court implied that these flaws they described were why the Ohio statute was found unconstitutional. They did not explicitly state if a more narrowly tailored statute, less accessible to the general public, could pass muster.

United States v. Alvarez, *Brown v. Hartlage*, and *Susan B. Anthony List v. Driehaus* are pillar cases in the discussion of electoral exceptionalism. Although their outcomes were contrary to what proponents of electoral exceptionalism would have wanted, they nonetheless could directly inform legislators how to craft statutes that *may* accomplish their goals while remaining constitutional. These cases similarly inform overzealous supporters of electoral exceptionalism of the numerous pitfalls and counterarguments against their claim.

One of the counterarguments critics are quick to point out is that Schauer and Plides' definition of electoral exceptionalism, as with any content-based restrictions on speech, has the potential to "chill" future speech that could contribute positively to the "marketplace of ideas."[45] Although other factors have contributed to the striking down of statutes, such as the aforementioned danger of overbreadth and lengthy bureaucratic processes, the Court has particularly emphasized maintaining a free and equal marketplace of ideas in each instance.

III. The Future of Journalism

The news reporting industry, especially local journalism, has seen a steep decline since the start of the 21st century. Once employing approximately 411,800 individuals in 2001, the industry now supports roughly a third of this number. Over the past two decades, journalism jobs have declined by over 65 percent, and the advertising money that formerly sustained the industry has now been funneled into online platforms such as Facebook, Twitter, and Instagram.[46] Unsurprisingly, elite news corporations such as *The New York Times* and *The Washington Post* have managed to sustain the financial blow, but countless smaller organizations have succumbed to bankruptcy. Scholars claim the lack of local reporters leads citizens to more nationalized news sources, thus ensuring that the average American becomes less and less engaged with politics at the county and state levels.[47] This ripple effect has led to increasingly polarized voters, as the only news media consumed becomes entrenched in nationwide partisan agendas.

Social media outlets have become the leading distributors of news instead of accredited organizations, which can be helpful for the quick dispersal of information but often results in an oversaturated market of information. "Cheap Speech" writer Richard Hasen summarizes this phenomenon in a simple metaphor created by economist George Ackerlof: "The Market for 'Lemons.'"

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[42] Infiltration of campaign - false statements in campaign materials - election of candidate, Ohio Rev. Code Ann. § 3517.21 (2013). Current through File 12 of the 135th General Assembly (2023-2024).
[43] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).
[44] *Id.*
[45] *Id. at* 5.
[46] RICHARD L. HASEN, CHEAP SPEECH32 (2022).
[47] *Id.*

When used car buyers (or, in this case, Americans searching for reliable news) shop the market, it is difficult to determine "whether a seller is offering a reliable used car or a 'lemon.'" The potential buyers must lower the price they are willing to offer to account for the possibility of unintentionally purchasing a "lemon," and by doing so, drive the higher-quality cars out of the market that cannot sustain the lack of profit. The market then becomes flooded with "lemons," leaving the buyer with no reliable cars.[48] Although "the Market for 'Lemons'" may seem to be a simplistic analogy for the spread of misinformation across the digital world, it aptly portrays the danger of flushing local journalists out of business.

IV. The Future of "Electoral Exceptionalism"

The introduction to this paper states that there are three common arguments regarding what the appropriate response to misinformation and lies in political speech should be. The bulk of this paper has focused on the third of these viewpoints—the idea of electoral exceptionalism. Before concluding, a few comments should be made about the other two.

Arguably, the most popular of the three stances remains advocacy for near-absolute First Amendment protection of speech, including false speech used in the context of an election. Typically touted by more conservative voters, 'pure' free speech has long been considered a vital aspect of true democracy, and the rhetoric used by its supporters is clear: without free speech, America risks becoming an authoritarian state in which necessary discourse about the government could be silenced entirely. However, many critics of this opinion claim that these pure free speech supporters rely heavily on fear-mongering and slippery-slope arguments to establish their point and disregard the many already-existing nuances in regulating harmful speech.

Despite the popularity of First Amendment purists' views, the voices arguing against complete free speech have become louder in recent years. As previously discussed, the emergence of the internet has altered the marketplace of ideas almost beyond recognition. Although an argument in favor of near-absolute free speech may have been defensible in past decades, AI, deepfakes, and highly polarized political views have rendered this stance outdated. There has been a documented uptick in misinformation spread throughout news feeds and by political candidates, either spoken purposefully for virality or to encourage fear-motivated voters. This increasingly popular trend has resulted in a larger community advocating for a more aggressive stance on the policing of misinformation.

The second perspective on how political misinformation should be handled involves crafting legislation that closely resembles the existing categories the Court has determined are not protected under the First Amendment. Typically, the categories legislators chose to accomplish this task are those most reasonably construed as relating to free speech: defamation, fraud, true threats, and obscenity. However, these categories have already been narrowly defined and tested by the court, and they often fail to criminalize the truly harmful aspects of false political speech. For example, verifiable lies about the COVID-19 pandemic were nearly impossible to criminalize under the categories of defamation, fraud, true threats, or obscenity. Some have argued that falsehoods concerning the coronavirus, such as those perpetuated during 2020 and 2021, have had lasting adverse effects. However, the current First Amendment exceptions require specific aspects, such as materiality or immediate threat to an individual's safety.

The third position, namely Schauer and Plides's 'electoral exceptionalism,' is currently the most viable alternative response to misinformation in political speech. As mentioned above, deciding in favor of electoral exceptionalism would be a bold step for the Court and one the current Justices may be unwilling to take. Nonetheless, it is the only pragmatic solution that accounts for the changing digital age while preventing legislators from creating countless unconstitutional statutes to combat the rise in political misinformation. By creating an entirely new category of speech exempted from First Amendment protection, the Court could establish a precedent that allows states to criminalize "empirically verifiably false election speech."[49] This would encourage the dissemination of more accurate information during campaigns while combatting state attempts to police misinformation in unconstitutional ways.

V. Conclusion

The evolving world of online news sources has drastically altered politics and campaigning. Disinformation has proliferated throughout digital platforms, and social media corporations are currently unable or unwilling to police the harmful aspects of electoral lies. States have, understandably, tried to combat such lies with targeted legislation. Although many of these statutes have constitutional deficiencies (such as overbreadth, vagueness, unwanted bureaucracy, and the potential for partisan abuse), the concerns for democracy are well-founded. Much of the precedent from *Brown v. Hartlage*, *Alvarez,* and *Susan B. Anthony List* regarding

[48] *Id.* at 30.
[49] *Id.* at 111.

political misinformation should be reevaluated in light of recent technological developments. States' interests in protecting the dissemination of reliable news are entirely justifiable and are of the utmost importance.

Very few scholars would argue against the theoretical concept of the marketplace of ideas as first proposed by Justice Holmes over a century ago; however, the type of misinformation now being combatted is entirely new. The marketplace is no longer an equal meeting ground of ideas but a web of fact and fiction often so intertwined they are indecipherable. Schauer and Plides' proposed solution of a narrowly defined category of the law in which it would be possible for the Court "to prescribe or apply First Amendment principles" when *empirically false* assertions are made is a viable path forward.[50]

Some of the criticisms of electoral exceptionalism are both valid and welcome, as any governmental interference in the realm of speech should be closely scrutinized. Nonetheless, the Court should be pragmatic when ruling about misinformation that directly interferes with the electoral process. Certain aspects of the country must evolve with technological advances in order to curb what threatens to derail American democracy: the uninhibited spread of misinformation.

[50] *Id* at *1805.*

No Home, Nowhere to Go: Understanding the Exclusionary Discretion of Humanitarian Parole

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Abstract

Humanitarian parole allows individuals to enter the United States without a formal grant of admission as a refugee or immigrant. Parole allows foreign civilians to flee their war-torn or unsafe native countries to receive urgent care and safety. However, it is evident that parole often engages in exclusionary discretion against certain nationalities and accepts applicants based on their potential benefit to the United States instead of based on their need. An analysis of existing literature, executive orders, federal rules, and court cases shows that parole is often wielded as an exclusionary measure, rejecting minority groups and focusing not on humanitarian need but on maintaining the social fabric of the United States.

Introduction:

When Russian troops attacked Ukraine in February 2022, millions of individuals fled their homes out of fear and necessity. As of February 2023, more than eight million Ukrainian refugees were reported throughout Europe, and over 17 million individuals still in Ukraine were in need of urgent humanitarian assistance.[1] Under the siege of the Russian government, many Ukrainian civilians require inaccessible care, necessitating aid from other countries. While the crisis in Ukraine continues to be a rapidly-growing emergency, this is not the first instance of civilian groups fleeing their home nations and seeking refuge abroad.[2] For example, the 2021 withdrawal of US troops from Afghanistan resulted in over five million Afghan refugees across the globe by the end of 2022.[3] Going back almost seven decades, hundreds of thousands of Hungarians fled their homes after the USSR invaded Budapest in 1956.[4] Time and again, millions must seek aid outside of their own nations, and the United States is often seen as the ideal place of refuge from persecution. While the United States presents multiple options for refugees to gain immigrant status, many of them take months to years to fulfill. Sometimes, an applicant's request to seek refuge in the United States is not even granted. However, as the Immigration and Nationality Act (INA) outlines, individuals seeking freedom from violence and persecution can seek "parole."

The INA defines immigration parole as the permission to enter the United States without a formal grant of admission as a refugee (an individual granted protection due to persecution in their home country) or immigrant of any kind.[5] While at the discretion of the Secretary of Homeland Security, the Attorney General, and all those to whom they grant parole power, individuals are often assessed by officials governed by the Department of Homeland Security under the United States Citizenship and Immigration Service (USCIS) on a case-by-case basis and are, under almost all circumstances, granted parole for either "significant public benefit" or "urgent humanitarian reasons." This is a temporary grant of stay, meaning that at the end of their period of granted parole, individuals can either re-apply for parole to stay in the United States or are forced to return to their original country of custody. However, while legally living in the United States for a period of time, parolees can apply for asylum to stay in the United States and avoid future persecution.

While the INA dictates that parole is meant to be evaluated and granted on a case-by-case basis, USCIS has implemented specific parole programs for different groups of concern to facilitate easier access to asylum (protections granted to refugees already present in the United States). Programs include the Haitian Family Reunification Parole Program, Cuban Family Reunification Program, Central American Minor Program, Filipino WWII Veterans, and Uniting for Ukraine; in most of these programs, there is a primary, explicit goal of reuniting families, where a legally permanent individual in the United States must apply on behalf of the parolee.[6] However, there are groups of humanitarian concern, such as refugees from Afghanistan, that are not granted a specific program by USCIS. Many other national and ethnic groups are excluded despite having the same credible fear of persecution as their paroled counterparts.[7] In examining executive orders and presidential proclamations, agency notices and rules, and federal court cases to see what instances do or do not requisite parole, I find distinct themes of public benefit, strict individualism, and racial and nationalistic exclusion. In line with existing literature, I find that the DHS and the Attorney General use these rules to exclude certain groups; however, I also find that those who are more likely to benefit the United States are promoted directly for humanitarian parole by the agency rules. While parole is one of the only accessible ways for asylum seekers to enter the United States, the implementation of parole power only occurs in exceptional cases and for those who provide a public benefit and fit into the modern (non-diverse) concept of American society, thus excluding numerous individuals who are in need of reprieve and aid.

Literature Review:

Humanitarian parole has historically been used to bolster the "nation's humanitarian tradition."[8] When considering President Eisenhower's unprecedented number of parole admittances, about 38,000 Hungarian parolees by May 1957, Anita

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[1] *Ukraine Emergency*, UNHCR, https://www.unhcr.org/emergencies/ukraine-emergency (last visited Apr. 16, 2023).

[2] *Ukraine Situation*, UNHCR.

[3] *Afghanistan Situation*, UNHCR,https://reporting.unhcr.org/operational/situations/afghanistan-situation(last visited Apr. 16, 2023).

[4] Anita Casavantes Bradford, '*With the Utmost Practical Speed': Eisenhower, Hungarian Parolees, and the 'Hidden Hand' Behind US Immigration and Refugee Policy, 1956–1957*, Journal of American Ethnic History 39, no. 2 (Jan. 1, 2020): 5–35.

[5] *Immigration and Nationality Act (INA)*, 8 U.S.C.S. § 1182 (1952).

[6] *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, USCIS.GOV https://www.uscis.gov/humanitarian/humanitarian_parole (last updated Oct. 23, 2023).

[7] Damus v. Nielsen, 313 F. Supp. 3d 317 (2018).

[8] Bradford, "'With the Utmost Practical Speed,'" 9.

Casavantes Bradford notes motivations such as supporting the American ideal of the "free world" and reforming the current immigration law to support those in need abroad.[9] However, Bradford also presents the fact that the Eisenhower administration selectively represented the parolees in terms of their whiteness and Christianity as a way to garner support from Congress.[10] This reflects the idea that, while there are significant humanitarian concerns for Hungarians fleeing Soviet control and abuse, the executive branch also used the racial and cultural similarities between Americans and Hungarians to advertise their acceptability. However, Eisenhower's mass acceptance of refugees is unique in that it does not follow the current procedures in which parole power is controlled through DHS and the Attorney General: instead, the power is entirely in the hands of the president. While Bradford highlights the explicit historical inclusion of a group of people, she also reveals that racial and cultural biases were at play in their acceptance; these same biases later function to exclude groups.

Throughout the 20th century, parole admissions became more restrictive. Harvey Gee notes in his review of refugee policy throughout United States history that, during the 1970s, the Ford administration viewed parole power as a way to bring the refugee problem "under control."[11] Gee saw resettling individuals as a way to secure concerns about the "political [communist] future" of Southeast Asia, illustrating that political and humanitarian interests bolstered the goal of moving refugees out of communist Indochina as to prevent the success of communism.[12] While Gee shows broad inclusion of a particular group of concern – individuals fleeing communism – , he also notes the particular change in the language of parole, which moved from classifying those eligible for humanitarian parole as those of "special concern" to those of "special humanitarian concern."[13] This narrowing language shows how the executive branch restricts numerous individuals from qualifying for parole in the United States.

During the first Bush administration, the Attorney General continued the practice of exclusion as she failed to parole HIV-infected Haitians detained in Guantanamo Bay. A 1993 court ruled that she abused the discretion of her parole power.[14] Nicola White, in her review of *Haitian Centers Council, Inc v Sale (II),* speaks of the historical exclusion of HIV-infected people from admission to the United States, which came to a head with the detention of HIV-infected Haitians in Guantanamo Bay without proper or adequate medical centers or resources.[15] She notes that the Attorney General has the discretion to parole people for purposes of humanitarian aid, family reunification, and public interest, but did not parole the Haitians despite doctors urging that the Haitians be taken out of Guantanamo Bay.[16] White asserts that the Attorney General both abused her discretion by violating current policy to parole, as stated by the Court, and also engaged in discrimination as she used HIV exclusion as an argument against Haitian refugees and no other groups.[17] The rhetoric of limiting parole reflects this implication of exclusion based on race and nationality. Moreover, White also sheds light on the reality of the restrictive nature of parole that had been set by precedent and would continue on through modern refugee crises, reifying exclusion.

For Afghan refugees and asylum seekers, as Thassila Uatanabe describes, humanitarian parole is seen as one of the only possible paths of entry to the United States.[18] However, since the embassy in Kabul closed in 2021 and parole can only be considered on a case-by-case basis, Afghans must now travel to a secondary country to apply from another embassy.[19] Uatanabe also alludes to the lack of human resources capable of handling the large refugee crisis coming from Afghanistan, which is evident in the lack of a specialized program for Afghan asylum seekers.[20] The absence of resources to process Afghan asylum seekers, ultimately caused by the presence and withdrawal of U.S. troops from Afghanistan, conveys exclusionary practices in modern parole cases. As

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[9] Ibid, 7; Ibid, 16.

[10] Ibid, 28.

[11] Harvey Gee, *BOOK REVIEW: The Refugee Burden: A Closer Look at the Refugee Act of 1980*, North Carolina Journal of International Law & Commercial Regulation 26 (Spring 2001): 559-651.

[12] Ibid.

[13] Ibid.

[14] Nicola White, *The Tragic Plight of HIV-Infected Haitian Refugees at Guantanamo Bay*, Liverpool Law Review 28, no. 2 (Sep. 8, 2007): 249–69, https://doi.org/10.1007/s10991-007-9018-1.

[15] Ibid, 251-257.

[16] Ibid, 262.

[17] Ibid, 265.

[18] Thassila Uatanabe, *The Handling of the Humanitarian Crisis in Afghanistan by the U.S. Legal System in Comparison with the Central and Latin American Systems of Protection Commentary*, New York University Journal of International Law and Politics 54, no. 2 (2022): 765–76.

[19] Ibid, 768.

[20] Ibid, 769.

Uatanabe puts it, "...interactions [between the U.S. and other states] are more focused on reaffirming U.S. national policies…rather than exchanging practices on the protection of vulnerable people in humanitarian crises."[21] As found in DHS and USCIS agency notices on parole programs, just as Uatanabe notes here, the public benefit to the United States is of more importance than the humanitarian need of the refugees in question, and groups are often excluded entirely from the parole process.

In another example of the exclusionary parole, President Donald Trump terminated the Central American Minors (CAM) Parole Program and rescinded approvals for those already granted parole. In her exploration of *Trump v. Hawaii*, Shalini Bhargava Ray notes that this case emphasized granting parole on a case-by-case basis. She also asserts that the lack of restricted discretion in parole power and only accepting specific groups facilitated the border crisis.[22] While Bhargava Ray brings to light the potentially beneficial emphasis on individualism over the support of a group as a whole, the group in question itself is important to look at. The CAM Program primarily brought in Hispanic individuals, whom President Trump reflected upon negatively in his proclamations. Trump's proclamations, in addition to agency notices, rules and federal court cases show excluded ethnic groups and the nationalistic reasoning behind their exclusion. As all of these authors have noted, humanitarian parole has been used, whether for inclusion or exclusion, to regulate the type of people that enter the United States. While the INA and the Courts state that parole is meant to be used on a case-by-case basis to promote individualism as a function of not automatically admitting those in a specific group who may not otherwise qualify for immigration, I find that parole is exclusionary for entire groups of people and inclusionary of only certain individuals that the government believes seem fit to benefit the United States.

Methods and Data:

The following analysis is based upon a comparative content analysis of executive orders and proclamations, federal executive agency rules and notices, and federal district and appeals court cases. For the executive branch, I used the Federal Register to find presidential documents and agency documents. I searched the term "asylum parole program" and only collected documents from the second Bush administration to the present day. For the judicial branch, I used NexisUni to find Circuit Court cases about parole discretion and decisions. I used terms such as "parole," "humanitarian parole," "asylum," "executive branch," and "attorney general," as well as cases that cited, or had been cited by, the cases mentioned within my literature review. In total, my data includes two executive orders (one from President Trump and one from President Biden; no data was available for Obama or Bush), two proclamations from President Trump, two rules and eight notices from the Department of Homeland Security and the U.S. Citizenship and Immigration Service, and five Circuit Court cases.

While the documents under Trump show language of exclusion and an aim to stop the "abuse of" and exploitation of parole power, executive orders under Biden show language of family reunification and improved parole programs to reduce strain at the border (2017; 2021). For the notices and rules under DHS and USCIS, I found two different topics: implementation of programs and notes on nonimmigrant topics. For the implementation of programs, there is language prioritizing "public benefit" reasons for admission, such as border security or reducing irregular migration, and "urgent humanitarian reasons", which are only given minimal weight. For the notes on nonimmigrant topics, there is an emphasis on the fact that DHS exercises its parole power on a case-by-case basis and will not make exceptions for larger groups. Finally, the court cases show patterns of emphasizing the same individualization of parole applicants and the necessity of the executive branch to follow that procedure, as well as the restraint to determine whether discrimination was present in the approval or refusal of granting parole but the allowance of broader policy that differentiates between nations.

Discussion:

Executive Orders and Proclamations

Parole is described by former President Trump as something that needs to be limited and "not illegally exploited."[23] In an executive order delivered just days after his inauguration, he explicitly states that the executive branch must "end the abuse of parole," by ensuring that that parole power is not used to accept "otherwise removable aliens."[24] Rather, President Trump

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[21] Ibid, 775.

[22] Shalini Bhargava Ray, *SYMPOSIUM: The Presidency And Individual Rights: The Emerging Lessons Of Trump V. Hawaii*, William & Mary Bill of Rights Journal 29 (March 2021): 775-808.

[23] Donald Trump, *Ending* "*Catch and Release'' at the Border of the United States and Directing Other Enhancements to Immigration Enforcement,* FEDERAL REGISTER, (Apr. 13, 2018) https://www.federalregister.gov/documents/2018/04/13/2018-07962/ending-catch-and-release-at-the-border-of-the-united-states-and-directing-other-enhancements-to.

[24] Donald Trump, *Border Security and Immigration Enforcement Improvements,* FEDERAL REGISTER, (Jan. 30, 2017), https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements.

emphasized that parole power must only be used on a case-by-case basis as outlined in the INA.[25] Furthermore, after placing an immigration ban on seven Middle Eastern countries, a Trump proclamation dictates that parole will not be an option for future asylum seekers of these countries. Only those who were granted parole before the ban are allowed into the United States as "exceptions."[26] This language conveys policies of strict individualism and exclusion. First, Trump makes it clear that parole must only be used on individual cases, and that to use it for larger groups would be exploitation. Secondly, his language about parole, the legal structures he uses to exclude entire nationalities from accessing parole, and the broad categorization of parole being given to individuals who would be "otherwise removable" conveys distinct exclusion. Nationality, and subsequently race, are targeted in these exclusions as the countries excluded are Middle Eastern and North African only. No countries from other regions are mentioned as excludable or barred from entry. This reflects the idea of only accepting individuals that fit within the idea of American society, specifically the one that President Trump tried to portray during his tenure. The exclusion allows Trump to paint a picture that people of Middle Eastern descent are not beneficial to American society, thus to use parole on these individuals would be an abuse of power.

On the other hand, President Biden takes a different approach: in an executive order meant to address safe migration and asylum, Biden aims to "reinstitute and improve" the CAM Parole Program and to promote family unity by increasing parole power.[27] In promoting the expansion of legal, safe paths for individuals from Central America, specifically the Northern Triangle region, Biden emphasizes the goals of parole which are present in modern parole programs: family reunification in the United States. He does the opposite of what Trump, and many of the court cases, dictate by promoting inclusion and the use of parole on a broader group of people. While the CAM Parole Program does require the consideration of cases on an individual basis, Biden's language clearly shows that he intends to reunite as many families as possible through parole. While this makes Biden an outlier, he does make it clear that these parole applicants are joining family members in the United States that are already living here legally. This reinforces the implication of parolees needing to be able to fit within the United States, as only those who have established ties to American society are accepted through the program.

Executive Agency Notices and Rules

Notices and rules regarding nonimmigrant aliens in the United States emphasize the guideline of only using parole on a case-by-case basis, without exception, as well as an emphasis on public benefit. In a rule regarding rights to employment authorization for non-citizens in the country, DHS explicitly states that they will not parole individuals for reasons of "compelling circumstances" and will only allow officers to grant parole based on the explicit "public benefit" or "humanitarian reasons" categories.[28] Looking at applicants for provisional unlawful presence waivers, DHS writes that it will only grant parole on a case-by-case basis under the two categories, and will not be "changing its current policy on the use of its parole authority."[29] Notices describing two different parole programs, one regarding the enhancement of the CAM Program and the other about Cuban Family Reunification, note the goals of reunifying families and doing so on a case-by-case basis, but also dictate the national interests of these programs. The programs speak about providing a "lawful and orderly pathway" for family reunification that improves familial well-being. Additionally, the programs aim to reduce the number of individuals migrating irregularly and unsafely through Central

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[25] Ibid.

[26] Donald Trump, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, FEDRAL REGISTER, (Sept. 27, 2017), https://www.federalregister.gov/documents/2017/09/27/2017-20899/enhancing-vetting-capabilities-and-processes-for-detecting-attempted-entry-into-the-united-states-by.

[27] Joseph Biden, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border,* FEDERAL REGISTER, (Feb. 5, 2021), https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration.

[28] *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* FEDERAL REGISTER, (Nov. 18, 2016), https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.

[29] *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,* FEDERAL REGISTER, (Jan. 3, 2013), https://www.federalregister.gov/documents/2013/01/03/2012-31268/provisional-unlawful-presence-waivers-of-inadmissibility-for-certain-immediate-relatives.

America to minimize the amount of resources needed at the border while "discouraging alien smuggling" and other illegal entrances to the United States.[30]

These notices and rules clearly show DHS's commitment to following the INA's regulations as written, but also highlight the necessity that those who are accepted for parole are also meant to benefit and fit within the United States. The first two rules explicitly state that they will not err from case-by-case considerations of parole, no matter the circumstances, and will not make admissions for large groups of people acceptable, thus emphasizing the strict individualism of parole acceptances. The two notices regarding parole programs clearly reflect that the programs must benefit the public interest of the United States. While they do note the case-by-case necessity of evaluating applicants, they also regard larger groups of people; however, when referring to the larger population within the region of concern (Cuba, Central America), the notices discourage irregular or illegal migration and the reunification with non-residents who are already within the United States. By accepting through these programs only individuals of relations to current legal residents in the country, they are narrowing the group that is acceptable for parole to only those who would be of benefit to United States residents and have current ties that connect them with the current society. Moreover, by explicitly noting the public benefits of reducing strain at the border and limiting illegal passage into the United States, they are emphasizing a public benefit to the United States that may contradict with the humanitarian need of those being kept out by the restrictions placed.

The implementation of parole programs follow similar frameworks to the prior two notices, strongly emphasizing the public benefits of the programs while giving little consideration to the humanitarian reasons that may be important for those seeking parole under the programs. Almost every notice denotes several reasons, in depth, for why enacting these parole programs will benefit the US public interest. Reasons include enhancing border security by "reducing irregular migration" of foreign nationals, reducing the burden on officers at the border, incentivizing migrants to use a "safe and orderly means to access the United States," and fulfilling foreign policy goals of supporting safe migration through the Western Hemisphere.[31] Many of the notices do include humanitarian reasons on a small scale, but often in only one paragraph instead of the multiple pages that denote public benefits. For example, the Venezuelan program speaks about the repressive regime of Nicolás Maduro, the Cuban program talks about economic conditions, social unrest, and the repressive government, and the Haitian program mentions worsened conditions caused by gang violence, earthquakes, and a cholera outbreak.[32] Finally, all of them address the need for applicants to have a "U.S.-based supporter" and that they will be evaluated on a case-by-case basis.

Overall emphasis on reasons for public benefit, a lack of attention for humanitarian issues, an emphasis on case-by-case consideration, and the necessity for a connection to the United States shows that these implementation notices promote a parole process that prioritizes individuals that will contribute to and fit into the social fabric of the United States. While these programs appear to facilitate easier and safer legal access to the United States for target nationalities, the requirement of having a supporter in the United States clearly excludes numerous individuals from seeking parole. The necessity of established ties in the United States reinforces the idea that one must fit into the current American society. Rather than supporting migrants for humanitarian reasons, the overall goal promoted by these notices is the public benefit for the United States, both in terms of border security and the reduction of illegal migration.

Federal Circuit Court Cases

The cases I examined varied in court rulings, but themes of individualism and a disregard for humanitarian issues were common throughout. In *Gutierrez-Soto*, the Court found that while the Attorney General has the power to revoke parole, the

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[30] *Cuban Family Reunification Parole Program,* FEDERAL REGISTER, (Nov. 21, 2007), https://www.federalregister.gov/documents/2007/11/21/E7-22679/cuban-family-reunification-parole-program; FEDERAL REGISTER, (Apr. 11, 2023), https://www.federalregister.gov/documents/2023/04/11/2023-07592/bureau-of-population-refugees-and-migration-central-american-minors-program.

[31] *Implementation of the Uniting for Ukraine Parole Process*, FEDERAL REGISTER, (Apr. 27, 2022), https://www.federalregister.gov/documents/2022/04/27/2022-09087/implementation-of-the-uniting-for-ukraine-parole-process; *Implementation of a Parole Process for Venezuelans,* FEDERAL REGISTER, Oct. 19, 2022), https://www.federalregister.gov/documents/2022/10/19/2022-22739/implementation-of-a-parole-process-for-venezuelans; *Implementation of a Parole Process for Cubans*, FEDERAL REGISTER, Jan. 9, 2023), https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans; *Implementation of a Parole Process for Haitians*, FEDERAL REGISTER, Jan. 9, 2023), https://www.federalregister.gov/documents/2023/01/09/2023-00255/implementation-of-a-parole-process-for-haitians; *Implementation of a Parole Process for Nicaraguans*, FEDERAL REGISTER, (Jan. 9, 2023), https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans.

[32] Ibid.

petitioners had their parole revoked on unconstitutional grounds that violated the First Amendment.[33] For this case, the Court emphasizes following procedure, but fails to consider any discrimination that may have occurred based on the nationality of petitioners in conjunction with President Trump's criticisms of Mexicans. Here, the Court adheres to the law and the Constitution without considering the possible racial or nationality-based exclusion that occurred by revoking parole. A similar adherence occurs in *Damus*, as the Court argues that ICE strayed from their own Parole Directive by "denying parole in virtually all cases" even when asylum seekers passed credible-fear hearings. Historically, rates of parole were 90%.[34] The Court did find the actions of ICE unlawful and ordered them to parole the petitioners, but while they did consider it, the Court failed to truly evaluate the petitioners' concerns that the cause of discretional oversight was due to thePresident's emphasis on deterrence of undocumented individuals. Once again, they fail to evaluate concerns of exclusion based on how parole is actually being used by the government.

Exclusion through parole programs is evident in *Jeanty*, where the government restricted parole for Haitians based on a fear of "loss of life" and a "threat of mass migration."[35] While the petitioners argue that the Immigration and Naturalization Service (INS) made restrictions on a group basis rather than a case-by-case basis, the Court found that the federal government is allowed to adopt a parole policy that "differentiates between nationalities" and that no illegal discrimination occurred.[36] As INS made determinations on a case-by-case basis, exclusion on the basis of nationality persisted. The Court failed to look at the humanitarian needs of the Haitians in question and instead excluded them from parole based on the public benefit logic of preventing mass and irregular migration into the United States. On the other hand, for Afghans, who do not have a designated parole program, the Court in *Roe* found that the government issued parole responses at an "unreasonably slow" rate and ultimately violated their own humanitarian parole statute.[37] The plaintiffs also argued that the speed and amount of parole approvals for Afghans was significantly less than other nationalities, specifically applicants from Ukraine.[38] This implies discriminatory discretion based on nationality, especially since Ukrainians also received their own parole program. Again, the Court declined to comment on the possible exclusion.

In *Aguilar-Mejia*, the Court held that individualized assessment of claims hold merit, and that the Attorney General should, upon evaluating the applicant's case, grant him humanitarian parole.[39] This case stands out as the only one to consider the petitioner's unique humanitarian need; as an applicant with AIDS, the Court urges parole approval so that he can receive adequate medical care that would be unavailable in his home country.[40] This case upholds individualism for parole acceptances and following regular procedure as the Court left the discretion up to the Attorney General. Despite the success of this case, the other four cases consistently depict practices of exclusion, whether for individuals or for entire nationalities; as the Court declines in most of these cases to comment on matters of discrimination as they emphasize upholding current policy and practices, they fail to address the humanitarian concerns that could arise from excluding groups of people based on nationality or the discrimination rooted in the practiced exclusion that has occurred.

Comparison and Conclusion

Exclusion from parole into the United States is evident at the individual and national level throughout all these sources. While court cases emphasize the law more than anything, the presidential and executive documents present a clear pattern of acceptance based upon overall benefit to the United States. The parole eligibility requirement of having a supporter that is a legal resident in the United States creates both a barrier to entry and prerequisite of Americanism. To only accept certain people into the country for short terms of parole under the requirement of already-established ties to the United States directly excludes large groups of people in dire humanitarian need to be placed in a safe country while they seek asylum or refuge. This requirement of family in the United States, while promoting unification, also presents a necessity of an individual to be of benefit to the United States. The language of the executive documents all emphasize the public benefits that paroling individuals into the country would bring for the nation and the subsequent characterization of parole recipients as needing to fit into American society.

Those individuals and nationalities that are excluded, whether on a case-by-case basis or through wider parole policy, tend to be those who are not from the Western Hemisphere and tend to not be white. Trump's policies directly excluded people from

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[33] Gutierrez-Soto v. Sessions, 317 F. Supp. 3d 917 (W.D. Tex. 2018).
[34] Damus v. Nielsen (2018).
[35] Jeanty v. Bulger, 204 F. Supp. 2d 1366 (S.D. Fl. 2002).
[36] Ibid.
[37] Roe v. Mayorkas, 2023 U.S. Dist. LEXIS 84440 (D. Mass. Apr. 28, 2023).
[38] Ibid.
[39] Aguilar-Mejia v. Holder, 616 F.3d 699 (7th Cir. 2010).
[40] Ibid.

Middle Eastern and North African countries and removed a parole program for Central American minors, both of which are composed of primarily non-white individuals. People fleeing Afghanistan are denied a specific parole program that would facilitate easier acceptance into the United States, and possibly one of the only ways for them to be able to come here. The Court in *Jeanty* explicitly stated that the government has the ability to make parole policy that differentiates between nationalities, which thus allowed them to exclude an entire group of Haitians arriving at the border.[41] These groups are those that constitute minorities in the United States, both nationally and racially; their exclusion denotes the necessity of parolees to be able to easily assimilate into and fit within the majority of American society. Otherwise, entry may still be an option, but it becomes immediately less accessible.

Parole presents one of the only entry points for those seeking asylum or refuge from their original country of origin. Where applying for resettlement as a refugee can take years and requires an individual to remain in a country that may be unsafe, asylum applicants for the United States are already within the borders of the country, a place that provides safety from the persecution from which the individuals are fleeing. Parole allows a refugee to enter the United States legally, be protected from the harm they fled, and apply for asylum in safety. However, if the federal courts and the executive branch are all upholding exclusionary practices that require American ties and bar those that do not provide a benefit to the country, then many of these refugees will be left in situations of precarity and insecurity. If the government does not make it easier for individuals who lack family in the United States to apply and obtain parole and reduces the exclusion of certain nationalities and groups of people, then refugees across the globe will be left in uncertainty, with no home and nowhere to go.

[41] Jeanty v. Bulger, (2002).

Challenging the Notion of Court Neutrality: An Empirical Study of the Role of Former Prosecutor Judges in Upholding Qualified Immunity within the US Court of Appeals

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INTRODUCTION

All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary. — President Andrew Jackson.[1]

The United States federal court system was established by the Constitution to function as a safeguard for constitutional rights by resolving disputes in a manner that imposes costs on any actor who has violated another's right(s) and provides redress to actors whose right(s) have been violated.[2] In recent years, though, the ideal of an independent, rights-enforcing judiciary has become increasingly fraught. Due in part to the advent of the information age and a surge in social media usage, the American public has more access than ever before to information related to polarizing issues associated with our justice system, including systemic racism, misconduct by public officials, and judicial decisions that punitively target marginalized groups.[3]

Among the growing calls for judicial reform, the proposition to end qualified immunity — the legal doctrine that protects public officials, including law enforcement, from civil liability for civil rights violations — has garnered particularly strong support.[4][5] Importantly, qualified immunity was established through Supreme Court precedent, as opposed to an act of legislation. Since this species of immunity is upheld through the courts, it is crucial to assess not only its ethical and practical considerations but also how it functions from a procedural standpoint. This work will focus on discerning whether there are factors beyond the rule of law and the facts of a given case that affect how judges make decisions in qualified immunity cases. Specifically, I will explore the influence of a judge's race, sex, partisanship, and their professional experience on decisional outcomes. The relationship between these factors and case outcomes is particularly complex within the U.S. Court of Appeals, as this court reviews cases through three-judge panels that confidentially deliberate on whether to affirm or reverse a lower court's decision. A final judgment depends on how the panel collectively rules, although one judge may dissent if they have a strong disagreement with their two co-panelists. Thus, the decision-making process of the Court of Appeals is affected on the individual-level by factors that influence each judge's vote for or against upholding qualified immunity, as well as on the panel-level by factors that influence how a group of panelists arrive at a formal ruling. My work seeks to build upon the existing literature regarding racial, gender, and partisan effects and to initiate research into the effect of professional background on judicial decision-making.

I. Professional Diversity on the Federal Bench

The subject of judicial diversity has become a politically contentious issue, with detractors casting doubt on the ability of certain judges – particularly women and people of color – to act as neutral arbiters of the law. In 2009, for example, Sonia Sotomayor was nominated by President Barack Obama to the Supreme Court, making her the first Latina to be nominated for the position. On one hand, Sotomayor faced much scrutiny from political opponents for her ethnicity and her vocal support of diversity on the bench. By contrast, she was met with near-unanimous praise for her experience as a former assistant district attorney. Media outlets at the time speculated that her prior experience as a prosecutor would "balance out her liberal tendencies" and make her "something of a law-and-order judge," which largely provided her with the political capital from both sides of the aisle necessary to secure her confirmation.[6] Beyond this instance, there is ample support to find that reverence and, indeed, preference for former-prosecutor judges is largely reflective of the current state of professional diversity on the bench.

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[1] Letter from Andrew Jackson to Andrew Jackson Donelson (July 5, 1822) (on file with the Donelson Papers, Library of Congress).

[2] John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. F. 1, 87-114 (1999).

[3] Lindsay de Stefan, *No Man Is Above the Law and No Man Is Below It: How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, Seton Hall Review, 543 (2017).

[4] E. J. Mandery, Qualified immunity or absolute impunity? the moral hazards of extending qualified immunity to lower-level public officials, Harvard Journal of Law and Public Policy, 479 (1994).

[5] Lawrence Hurley and Andrea Januta, When cops kill, redress is rare — except in famous cases, REUTGERS INVESTIGATES, May 8, 2020.

[6] James Oliphant, Sotomayor is remembered as a zealous prosecutor, LOS ANGELES TIMES, June 9, 2009.

A breakthrough study by the Cato Institute in 2019 found that a disproportionate number of judges on the federal bench previously worked as prosecutors and other types of advocates for the government ("prosecutor judges"[7])[8]. By contrast, judges that worked as advocates for individuals ("defender judges") – including criminal defense attorneys, public defenders, and lawyers for civil rights groups – are underrepresented. **Appendix Figure A** shows all of the Court of Appeals judicial appointees by the last three U.S. presidents, categorized by their professional background. Both Trump (N=54) and Obama (N=55) show strong preference towards prosecutor judges, with Trump appointing zero judges with any prior public defense or individual advocacy experience and Obama appointing just seven. Marking a noticeable shift, Biden's appointees, as of February 2022, (N=15) have thus far leaned towards defender judges, with over half of his appointees having some form of defense experience.[9]

This glaring disparity begs the question: Why are so few defender judges appointed to the federal bench? There is no singular, clear-cut answer — particularly since the reasons for appointment to judgeship are often shrouded by partisanship. However, some light can be shed on this issue through the example of Eighth Circuit Judge Jane Kelly, who was in contention to become Obama's Supreme Court nominee in 2016. Although Judge Kelly, a former public defender in Iowa, was tasked with defending many different clients during her nearly twenty-year tenure, conservative groups highlighted emotionally charged cases, particularly one in which she secured a plea deal for a client who was caught with child pornography. One television advertisement urged constituents to call their Senators and tell them that "Jane Kelly doesn't belong on the Supreme Court" because "she argued that her client, an admitted child molester, wasn't a threat to society."[10] Since politicians are largely motivated by re-election efforts, they know that backing nominees who have been accused of morally reprehensible acts could potentially cost them future elections. Therefore, while Obama has never directly commented on his decision not to nominate Kelly, it is likely that the public backlash of her defense work resulted in increased political opposition to her nomination, thus influencing Obama to choose a less controversial option. In the end, Obama nominated DC Circuit Judge Merrick Garland, a former federal prosecutor and the assistant US attorney for the District of Columbia.[11][12] This vignette shows how easily political opponents can weaponize the work of defender judges despite their invaluable contribution in providing people their constitutional right to legal representation.

However, this trend against defender judges may be shifting, in part due to a growing appreciation for the fact that public defenders represent Americans, many from marginalized, low-income, and minority groups, who could not otherwise afford an attorney.[13] President Joe Biden has already begun to nominate an unprecedented number of lawyers with experience as public defenders to the district and circuit courts. Most publicly, Biden made strides for defender judges by nominating former assistant federal public defender Ketanji Brown Jackson to the Supreme Court. In his press statement about Justice Jackson's nomination, Biden directly addressed her experience as a public defender as evidence of her exemplary public service work, signaling a legitimate effort to shed the status quo.[14]

II. The Problem with Court Neutrality

Our Constitution bestows on the people the authority to make law through our politically accountable representatives. We should protect that prerogative by demanding that judges resist the temptation to become politicians in robes – Ninth Circuit Judge Diarmuid O'Scannlain.[15]

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[7] For the sake of simplicity, I heretofore refer to judges that formerly worked as lawyers representing government advocacy as "prosecutor judges" and refer to judges that formerly worked as lawyers representing individual advocacy as "defender judges."

[8] Are a Disproportionate Number of Federal Judges Former Government Advocates?, Cato Institute, May 27, 2021.

[9] The numbers in this figure were last updated on April 7, 2022.

[10] Burgess Everett, Ad Targets Potential Obama Court Pick, POLITICO, March 11, 2016.

[11] Ron Elving, What Happened with Merrick Garland In 2016 And Why It Matters Now, National Public Radio, June 29, 2018.

[12] However, Garland was never confirmed by the Senate, due in part due to his nomination being during Obama's last month in office and Senate Minority Leader Mitch McConnell (R-KY) issuing a statement that the vacancy should be filled by the following president. No negative comments by McConnell were made about Garland's prosecutorial past.

[13] Associated Press, Biden Seeking Professional Diversity Picks, U.S. NEWS,. February 10, 2022.

[14] Joe Biden, Remarks by President Biden on the Nomination of Judge Ketanji Brown Jackson to Serve the Associate Justice of the Supreme Court, THE WHITE HOUSE, February 25, 2022.

[15] Diarmuid O'Scannlain, Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation, 101 Virginia L. R., (2015).

Per the Constitution, the function of the judicial branch is to say what the law is.[16] The ideal of an independent judiciary, meaning one separated from the political dealings of the other governmental branches, can be traced back to the constitutional framers.[17] As such, the normative view that courts ought to be independent and apolitical in rendering their decisions has become the bedrock principle on which the courts derive their legitimacy from the public. In short, Americans do not want their judges to become "politicians in robes." However, I contend that our national consciousness has conflated the idea of independence with that of neutrality — an important distinction, given decades of mounting criticisms towards judicial bias and politicization.

In his 1970 book, "The Supreme Court: Politicians in Robes," Charles Sheldon details the Supreme Court's history of politicization, beginning with the appointment of Chief Justice Earl Warren to the Court in 1953. Since then, Sheldon claims, the Court has become increasingly entrenched in judicial activism — a form of judicial decision-making that goes beyond the rule of law and precedent, usually to enact social change that has not achieved congressional majoritarian support.[18] Through landmark cases of judicial activism, the United States has increasingly relied on the courts to settle its most controversial social issues, such as abortion, the purchasing of birth control, and same sex marriage.[19] Though the intent of these decisions is often to enshrine and protect constitutional rights, detractors assert that judicial activism overrides democratic principles because it empowers unelected judges to, in effect, create new law instead of interpreting what the law says.[20] Judicial activism may thus blur the boundary between the branches of government and undermine the court's constitutional purpose to act as a check on the behaviors of the executive and legislative branches. The politicization of the courts, then, represents a failure of the modern U.S. government to avoid issues of political entanglement from which the courts were intended to be independent.

However, I find that the problems associated with judicial politicization do not necessarily mean that judges should not be allowed to harbor certain ideological preferences when rendering decisions. This is largely because of a lack of clear "right" answers in law.[21] The Constitution, in particular, has been subject to much dispute because of the ambiguity of its language.[22] In view of the law's openness to interpretation and the diversity of thought among judges, judicial scholars have moved towards the idea of legal realism, which states that judges rely not only on the rule of the law, but also on their life experiences, personal judicial philosophies, and other extralegal factors when they formalize their legal reasoning.[23] Normatively speaking, this may not be what Americans want from a neutral judiciary, as legal realism acknowledges and permits that judges bring their personal beliefs into their decision-making. However, accepting that perfect court neutrality may not be achievable does not have to undermine the legitimacy of the courts. Framed differently, judges can be nuanced decision-makers informed by a variety of personal factors including race, gender, partisanship, and professional experience, which allow them to make difficult decisions in view of a lack of clear legal answers.[24]

In sum, although judges behaving as "politicians in robes" may be problematic to the independence of the judiciary, there seems to be space for two judges, both acting in good faith, to come to different decisions about a holding for the same case. But when are these differences of opinion valid and when are they a breach of their duty as a judge? The line is not so clear. The American public can continue to demand wholly neutral judges, but in the face of ambiguities in the law and the facts of a case, a more plausible demand would be for judges to be reasoned and have equal consideration for all parties involved in a dispute. Then, while judges may not all be "politicians in robes," they can aptly be considered "human beings in robes" — people who, despite their judicial positions, are subject to the same decisional errors and biases as everyone else.[25]

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[16] Robert W. Bennett, Objectivity in Constitutional Law, University of Pennsylvania L. R. Pp. 445 (1984).

[17] See Federalist Paper No. 51, where James Madison wrote "to lay a due foundation for that separate and distinct exercise of the different powers of government… each department should have a will of its own" and Federalist Paper No. 78, where Alexander Hamilton described the court as the "least dangerous to the political rights of the Constitution" because it "has no influence over either the sword or the purse… it may truly be said to have neither force nor will, but merely judgement"

[18] CHARLES H. SHELDON, THE SUPREME COURT: POLITICIANS IN ROBES pp. ix., 1974.

[19] GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS. Pp. 2, (2007).

[20] LIEF CARTER & THOMAS BURKE, REASON IN LAW, 9TH EDITION, University of Chicago Press. (2016). pp. 174.

[21] Thomas Grey, Langdell's Orthodoxy, University of Pittsburgh L. R., 5 (1983).

[22] Allison Harris and Maya Sen, Bias and Judging, Annual Review of Political Science. 4, (2019).

[23] LIEF CARTER & THOMAS BURKE, REASON IN LAW 9TH EDITION, pp. 202.

[24] Harris and Sen, supra note 24, at 2.

[25] David Levi, What Does Fair and Impartial Judiciary Mean and Why is it Important?, Duke Law, (2019).

LITERATURE REVIEW

This work seeks to determine whether there is a link between a judge's professional background and their decision-making in qualified immunity cases. In contrast to the rigid ideal of court neutrality, research into judicial decision-making has uncovered that judges are, at times, influenced by extralegal factors.

Within the Court of Appeals (CoA), judges review cases through three-judge panels randomly assigned to a case. Because of this institutional feature, appellate judges participate in judicial decision-making on two levels: as an individual thinking through a case, and as a member of a panel participating in deliberations to yield a formal ruling. Research into the CoA decision-making process, then, must examine not only *individual-level effects* — the effect of a judge's background on their own voting behavior — but also *panel-level effects* — the effect of a panel's composition on their ruling. It is important to note that, while most CoA decisions are reached by a unanimous vote, a panelist always has the option to file a dissenting opinion.[26] Consequently, research into individual effects for the CoA has utilized these dissents to measure judges' personal voting behaviors. Thus far, research into judicial decision-making has focused on whether a judge's race, gender, and/or partisanship influence their rulings. This study seeks to build upon the existing literature to initiate a new line of inquiry into the impact of a judge's professional background.

To inform my inquiry, I began by reviewing studies concerning whether underrepresented judges tend to vote differently on the CoA. A quantitative analysis of the effects of gender on case outcomes in the CoA found that, across 13 different areas of law, a judge's gender only affected rulings for sex discrimination cases, with female judges around 10 percent more likely than male judges to vote in favor of the plaintiff alleging discrimination.[27] This finding suggests that female judges are not generally more pro-plaintiff, but rather, that judges of different genders have different reactions to the cases presented in sex discrimination. This gender effect extends to the panel level as well. Male judges were found to be 12 percent more likely to rule in favor of the plaintiff when a female judge was on their panel.[28] Another study of the CoA found that female judges were 19 percent more likely than male judges to vote in favor of the plaintiff for sexual harassment claims, and 11 percent more likely than male judges to vote in favor of the plaintiff in sex discrimination cases.[29] Further, this research reported that adding a female judge to a panel more than doubled (increased from 16 to 35 percent) the likelihood that a male panelist would rule pro-plaintiff in sexual harassment cases and nearly tripled this likelihood in sex discrimination cases (from 11 to 30 percent).[30] These findings imply that gender has a measurable effect on judicial decision-making when it comes to cases that involve gendered issues.

Similar to studies on gender, studies that focus on the impacts of race have reported observable effects on voting behavior and case outcomes — but only if the case under appeal is substantively related to racial issues. One study of liability claims under the Voting Rights Act (VRA), a law intended to protect racial minority voting rights, found that African American CoA judges were twice as likely as White judges to vote in favor of plaintiffs alleging violations under the VRA.[31] Further, the presence of at least one African American judge on a panel increased the likelihood of the panel finding in favor of the plaintiff. Another CoA study explored the effect of a judge's race among cases that involved constitutional challenges to race-based affirmative action programs. The results indicated that Black judges were almost twice as likely to rule in favor of an affirmative action program than non-Black judges, and that panels with all non-Black judges rule in favor of affirmative action programs 53 percent of the time, while panels with at least one Black judge voted in favor of these programs 90 percent of the time.[32] Effectively, these studies indicate that when a case is substantively related to race, Black judges tend to vote differently than do non-Black judges and the presence of Black judges on panels influences the voting behavior of their non-Black co-panelists.

Even more than race and gender effects on judging, research suggests that a judge's partisanship is the most reliable predictor for case outcome. Determining the political leanings of judges presents a challenge, since, as discussed, there is a normative pressure for judges to position themselves as neutral arbiters. However, studies have consistently found a link between the voting behaviors of

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[26] Lee Epstein, William M Landes, and Richard A Posner, Why (And When) Judges Dissent: A Theoretical And Empirical Analysis, 3 Journal of Legal Analysis, 106 (2011).

[27] Id. at 401.

[28] Id. at 406.

[29] Jennifer L. Peresie, Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts, Yale L. J. 1766 (2005).

[30] Id. at 1768.

[31] Adam b. Cox and Thomas J. Miles, Judicial Ideology and the Transformation of Voting Rights Jurisprudence, University of Chicago Law Review. 1494 (2008).

[32] Jonathan P. Kastellec, Racial Diversity and Judicial Influence on Appellate Courts, American Journal of Political Science, 175(2013).

judges and the party of the president that appointed them. In a comprehensive study of over 6,000 CoA decisions, researchers found that Democrat judges (judges appointed by a Democrat president) cast more liberal votes while Republican judges cast more conservative votes across a broad range of fifteen different case types.[33] This partisan effect was also observable on the panel level, with the likelihood of panels holding a liberal outcome increasing when two of the panelists are Democrat judges and decreasing when two of the panelists are Republican judges. Further, the strongest observable panel effect was among panels with all Democrat judges, in which the likelihood of a liberal outcome was twice as high as panels with all Republican judges.[34] Taken together, the existing literature suggests that a judge's identity has an observable influence on their judicial decision-making. However, this influence is limited in scope, as persistent effects have been observed only when (1) the identity is partisan or (2) the identity of a judge is substantively related to the subject of a case.

Compared to studies on race, gender, and partisanship, the impact of prior professional experience has been explored far less. Most recently, researchers conducted a large-scale study of hundreds of thousands of federal sentences from 2010 to 2019 and found that defendants assigned to district court judges with criminal defense experience were less likely to be incarcerated, more likely to be sentenced to community service or probation, and more likely to be given shorter sentences by about 18 months.[35] By contrast, defendants assigned to former prosecutor judges were more likely to be incarcerated, although there was no effect on the length of sentencing.[36] Therefore, though the limited existing literature suggests that professional experience may have some influence on judging, research has yet to sufficiently explore the individual and panel-level effects of professional background within the CoA.

THEORETICAL EXPECTATIONS

Taking into account the existing literature, I now turn to different theoretical expectations. These expectations draw from insights encountered in previous research that may provide explanations for the mechanisms through which a judge's background influences their votes, as well as the votes of their co-panelists, though more investigation is needed to better test and understand these mechanisms. To best capture the potential effect of professional background, my focus will be on qualified immunity cases. Qualified immunity is an ideal case study because the subject matter involved in these cases is substantively related to the jobs of prosecutors and defenders. While prosecutors enjoy the legal doctrine of prosecutorial immunity – which similarly shields them from liability – and may have advocated for grants of qualified immunity during their careers, defender judges can be expected to have a different view of qualified immunity, as their experience is often with defending civilians against the claims of government officials.

I. Individual Effects on Voting

—Protectionism.[37] Some literature suggests that judges utilize judicial decisions to advance the interests of groups and communities to which they belong, which may explain why there are persistent gender and race effects only when a case is substantively related to their identity.[38] As a result of their career experience protecting and advocating for the rights of civilians, defender judges may view voting against qualified immunity as a way of protecting civilian's rights against violations by government actors. Similarly, a prosecutor judge may, due to their career experience, seek to rule in favor of granting qualified immunity in order to protect the rights of public officials, as well as to safeguard doctrinal immunity more broadly.

—Enhanced Believability. One explanation as to why female judges and judges of color are more likely to vote pro-plaintiff for cases of gender and race discrimination is that they themselves have experienced discrimination and, therefore, are more likely to believe that a plaintiff's allegations are true.[39] In other words, a judge's perception of the believability of a litigant's claims may be enhanced by their lived experiences. It follows that defender judges who have listened to and prepared cases around the experiences of civilians may, as a result, be more open to believe that a public official would have unacceptably violated their rights. Meanwhile,

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[33] Cass Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki, Are judges political?: an empirical analysis of the federal judiciary, BROOKINGS INSTITUTION PRESS, 2007, at 20.

[34] Id. at 22.

[35] Allison Harris & Maya Sen, How Judges' Professional Experience Impacts Case Outcomes: An Examination of Public Defenders and Criminal Sentencing, 21 (2022).

[36] Id. at 21.

[37] Adam Glynn, and Maya Sen, Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?, 59 American Journal of Political Science, 41 (2015).

[38] Christina Boyd, Representation on the Courts? The Effects of Trial Judges' Sex and Race, Political Research Quarterly, 789 (2016).

[39] Sean Farhang & Gregory Wawro, Institutional Dynamics on the US Court of Appeals: Minority Representation Under Panel Decision Making, Journal of Law, Economics, and Organization, 301 (2004).

prosecutor judges may identify with the unique challenges of public work, inclining them to believe that a public official made a reasonable decision in an attempt to correctly do their job and that they are therefore deserving of immunity.

II. Panel Effects on Case Holding

—Norm of Consensus. Within the Court of Appeals, there is a pervasive norm of consensus, or pressure to have all three panelists issue a decision unanimously.[40] The impetus to protect the public perception of legitimacy is essential to the functioning of the courts and would be undermined if a large number of cases were met with dissents.[41] As a result, an overwhelming majority of Court of Appeals cases are decided unanimously, with just 2 to 7 percent being accompanied by a dissent from one of the panelists, varying by case type and circuit.[42] Pursuant to the norm of consensus theory, judges may not always vote sincerely due to the institutional structure of the court. Rather, they may decide to conform to the majority opinion of the panel to avoid writing a dissent, as the costs associated with dissenting may outweigh the benefits. Beyond undermining the court's legitimacy, the costs of dissenting include becoming ostracized from peers, developing a difficult reputation, and taking on the burden of what could be viewed as "fruitless work," since a dissent will not change the ruling of a case.[43] For these reasons, the pressure to conform may influence the minority of defender judges to side with prosecutor judges when they are outnumbered on a panel.

—Sharing Informational Accounts. Researchers posit that each judge possesses unique and valuable knowledge drawn from their lived experiences and that sharing this knowledge during deliberation may influence their co-panelists.[44] For example, Justice Jackson touched on how her experience as a public defender shapes her judicial decisions, emphasizing that "having actual experience is an asset as a judge. You understand the way the system works and as a defense counsel you have interacted with defendants in a way that as a judge… I thought was beneficial."[45] This mechanism – in contrast to the norm of consensus which inclines judges towards majoritarian voting – may result in voting behaviors that bolster the sway of underrepresented judges. If a panel includes a defender judge, they may share their experience defending civilians from government violations of their rights and influence their co-panelists to decide that a public official ought not be granted immunity.

—Ideological Amplification/Dampening. The observation that judges' partisanship affects panel-level case outcomes may be due to both *ideological amplification* — for example, when a Democrat judge votes especially liberal when sitting with two other Democrat judges — and *ideological dampening* — for example, when a Republican judge votes more liberal when sitting with two Democrat judges.[46] As such, I expect to observe that panels with a more homogeneous composition will consistently vote in one direction. That is, a prosecutor judge may be especially pro-qualified immunity when sitting on a panel with two other prosecutor judges, since, in the absence of a contrary perspective, their pro-qualified immunity perspective would be amplified. However, given the scarcity of defender judges in the Court of Appeals, there will likely be few, if any, panels with three defender judges. I expect that defender judges may experience only an ideological dampening effect and be more likely to grant immunity when sitting with prosecutor judges.

QUANTITATIVE ANALYSIS

Building upon the existing literature and theoretical expectations on the individual and panel level, this study will test the following hypotheses:

Hypothesis 1: Prosecutor judges will be more likely to vote pro-qualified immunity

- Panels with at least one prosecutor judge will be more likely hold in favor of qualified immunity

Hypothesis 2: Defender judges will be more likely to vote anti-qualified immunity

- Panels with at least one defender judge will be less likely to hold in favor of qualified immunity

To test these hypotheses, I collected data on qualified immunity Court of Appeals cases decided within the last decade.

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[40] Joshua Fischman, Estimating preferences of circuit judges: A model of consensus voting, The Journal of Law and Economics, 782 (2011).

[41] Farhang & Wawro, supra note 45, at 306.

[42] Lee Epstein, William M Landes, and Richard A Posner, Why (And When) Judges Dissent: A Theoretical And Empirical Analysis, 3 Journal of Legal Analysis, 106 (2011).

[43] Id. at 782.

[44] Boyd, Epstein, & Martin, supra note 30, at 391.

[45] PBS NewsHour, WATCH: Jackson explains how being a public defender made her a better judge, YouTube Video, 4:25. March 22, 2022.

[46] Thomas J. Miles and Cass R. Sunstein, The New Legal Realism, University of Chicago L. R. 839 (2008).

I. Data & Methodology

Using data collected from Westlaw[47] of qualified immunity (QI) cases decided in the Court of Appeals between January 1st, 2010 and December 31st, 2019, I excluded cases held *en banc* and cases in which the court refused to rule on the issue of whether an actor was entitled to qualified immunity. I used a random number generator to select the 301 cases I ultimately performed analysis on. The Court of Appeals randomizes their assignment of judges presiding over cases, so randomization of judges to panels in my data is assumed.[48] I collected data on the race, gender, professional background, and appointing president of the presiding judges using the Federal Judiciary Center (FJC).[49]

1. Description of variables

My data accounted for race, gender, and political party as demographic independent variables.[50] I used the party of the president that appointed each judge as a proxy for the political party affiliated with that judge. My primary investigative interest is in the professional backgrounds of judges. In my codebook, (0) indicates that the judge neither formerly worked as a prosecutor nor a defender[51]; (1) indicates that the judge formerly worked as a prosecutor[52]; (2) indicates that the judge formerly worked as a defender.[53]

2. Dependent Variables

Since my research interest is in both individual and panel effects, the dependent variables for these analyses are judge votes and case holdings, respectively. I used a binary variable for both of these dependent variables. For the individual-level analysis, a vote of (0) indicates that the judge voted — either in congruence with their panel or in dissent — to not grant QI and a vote of (1) indicates that the judge voted to grant QI. For the panel-level analysis, (0) indicates the panel affirmed a denial of QI or reversed a grant of QI and (1) indicates the panel affirmed a grant of QI or reversed a denial of QI.

3. Data Analysis

I utilized logistic regression analysis to determine whether extralegal factors had an effect on the dependent variables and the linear probability model to estimate the marginal effect of the independent variables on the probability that a judge/panel will yield a pro-qualified immunity decision.[54] A positive (+) coefficient reflects an enhanced probability that the judge/panel will grant QI and a negative (-) coefficient reflects a lowered probability that the judge/panel will grant QI. My research design follows the general methodology of Farhang & Wawro (2004) and Peresie (2005).

II. Results

Results of logistic analysis and linear probability regression show a link between case holding and demographic factors. In **Table 1**, which focuses on individual effects, I found that prosecutor judges were 7% more likely to vote pro-QI ($p<0.05$). Further, I found that Democrat judges were 10.7% more likely to vote anti-QI ($p<0.001$) and Republican judges were 10.7% more likely to vote pro-QI ($p<0.001$).

In **Table 2**, which focuses on panel-level effects, I performed two different models. Model 1 performs analysis based on whether at least one judge of a certain demographic factor presided over the case. In this model, I find that panels with at least one prosecutor judge are l4.7% more likely to hold pro-QI ($p<0.1$) (Model 1, Table 2). In Model 2, I performed a regression using specific numbers of demographic composition and found that, consistent with Table 1, panels with more prosecutor judges hold more pro-QI, and panels with more Democrat judges hold more anti-QI. Specifically, I found that panels with at least one prosecutor judge are 14.7% more likely to hold pro-QI ($p<0.1$); panels with two prosecutor judges are 14.9% more likely to hold pro-QI ($p<0.1$); panels with three prosecutor judges are 25.2% more likely to hold pro-QI ($p<0.05$); panels with three Democrat judges (and no Republican judges) are 21.6% more likely to hold anti-QI ($p<0.1$) (Model 2, Table 2).

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[47] Available for subscription at https://legal.thomsonreuters.com/en/products/westlaw.

[48] Joshua Fischman, Estimating preferences of circuit judges: A model of consensus voting, The Journal of Law and Economics, 807 (2011).

[49] Available at https://www.fjc.gov/history/judges.

[50] For race I coded White = 0; Hispanic = 1; Asian = 2; Black = 3; Native American = 5. For gender, Male = 0; Female = 1. For political party, Republican = 0; Democrat = 1.

[51] Examples include but are not limited to work in private practice, law professors, and general private sector employment.

[52] Examples include but are not limited to attorney generals, US attorneys, district attorneys, and attorneys for the Department of Justice. Judges that worked for political campaigns, politicians offices, or other government offices were not included in this group if they did not advocate directly on behalf of the government.

[53] Examples include but are not limited to public defenders, federal defenders, and attorneys for legal aid and civil rights groups.

[54] ALDRICH, JOHN H., AND FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS, 13 & 40(No. 45 1984).

Appendix Figure B breaks down the descriptive statistics for my data and shows the average holdings across panel compositions and judge characteristics. Consistent with my quantitative analysis, the average prosecutor judge vote was more pro-QI than the average for all judges and the average for defender judges.

Table 1 – Individual Effects on Votes

Variable	(Model 1)	(Model 2)	(Linear Probability Model)
Intercept	0.809 (0.122)	0.809 (0.122)	0.690 (0.026)
Judges of Color	0.028 (0.088)	0.028 (0.088)	0.007 (0.019)
Democrat Judges	**-0.478***** (0.151)	___	**-0.107***** (0.079)
Republican Judges	___	**0.478***** (0.151)	**0.107***** (0.079)
Female Judges	-0.300 (0.164)	-0.300 (0.164)	-0.068 (0.033)
Prosecutor Judges	**0.329**** (0.149)	**0.329**** (0.149)	**0.071**** (0.032)
Defender Judges	-0.303 (0.346)	-0.303 (0.346)	-0.074 (0.079)
N = 903		*** *denotes p < 0.001, ** denotes p < 0.05*	

Note: The Linear Probability Model collapses results from Models 1 and 2 into one column.

Table 2 – Panel Composition Effects on Case Holdings

Variable	(Model 1)	(Model 2)	(Linear Probability Model)
Intercept	0.263 (0.608)	0.709 (0.431)	0.666 (0.092)
At Least One Prosecutor Judge	**0.652*** (0.344)	——	**0.147*** (0.077)
One Prosecutor Judge	——	0.585 (0.370)	0.133 (0.083)
Two Prosecutor Judges	——	**0.664*** (0.386)	**0.149*** (0.086)
Three Prosecutor Judges	——	**1.187*** (0.618)	**0.252**** (0.127)
At Least One Defender Judge	0.134 (0.376)	0.142 (0.381)	0.029 (0.082)
At Least One Judge of Color	-0.063 (0.270)	——	-0.012 (0.093)
One Judge of Color	——	0.009 (0.290)	0.004 (0.064)
Two Judges of Color	——	0.136 (0.479)	0.032 (0.105)
At Least One Female Judge	-0.248 (0.169)	——	-0.053 (0.057)
One Female Judge	——	-0.149 (0.282)	-0.031 (0.061)
Two Female Judges	——	-0.373 (0.393)	-0.081 (0.088)
At Least One Democrat Judge	-0.456 (0.373)	——	-0.093 (0.076)
At Least One Republican Judge	0.495 (0.413)	——	-0.117 (0.095)
One Democrat Judge	——	-0.356 (0.395)	-0.071 (0.082)
Two Democrat Judges	——	-0.671 (0.415)	-0.141 (0.087)
Three Democrat Judges	——	**-0.977*** (0.535)	**-0.216*** (0.118)
N = 301		*** denotes p < 0.05; * denotes p <0.1*	

III. Interpretation of Results

These results demonstrate that professional experience and partisanship were most significantly linked with judicial decision-making in qualified immunity cases. Race and sex played no significant effect, which aligns with the existing literature finding that these factors only influence decisions for substantively related cases. My key results are as follows:

- Prosecutor judges are approximately 7% more likely to vote for qualified immunity ($p<0.05$) (**Table 1**), and panels with at least one prosecutor judge are approximately 14% more likely to rule in favor of qualified immunity ($p<0.1$) (**Table 2**)
- Democrat judges are approximately 10% more likely than Republican judges to vote against qualified immunity ($p<0.001$) (**Table 1**), and panels with three Democrat judges and no Republican judges are approximately 20% less likely to rule in favor of qualified immunity ($p<0.1$) (**Table 2**)

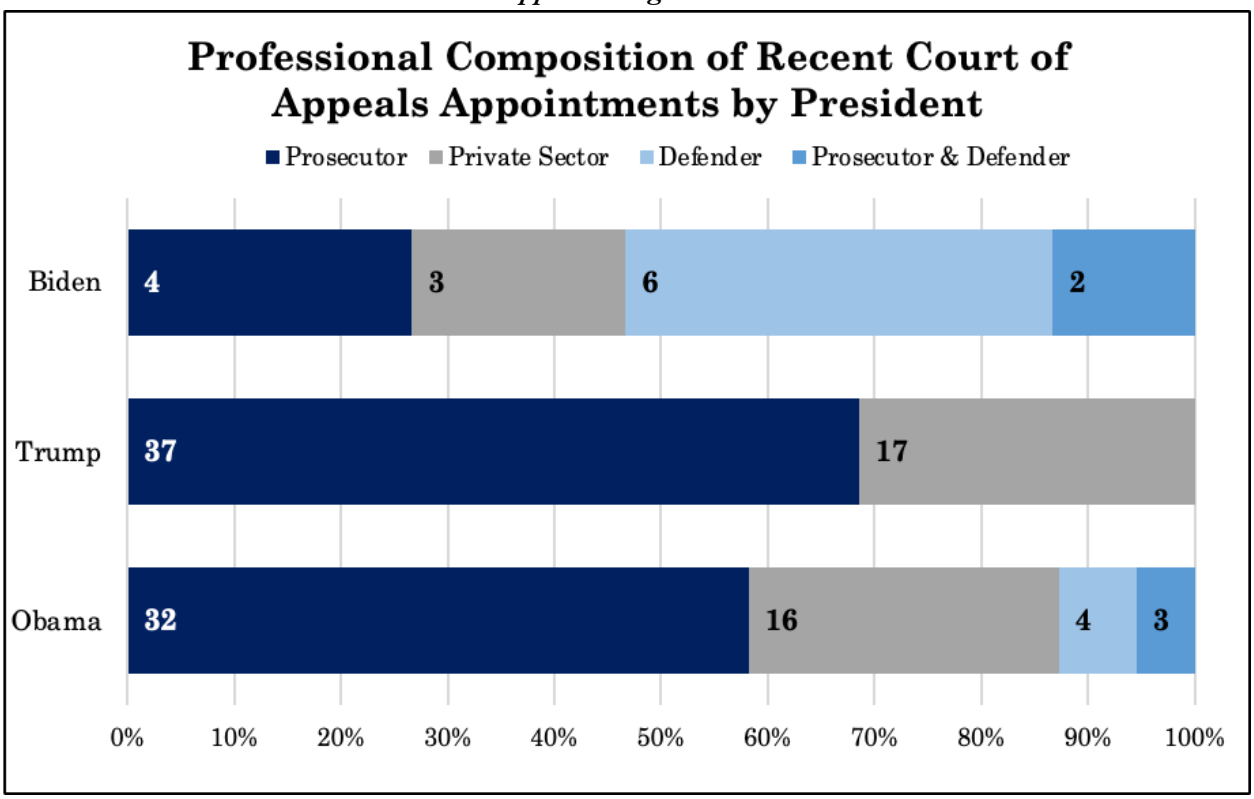
My results affirm both prongs of Hypothesis 1, as prosecutor judges are more likely to vote in favor of immunity and panels with prosecutor judges are more likely to rule in favor of immunity. My results cannot affirm Hypothesis 2 regarding the voting behaviors of defender judges. This lack of finding may be due in part to the lack of representation of public defenders within my dataset – across the 301 cases examined, 284 distinct judges presided. Of those, only 11 (or 3.9%) were defender judges (**Appendix Figure C**).

IV. Conclusion

My research demonstrates the persistent lack of professional diversity within the U.S. Court of Appeals has downstream effects on the way that panels rule. I find that prosecutors are more likely to grant qualified immunity to public officials and that they influence their co-panelists to align with their preference to grant qualified immunity. These novel findings directly address the gap in the literature regarding the impact of a judge's former professional experience on their judging. Further, I find that Democrat judges are more likely to vote against granting qualified immunity, although it seems they are unable to persuade their Republican co-panelists to rule against QI. This provides further evidence that the Court of Appeals is becoming increasingly entrenched in political partisanship – a growing and oft-criticized trend within the US judicial system.

Of the 301 total cases I analyzed in this thesis, 202 of them ruled in favor of upholding qualified immunity, which sparks the question: How many of these cases would have been ruled differently, had there been different judges assigned to the panel? In such a polarizing political climate, it is imperative to continue research to unearth disparities in case rulings, particularly among cases that uphold such a controversial doctrine as qualified immunity. While there is still future research to be conducted on this subject, my findings provide an important step in identifying an overlooked but persistent bias in the United States Court of Appeals.

Appendix Figure A



Source: Data collected from the Federal Judiciary Center. Chart created by Bianca Ortiz-Miskimen. The numbers in this figure were last updated on April 7, 2022.

Appendix Figure B: Descriptive Statistics

Statistic	N	Avg. Holding	Min	Max
Panel level				
All Panels	301	0.671	0	1
At Least One Prosecutor Judge	260	0.665	0	1
At Least One Judge of Color	135	0.659	0	1
At Least One Democrat Judge	247	0.652	0	1
At Least One Female Judge	182	0.624	0	1
At Least One Defender Judge	44	0.659	0	1
Individual Level				
All Judges	903	0.671	0	1
Prosecutor Judges	402	0.701	0	1
Private Practice Judges	457	0.645	0	1
Defender Judges	44	0.659	0	1
Male Judges	673	0.687	0	1
Female Judges	230	0.622	0	1
Democrat Judges	407	0.634	0	1
Republican Judges	496	0.702	0	1
White Judges	736	0.674	0	1
Black Judges	80	0.625	0	1
Hispanic Judges	63	0.651	0	1
Asian Judges	23	0.782	0	1

Appendix Figure C: Distribution of Professional Background

Professional Background	N	Percent of Total
Prosecutors	138	48.6%
Private Sector	135	47.5%
Public Defense	11	3.9%

N = 284

The Invisible Danger of Implicit Biases: The Ability of Machine Lea

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I. Introduction

Against an ever-changing backdrop, artificial intelligence ("AI") has emerged as an unknown and inexplicably powerful tool. The exponential learning power of such complex machines with no real limiting principle introduces questions about the scope of their role in mainstream society. Ultimately, AI is an imperfect tool that can both solve and create problems. Recently heightened scrutiny regarding the ethical behavior and implicit biases of artificially intelligent entities has introduced opportunities upon which legal scholars should capitalize. These opportunities present unique ways of identifying implicit biases and discrimination in the very tools created to ameliorate such issues. Specifically, this paper will examine the potential utility of machine learning models in death penalty trials. Public opinion of the death penalty has morphed over the centuries of its use, although in the last half-century, questions emerged regarding its disparate implementation. A historical analysis of the death penalty in American jurisprudence contextualizes the system - and issues - of today. Additionally, theoretical justifications for such issues illuminate the standard of just practice and raise critiques of the American legal system that must be addressed in order to achieve a just method of capital punishment. The research demonstrates that machine learning systems hold untapped utility in exposing discriminator practices and systemic discrimination - if applied correctly. Specifically, vertically integrated machine learning models can serve as an efficient and effective tool to highlight systemic forces that perpetuate disparate implementation of the death penalty.

II. Theoretical Frameworks Behind Capital Punishment

Classical Justifications for Capital Punishment

Before delving into the analysis of this paper, it's imperative to discuss the theoretical justifications for the death penalty in American jurisprudence. This paper will not make a claim regarding the inherent morality of capital punishment. Nor will this paper argue for or against the existence of capital punishment in the United States. Both areas of discourse are still relevant in modern jurisprudence. However, this paper need not delve into the normative existence of the death penalty to craft a comprehensive picture of its current implementation.

Two classic theoretical justifications have dominated the discourse surrounding the utility of capital punishment in American jurisprudence. An understanding of these frameworks is critical to understanding why the death penalty has remained a largely uninterrupted pillar of criminal justice in America. The two main justifications, retributivism and consequentialism, differ in moral reasonings, but both ultimately agree that a death penalty is necessary for a "well-governed republic."[1]

Retributive values are commonly viewed and discussed concurrently with justice in the American legal system. Retribution is often-times closely linked with closure for the victim and their family, but can also be viewed as retaliation or vengeance.[2] Retributivist philosophers make no claims about the death penalty as a useful tool for society but rather assert that death is the necessary and sufficient punishment to assert the moral dignity of the victims.[3] This approach to death and retribution is centered on *lex talionis,* the law of retribution and is governed by the principle of proportionality. As such, the punishment is wholly decided by the severity of the crime. Retributivists find no sameness in condition between death and remaining alive in the most miserable of conditions; therefore, they argue that all murderers must meet the same end as their victims.[4] The rigidity of this view falls on one extreme of the debate and is not realistically conducive to practical application in the American justice system. For example, the question of ethics remains largely unanswered in retributivist thought; what method of execution allows the state to ethically execute one of its own citizens while still honoring the principle of proportionality? Today, the upper bounds of permissibility on such executions are death by lethal injection or electrocution.

Despite the animating principles described above, scholars and prisoners alike continue to raise questions surrounding the ethics of such methods in the wake of harrowing accounts of lethal injection.[5] Many take issue with the retributivist approach because such unyielding demand for proportional retribution can reasonably blur into personal vengeance carried out by the state. Retributivist instincts continue to occupy a large portion of public discourse around the utility of the death penalty. However, the United States does not execute every single person convicted of murder as retributivists would wish, and there are both moral and pragmatic reasons for this.

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[1] Adam Sitze, *Capital Punishment as a Problem for the Philosophy of Law*, 9 CR: New Centennial Rev. 222 (2009).

[2] Ibid.

[3] Ibid.

[4] Ernest Van de Haag, The Ultimate Punishment: A Defense, Harvard Law School Association (1986), https://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html.

[5] Death Penalty Information Center, Executed But Possibly Innocent, https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent.

Consequentialism is the other classical ethical justification for the death penalty. This theoretical justification is most commonly cited to explain the necessity of the death penalty in the United States. Consequentialists advocate for the death penalty because they view the death penalty as a tool to derive increased societal benefit because it prevents greater evil from occurring.[6] Under the broad ideal of consequentialism, the group forks and two subsets of consequentialism differ on what exact consequence of the death penalty actually benefits society.

The deterrent value of the death penalty argues that the threat of capital punishment and a demonstrated history of use will deter would-be murderers from committing the crime in the future. That is, state-executed death sets a sufficiently harsh example to deter people from committing the very crimes that would warrant the death penalty. The other subset of consequentialism is utilitarianism, which accepts the premise of deterrence and goes a step further by arguing that the potential civilian lives saved from deterrent consequences justify the death penalty. They argue that the state has a moral duty to implement the death penalty because refraining from doing so would be tantamount to complicity in further civilian loss of life.[7]

Consequentialists face the difficult task of proving the causation of something that does not occur. Criminal patterns and the factors that influence the crime rate are fundamentally intricate and, in reality, are deterred or spurred on by myriad factors. To this day, death penalty scholars have not found any substantial link between the death penalty and a deterrent effect on the murder rate.[8] In fact, states that exercise capital punishment boast higher crime rates than states without the death penalty.[9] As such, there is no conclusive evidence that the main ethical argument in favor of capital punishment is effective in any significant capacity.

In order to comprehensively discuss the problematic underpinnings of capital punishment as an institution, one must examine the historical practice of the death penalty and the issues identified by legal scholars throughout the nuanced practice.

III. *McGautha, Furman, and Gregg:* Capital Punishment in Practice

The long and storied history of capital punishment in the United States dates back to the colonial period.[10] Over the centuries, capital punishment morphed from public executions to encompass de facto lynchings and finally became the private, closed-door affair we identify today as a legal execution in the late twentieth century.[11] Due to the limited scope of this paper, the nuanced history of the American death penalty must be reserved for another discussion. Instead, historical analysis must begin with the first judicial discussions about the procedural justice of the death penalty. This discourse sparked as the Supreme Court began to tackle Eighth Amendment questions about the death penalty. The most immediate result of this discourse was the first and only hiatus of executions in American history. Many date the beginning of this critical discourse to the landmark case, *Furman v. Georgia* (1972).

In reality, the discourse begins in Justice Goldberg's dissenting opinion of the Court's denial of certiorari in the 1963 case, *Rudolph v. Alabama*. Justice Goldberg, joined by two other justices, thought that the questions regarding the constitutionality of the death penalty are relevant and should be heard by the Court.[12] This dissent demonstrated a burgeoning interest of the Court in this debate and consequently sparked a national campaign led by the NAACP and the Legal Defense Fund (LDF) to flood the courts with death penalty litigation. By 1967, as a direct result of this campaign, executions were under a *de facto* hiatus while litigation played out in the courts.[13] In a decision that made *Furman* all the more unexpected, the Court dealt a fatal blow to the LDF and the NAACP, who had just argued *Furman*. In *McGautha v. California* (1971), the Court held that the current implementation of the death

[6] Ernest Van de Haag, The Ultimate Punishment: A Defense, Harvard Law School Association (1986), https://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html.
[7] Ibid.
[8] Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 Am. L. & Econ. Rev. 332 (August 2003).
[9] Ibid.
[10] Robert M. Bohm, Death Quest III: An Introduction to the Theory & Practice of Capital Punishment in the United States 1 (2007).
[11] Raymond Taylor Bye, Capital Punishment in the United States 1-3 (1919)
[12] Lorin Granger, Cases in Brief: Furman v. Georgia with Carol Steiker, Harvard Law Today (August 15, 2022), https://hls.harvard.edu/today/cases-in-brief-furman-v-georgia-with-carol-steiker/#:~:text=In%201976%2C%20the%20Court%20decided,abolish%20the%20death%20penalty%20altogether.
[13] Ibid.

penalty was constitutional under the due process clause of the Fourteenth Amendment.[14] Justice Harlan, writing for the majority, repudiated the assertion that jury discretion in capital cases violated "any provision of the constitution."[15]

Against the backdrop of *McGautha, Furman* was not only unexpected but unprecedented.[16] One year later, *Furman* appeared to directly contradict the 6-3 decision in *McGautha.* In a one-page per curiam opinion, the Court ruled that the implementation of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In over 230 pages of concurring and dissenting opinions, the nine justices individually articulated how and why they ruled on this issue. Five of the justices agreed that the current implementation of the death penalty was, to varying degrees, cruel and unusual punishment.[17] Ultimately, the justices directed their scrutiny to the wide latitude that the jury enjoyed in deciding capital cases. Therefore, *Furman* became a case about jury guidelines and discretion.[18] The controlling opinion decided that the death penalty itself was not cruel and unusual. Rather the absence of rigorous due process, which resulted in a wide degree of discretion for the jury while sentencing, suggested arbitrary implementation with discriminatory underpinnings.[19] Justices Stewart, White, and Douglas characterized the death penalty as being implemented "wantonly and freakishly."[20] Stewart likened the death penalty to being struck by lightning, conjuring images of perhaps the most random act in the universe.[21] As such, the Court implemented a moratorium on the death penalty for the first and only time in American history.

The four dissenters, Justices Burger, Blackmun, Powell, and Rehnquist, repudiated the theory of successive restriction articulated in the controlling opinion by pointing to over forty state statutes that legalized and, in certain cases, required a death penalty sentence.[22] They argued that the death penalty was still morally acceptable in the American consciousness, and the real danger of unpredictability lay in the justices' decision to repudiate such widely held beliefs.[23] Ultimately, this dissent laid the groundwork upon which *Furman* would be overturned four years later. Within those four years, 37 states enacted new death penalty statutes that increased stringent guidelines and limited jury discretion.[24] Many thought that *Furman* put an end to the death penalty in America for good. However, the state statutes and litigation that ensued after *Furman* suggested that the Court must indeed decide what *are* sufficient guidelines for jury discretion in capital trials.

Gregg v. Georgia (1976) affirmed the new guidelines for the jury in Georgia's death penalty cases and prompted seven justices to hold that the death penalty in its new form did not violate the Eighth or Fourteenth Amendments. Georgia's new guidelines became the standard for guidelines and discretion in capital cases, referred to in this paper as 'super due process.' At its core, *Gregg* was an attempt to remove the arbitrary implementation of the death penalty regarded as unconstitutional in *Furman.* Such changes included new sentencing guidelines that removed mandatory capital sentencing for certain crimes.[25] Additionally, *Gregg* bifurcated the capital trials: one trial to determine the defendant's guilt and a separate trial to determine the defendant's sentencing.[26] In these

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[14] The Due Process Clause of the 14th Amendment stipulates that no state shall deprive their citizens of life, liberty, and property, without due process of the law. In *McGautha,* the court affirmed that the current implementation of the death penalty provided sufficient due process.

[15] *McGautha* v. *California*, 402 U.S. 183, 196 (1971).

[16] *Furman* was handed down in tandem with two other death penalty cases, *Jackson v. Georgia* and *Branch v. Texas* These cases concern the constitutionality of a death penalty conviction for rape. The Court rejected this claim and since *Gregg,* no one has been sentenced to death for non-homicide crimes.

[17] Justices Brennan and Marshall believed that the death penalty was per se unconstitutional, whereas Justices Douglas, Stewart, and White thought the death penalty was only discriminatory in its implementation. All five agreed that in its implementation, the death penalty overwhelmingly targeted minority defendants, poor people and politically unpopular people. The fact that the death penalty was widely authorized but rarely used suggested randomness in its implementation that the Justices found deeply unconstitutional.

[18] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[19] Lorin Granger, Cases in Brief: Furman v. Georgia with Carol Steiker, Harvard Law Today (August 15, 2022), https://hls.harvard.edu/today/cases-in-brief-furman-v-georgia-with-carol-steiker/#:~:text=In%201976%2C%20the%20Court%20decided,abolish%20the%20death%20penalty%20altogether.

[20] *Furman* v. *Georgia*, 408 U.S. 238, 295 (1972).

[21] *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972).

[22] *Furman* v. *Georgia*, 408 U.S. 238, 383-386 (1972).

[23] *Furman* v. *Georgia*, 408 U.S. 238, 383-386 (1972).

[24] Lorin Granger, Cases in Brief: Furman v. Georgia with Carol Steiker, Harvard Law Today (August 15, 2022), https://hls.harvard.edu/today/cases-in-brief-furman-v-georgia-with-carol-steiker/#:~:text=In%201976%2C%20the%20Court%20decided,abolish%20the%20death%20penalty%20altogether.

[25] *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

[26] Death Penalty Information Center, Constitutionality of the Death Penalty in America, https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america.

separate deliberations, juries are required to take into account aggravating and mitigating circumstances that should be reflected in their sentencing.[27] The Court also affirmed the implementation of automatic appellate review of both convictions and sentences.[28] Finally, Georgia introduced automatic proportionality review in the appellate proceedings, mandating that the reviewing bodies compare the sentence of the case before them with the sentences of similar cases in an attempt to mitigate sentencing disparities.[29]

Although the history of the death penalty in the United States is complex, it is clear that the consequentialist and retributive theories discussed prior inform the ethical conceptions of just implementation, but neither is practiced in any absolute capacity. As of today, the justices acknowledge that the death penalty occupies an ethical function, and super due process is their attempt to more closely align their ethical standards with practical implementation.

In theory, super due process enables the degree of jury discretion necessary to account for the complexity of context while still ensuring accountability and consistency across the board via rigid guidelines and procedures. However, effective theoretical models do not ensure effective practice. As super due process is nearing its half-century of implementation, recurring disparities loom over its legacy.

IV. Super Due Process: Does it Work?

Even though questions remain about the efficacy of super due process, significant obstacles endemic to the institution of the death penalty prevent the ability to find concrete answers. To begin, the number of completed executions compared to the number of authorized executions is infinitesimally small.[30] This skewed proportion occurs for many reasons; those who are sentenced to death are entitled to appellate review and the ensuing litigation takes years. In the process of ensuing litigation, opportunities arise for stays of execution, exonerating evidence, and procedural errors that entitle the defendant to a new trial, re-sentencing, or exoneration.[31] The average prisoner on death row spends ten years awaiting execution or new rulings that overrule their death sentence.[32] More than half of all U.S. prisoners have lived on death row for more than 18 years.[33] As such, the intensive processes raise questions about the efficacy of the Court's solution. While automatic appellate review is necessary and increases the likelihood of exoneration or non-capital resentencing, it does not ensure that innocent defendants will be exonerated nor that discriminatory sentencing is eradicated. Further, if appellate review takes decades before a final decision is reached, is it cruel and unusual to require an innocent man to await justice in the most notorious corners of the prison system for decades before justice is served? Such an issue is a symptom of our broader court system, and time is necessary to ensure all avenues are exhausted. However, the questions of constitutionality must guide the courts and the prisons when creating capital guidelines.

Another issue that arises as a result of the small number of executions that take place is the difficulty in capturing all of the extenuating circumstances that might be a result of discriminatory practice. For example, the death penalty can appear objective in its application - a proportionate sentence to similar crimes and procedural compliance - while being discriminatory in effect. Poor and non-white people are disproportionately sentenced to death for equivalent crimes than their white and richer counterparts. There are many reasons for this, one of them being the financial barrier to competent and robust representation that could have resulted in a better outcome for the defendant. Such *prima facie* objectivity can hide concerning statistical evidence of discrimination. Studies have found that the race of the victim is an influencing factor in the decision to impose the death penalty. For example, 299 Black defendants have been executed for the murder of a white victim since 1976.[34] As for white defendants executed for the murder of a Black victim, only 21 have been executed in the same time frame.[35] A disparity this noticeable is a result of many systemic factors and suggests structural inequality in sentencing.[36]

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[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Death Penalty Information Center, Time on Death Row, Death Penalty Information Center, https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Death Penalty Information Center, Executions by Race and Race of Victim, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim.

[35] Ibid.

[36] As mentioned previously, after the implementation of super due process, no one has been executed for non-homicide crimes. However, between 1930 and 1972, 89% of the 455 people executed for non-homicide rape were black, but no white man has ever been executed in the

The final fundamental issue with super due process is that it cannot wholly eradicate the execution of innocent people believed to be guilty at the time. This is a flaw endemic to the human race, and this paper will not attempt to eradicate the fallibility of human judgment. However, the question of innocence at the time of execution highlights systemic forces that influence capital proceedings. General practice in the United States legal system is to declare any ongoing proceedings contesting the defendant's innocence moot once the defendant dies, either at the hands of the state or otherwise.[37] However, over the years at least twenty people were executed amidst strong suggestions of their innocence.[38]

Georgia executed Carlton Michael Gary in 2018 without any federal court review of evidence suggesting his innocence.[39] He was convicted in 1986, under the super due process guidelines, for the alleged serial rape and murder of almost a dozen women, three of whom were elderly and white.[40] The most compelling evidence presented at trial was the eyewitness testimony of a surviving victim who identified Carlton as her alleged rapist and attempted murderer.[41] However, The prosecution withheld an earlier statement from the same witness who initially told investigators that her room was so dark she could not identify her attacker, let alone describe him. Post-conviction DNA testing of the semen found on the victim's clothing excluded Carlton from the scene of the crime.[42] Additionally, a leading forensic odontologist found that Carlton could not have made the bite marks left on a victim based on a dental mold police had made. The prosecution never presented him as a witness nor did they share this information with the defense until the post-conviction process.[43] The prosecution claimed that they received a partial confession that Carlton denied ever making, although it was neither recorded nor contemporaneously documented. At a minimum, the evidence in totality cast doubt on the prosecution's theory. However, Carlton was executed in 2018, almost twenty years after he was convicted.[44] Although the withheld evidence suggested that he did not commit the crimes for which he died, it was a constitutionally compliant and therefore non-discriminatory execution under super due process.

The recurring theme in capital trials is that of procedural misconduct in order to get a conviction, even if the evidence is inconsistent with the story they presented to the jury. These twenty cases do not invalidate the fact that super due process has empirically increased the chance of eventual exoneration. Since 1976, over 190 people have been exonerated from death row in the post-conviction litigation processes.[45] However, given the gravity of the death penalty and the systemic discrimination that has permeated the procedures, any margin of error raises moral questions. As such, this paper aims to identify the potential areas of improvement in super due process and articulate the burgeoning role of artificially intelligent technology in optimizing efficiency and understanding in this process.

V. Freeman and Crenshaw: Critical Legal Views on Super Due Process

Critical legal studies scrutinize recurring themes of power and distribution, which are often taken for granted in mainstream legal discourse, against the backdrop of American history in its totality. Such rigorous analysis reveals problems with the basic ordering of not only American jurisprudence but society as a whole. As such, these critiques must be applied to both the legal discourse surrounding the death penalty and the public discourse surrounding the ethical implications of an increased presence of artificially intelligent entities in daily life. As such, this section of the paper will articulate the leading arguments of critical legal scholars in an attempt to explain common critiques of both the death penalty and an increased reliance on artificial intelligence.

The American legal model operates on the conception of an isolated perpetrator and an isolated victim. Critical legal scholar A.D. Freeman has left an indelible mark on the field by conceptualizing the blindspots and harmful assumptions upon which the

US for the non-homicide rape of a black woman or child; Statistic found in Lorin Granger, Cases in Brief: Furman v. Georgia with Carol Steiker, Harvard Law Today (August 15, 2022).

[37] The University of Michigan Law School, Posthumous and Historical Exonerations, National Registry of Exonerations.

[38] Death Penalty Information Center, Executed But Possibly Innocent, https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Ibid.

[45] Death Penalty Information Center, Exonerations by Race, https://deathpenaltyinfo.org/policy-issues/innocence/exonerations-by-race.

legal system operates.[46] He describes this system as "the perpetrator perspective."[47] The perpetrator perspective views individual action as wholly detached from the fabric of society and historical continuity.[48] That is to say, in evaluating the damage perpetrated, the legal system does not meaningfully recognize the context in which the damage occurred. In doing so, the offending individual shoulders all of the responsibility and insulates society from any blame. Thus, even in the context of anti-discrimination laws, society continues to slough systemic problems onto individual people, refusing to solve them.[49] The perpetrator perspective challenges the mainstream understanding of the legal system. The mainstream understanding of the legal system does not conceptualize systems as contributing factors to individual offenses, and it accepts the perpetrator/victim dichotomy that Freeman critiques. An adversarial system that pits an immoral defendant against an innocent victim does not fit well with a system that accounts for historic patterns of discrimination and oppression that might impact the defendant in ways out of the defendant's control.[50]

Not only does the law operate with a perpetrator perspective, but it does not properly acknowledge a plurality of identities in American life. The seminal work of Kimberlé Crenshaw serves as a continual reminder that systems in America are not well-equipped to grapple with the compounding effects of discriminatory forces in certain intersections of identity groups.[51] As such, there exist no legal remedies for the unique experiences of intersectional individuals who experience multiple forms of discrimination.[52] This complex, systemic problem is not confined to the legal field. Such inadequacy in addressing pluralist experiences also arises when confronting the issues of systemic racism coded into complex machine-learning models.

In examining the construction of these tools, scholars and users alike have encountered concerning ethical behavior that confirms Freeman and Crenshaw's critiques of the system. This data will be discussed at length in the following section. However, it is important to raise theoretical concerns about machine learning before even examining the real-world implication. Crenshaw and Freeman argue that there is yet to exist a conceptual framework that can accurately encapsulate and thus compensate for the systemic forces working against certain groups in the United States. Machine learning falls into the same trap. As such, these critical frameworks must be included in machine learning systems when analyzing potential uses for machine learning in eliminating discrimination and disparate impacts of capital punishment.

VI. Opportunities for Improvement: Machine Learning and the Death Penalty

Artificial Neural Networks

The very existence of artificial intelligence is not only a futuristic invention coming to fruition, but its increased role in the professional world carries significant implications for society as we know it. This section of the paper will identify the potential ways that artificial intelligence can be utilized during relevant capital punishment procedures to ameliorate the persistent and implicit discriminatory outcomes in sentencing.

Due to the scope of this paper, the solutions will be targeted exclusively at the appellate review portion of super due process. Jury proceedings are of a fundamentally different nature than those of appellate courts, first and foremost because the average jury person is not expected to know the inner workings of the legal system nor the nuanced history of the death penalty in the United States. While highlighting implicit forms of discrimination in trials with juries is important, potential roles for machine learning models in accomplishing this goal are still murky at best. Proportionality review in appellate litigation offers a logical opportunity for legal experts to analyze discriminatory underpinnings or subconscious biases that are impacting the jury. It is important to note that this approach has drawbacks. The appellate review process takes several years, and the defendant would remain incarcerated on death row for the entirety of the review process. However, because of the unique nature of the jury trial and

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[46] Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 63 Minn. L. Rev. 1049-1119 (1978).

[47] Ibid.

[48] Ibid.

[49] Judicial conduct across the eras Freeman identified simultaneously integrated racial disadvantage for minorities while bolstering society's moral claims to providing fair treatment to all, perpetuating the "myth of equal opportunity" as society perceives itself as equal and largely dismisses pernicious forces that perpetuate racial disadvantage; Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 63 Minn. L. Rev. 1049-1119 (1978).

[50] Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 63 Minn. L. Rev. 1049-1119 (1978).

[51] Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139-167 (1989).

[52] Crenshaw articulates how Black Women are fundamentally unaligned with the experiences of white women, unaligned with the experiences of black men and thus are excluded from the movements; Crenshaw, "Demarginalizing the Intersection of Race and Sex."

appellate proceedings, proportionality review remains the most effective opportunity to implement rigorous and comprehensive machine learning analysis

The most prominent use of artificial intelligence in capital cases is centered on the use of Artificial Neural Networks. These systems, referred to as ANNs, are a vein of machine learning at the heart of "deep learning algorithms."[53] Machine learning is a subset of AI that allows computers to learn organically from their experiences and interaction with both data and humans.[54] ANNs are modeled on a human brain and, like humans, their learning adapts and improves over time.[55] Most importantly, once the algorithm has been honed, ANNs can be highly effective tools for "classifying and clustering" data at remarkable speed.[56] As such, they are useful tools if applied to the vast data points of capital trials and the thousands of defendants who move through them. ANNs can highlight data that disprove common conceptions or perceived functions of death penalty proceedings and identify recurring trends.

In a Texas A&M study, two computer science professors created an ANN as a tool for predicting death penalty outcomes. Researchers reconstructed 1,366 profiles of previous and current defendants on death row; however, they did not use any substantive characteristics of the crime for which they were convicted.[57] In this case, researchers defined substantive characteristics as the qualitative judicial procedures in each defendant's trial, including the quality of the defense and any relevant tests conducted during the trial and ensuing appeals. Instead, the ANNs collected data on 19 different characteristics of each profile:

> inmate identification number, state, sex, race, Hispanic origin, year of birth, third, second, and first most serious capital offense, marital status at time of first imprisonment for capital offense, highest year of education completed at time of first imprisonment, legal status at time of capital offense, prior felony conviction(s), year of arrest for capital offense, month and year of conviction for capital offense, month and year of sentence for capital offense, and the outcome (execution/non-execution).[58]

I include the list in its entirety to demonstrate the wide variety of data that the ANN analyzes through its algorithm to decide whether or not the prisoner was executed. It's important to note that of the nineteen characteristics analyzed, none included procedural compliance nor any other substantive characteristics of the trial.

Of the 1,366 profiles analyzed, half of them represent death row inmates who had been executed and the other half represented non-executed inmates.[59] The ANN successfully classified 147 of the 158 profiles of non-executed prisoners, with an accuracy rate of 93%. Additionally, the ANN successfully classified 91.5% of the executed inmates. This accuracy rate is comparatively better than other ANNs which have been created to predict similar outcomes, like that of juvenile recidivism.[60]

What is most concerning about the remarkable accuracy of this study is that the ANN was able to hone such accuracy without any substantive details or data from the trials. Leading death penalty scholars point to substantive characteristics as the determining factors of sentencing. This data raises substantial concerns about the fairness of the justice system and the efficacy of super due process in the first place. As discussed at length in the section regarding the efficacy of super due process, these procedures were created to eradicate the arbitrary implementation of the death penalty. This study suggests that this arbitrary implementation persists today, fifty years later. If substantive characteristics of the trial do not have a substantial impact on the outcome of the trial, then legal scholars must scrutinize the efficacy of the structures in place.

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[53] IBM, What is a neural network?, Topics (Accessed August 10, 2023), https://www.ibm.com/topics/neural-networks#:~:text=Neural%20networks%2C%20also%20known%20as,neurons%20signal%20to%20one%20another.

[54] Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 Tul. J. Tech. & Intell. Prop. 189-204 (2017).

[55] IBM, What is a neural network?, Topics (Accessed August 10, 2023), https://www.ibm.com/topics/neural-networks#:~:text=Neural%20networks%2C%20also%20known%20as,neurons%20signal%20to%20one%20another.

[56] Ibid.

[57] Stamos T. Karamouzis & Dee Wood Harper, *An Artificial Intelligence System Suggests Arbitrariness of Death Penalty*, 16 Int'l J.L. & Info. Tech. 1-7 (Spring 2008).

[58] Ibid.

[59] 1,000 profiles from total population were used for training for the neural network, 66 for cross validation, and the remaining 300 were used for the testing analysis; Karamouzis and Harper, "Artificial Intelligence System Suggests Arbitrariness," 5.

[60] Karamouzis and Harper, "Artificial Intelligence System Suggests Arbitrariness," 5.

It is possible that the ANN is able to capture broad trends and implicit biases that might influence the behavior of the jury and the judges in its nineteen objective data points - with remarkable accuracy. For example, increased prior felony convictions lead to a higher chance of recidivism and thus increase the likelihood that the prosecution seeks the death penalty, citing a dangerous history. The aim of this paper is not to explain the accuracy or computational capabilities of this ANN. However, the aim of this paper is to highlight the utility of this ANN to highlight inconsistencies within the trial.

The Benefit of ANNs in Death Penalty Trials

This ANN used to analyze execution outcomes solidifies the utility of ANNs as tools to predict outcomes and categorize data in death penalty trials. The analysis of this ANN offers a new perspective on characteristics that are impacted by systemic discrimination. Death penalty scholars can use this unique vantage point to identify what the determining characteristics in the outcome of death penalty cases actually are if the substantive qualities of the trial matter less than previously thought. For example, statistical analysis of the data found by the ANN might reveal that a substantial percentage of executions occur if the defendant was Black and had prior felony offenses regardless of the other seventeen characteristics analyzed.[61] Such information would allow scholars to examine whether such sentencing is proportional to counterparts of other races and highlight the subtle discrimination that contributes to a disproportionate amount of Black people on death row.

ANNs should never replace the automatic appellate review nor does this study demonstrate an ability to do so. However, this ANN could be a helpful tool in the proportionality review process to synthesize complex data into digestible analysis. Rather than cross-referencing previous cases decided on the same discriminatory undercurrents, statistical analysis of the ANN data can highlight systemic discrepancies. The case in question can then be compared to the issues highlighted by the ANN and illustrate a fuller picture that the judge can use to determine whether this was a warranted sentencing.

ROSS: Ethical Judgment of an AI Lawyer

In 2016, ROSS intelligence created ROSS - the first AI lawyer. Built on the company's "proprietary legal framework" and IBM's "cognitive computing technology," ROSS is a machine learning program that conducts legal research. Through its repetitive interactions and dialogues with associates, its accuracy improves without being programmed.[62] ROSS does not handle any client interaction nor is it tasked with critical analysis. Such responsibility remains for the lawyers at the firm, including the duty to perform professional judgment by "bringing coherence to conflicting values…in highly contextualized circumstances."[63]

While there is strong debate over the role of morals in the legal profession at all, the American Bar Association (ABA) has created a professional code of conduct that condones, and even at times stipulates, the use of moral judgment in providing legal advice or services.[64] There are unavoidable times when a lawyer must confront the tension between remaining an ethical person and the duties they have to their client.[65] These decisions, including if and when to disclose confidential information to save lives, require the nuanced understanding and judgment that only humans can produce. Professor Krusse of Princeton University has developed a three-level process for articulating professional judgment. This process requires a lawyer to "determine and assess" the language of the rule in question, the conflicts in the underlying principles that create the rule, and the lawyer's conception of their professional role to provide guidance when making decisions.[66]

ROSS has begun to demonstrate burgeoning capabilities to perform professional judgment, which poses important implications for the role of 'automated lawyers' in general and specifically in death penalty trials. To determine ROSS's utility in highlighting inconsistent or questionable moral judgment, its behavior and capabilities must be analyzed through the three-tier process of moral judgment outlined above.

Because of ROSS's primary research function and its ability to relay said research findings in an applicable and contextual manner, it is reasonable to believe that ROSS could determine and assess the language of the statute or rule in question.[67] One could

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[61] I am unable to perform this statistical analysis because the authors of this study did not publish the characteristics of all 1,366 inmate profiles and therefore am merely offering a hypothesis to explain the data.

[62] Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 Tul. J. Tech. & Intell. Prop. 193, 189-204 (2017).

[63] Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 Tul. J. Tech. & Intell. Prop. 194, 189-204 (2017).

[64] Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 Tul. J. Tech. & Intell. Prop. 195, 189-204 (2017).

[65] Ibid.

[66] Nunez, "Artificial Intelligence and Legal Ethics," 202.

[67] Nunez, "Artificial Intelligence and Legal Ethics," 202.

even go as far as to say that with a grasp on the language of the statute, ROSS might even be able to identify the underlying principles of the statute.[68] However, such comprehension does not automatically create a lawyer equipped with the necessary professional judgment. They must also incorporate, to a certain extent, their morals when interpreting the law.[69] Machine learning algorithms, no matter how state-of-the-art, cannot conceptualize morals the same way that humans do, much less incorporate them into professional judgment. Through extensive interaction with lawyers and scholarship about morals in the legal field, ROSS could feasibly develop a moral compass that is consistent with its firm's values and priorities.[70] Machine learning improves by getting positive or negative feedback on its work, and through these interactions and mock cases, ROSS could synthesize and replicate professional judgment aligned in spirit with the firm.[71] Such a discovery introduces benefits and risks in identifying and rooting out the discrimination endemic in death penalty trials.

The Benefit of ROSS in Death Penalty Trials

ROSS could theoretically develop professional judgment consistent with the morals and practices that acknowledge the systemic forces at play in death penalty trials. For example, appellate courts could use the professional judgment of ROSS as another perspective when reviewing proportionality. If ROSS is well-equipped with a sufficient understanding of leading critical theories and the most recent data on disparate impacts of capital punishment, its consistent perspective unswayed by human emotions could be of benefit during proportionality review. This perspective could be used as a 'check-in' for the reviewing body to decide if their holding is - or even needs to be - consistent with ROSS.

Vertical Models & Integration

As described in the earlier discussion of critical legal scholars, machine learning systems are not objective systems. They remain susceptible to bias and discriminatory practices.[72] In its short history of use, machine learning models have incorrectly identified people of color and perpetuated stereotypical biases in applications for apartments, credit cards, and jobs.[73] Implicit biases and micro-aggressions that we admonish as a society are embedded into machine learning algorithms because the developers who make the algorithms bring with them their own implicit biases. Such disparate effects of machine learning algorithms are due to myriad factors. Primarily the data collection process and reserves do not accurately represent the diversity of the entity that is being collected.[74] Instead, dominant identities are overrepresented. An overwhelming skew to the data is likely a result of the disproportionately large percentage of white AI software developers and thus implicit biases are coded into the machines society relies on for objectivity.[75] Incomplete data sets perpetuate systemic discrimination.[76] For example, predictive policing tools make assumptions about future crime by analyzing and extrapolating data from previous arrests. However, any discriminatory practices or subconscious racial profiling that impacted those prior arrests go unquestioned in the creation of these 'objective' systems. On the surface, there is no proactive decision to perpetuate discriminatory practices, but in machine learning, passivity is not sufficient to create ethical AI models.

The Benefit of Vertical Models in Death Penalty Trials

Building machine learning systems used in death penalty trials will be no different. As discussed in the historical section, documented use of the death penalty has been disparate at best and discriminatory at worst. Software developers must not rely exclusively on prior cases to build ANNs that reach fair and just conclusions lest they risk falling into the same trap as the aforementioned example. Software developers at MIT have developed tools to "effect structural and normative change toward racial equity" in machine learning models.[77] The overarching goal of these efforts is to account for the broader impact of

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[68] Nunez, "Artificial Intelligence and Legal Ethics," 203.

[69] Nunez, "Artificial Intelligence and Legal Ethics," 203; Nunez articulates 3 different moral frameworks to approach the law: moral activism, contextual justice, and fidelity to the law.

[70] Nunez, "Artificial Intelligence and Legal Ethics," 203.

[71] Nunez, "Artificial Intelligence and Legal Ethics," 203.

[72] Aaron Rieke et al., Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers, Upturn (July 6, 2021), https://www.upturn.org/work/essential-work/.

[73] Ibid.

[74] Deborah Raji, How our Data Encodes Systemic Racism, MIT Technology Review (December 10, 2020), https://www.technologyreview.com/2020/12/10/1013617/racism-data-science-artificial-intelligence-ai-opinion/.

[75] Scott Murray, How AI Can Help Combat Systemic Racism, Massachusetts Institute of Technology News (March 16, 2022), https://news.mit.edu/2022/how-ai-can-help-combat-systemic-racism-0316.

[76] Ibid.

[77] Ibid.

interconnected systems that appear facially objective but are discriminatory in effect.[78] According to MIT computer scientists, the key to ensuring equitable algorithms is to capture the whole picture in it. Thus, scholars are building models that capture the interconnection of systems that might disparately impact historically underserved groups. Such unique systems are referred to as vertical models to incorporate the many factors that contribute to one outcome.[79] These vertical models are the product of a deliberate and proactive decision to acknowledge that data does not exist in a vacuum. While these vertical models do not stop discriminatory practices from happening, they can ensure that reviewing bodies have the full context of the forces at play when making life-or-death decisions.

The vertical framework of MIT can be integrated into the appellate review process to ensure that the reviewing body has a thorough understanding of the relevant forces. While statistical analysis of the ANN mentioned previously can highlight systemic discrepancies, ANNs built with vertical integration can enable an even more robust understanding of the systemic forces at work. Similarly, a ROSS-like algorithm might be able to produce moral judgment in line with an equitable vertical model aimed at capturing all forces at play during these trials under the vertical framework. These models in and of themselves are necessary to build a comprehensive environment, but they can be integrated into virtually any relevant machine learning model. Therefore, vertical models hold the biggest utility in approaching the death penalty in a comprehensive way. With vertical models integrated into machine learning models that synthesize the aggregate data on capital punishment and mimic professional judgment in line with their organization, super due process will be that much closer to realizing its idealized standard.

VII. Conclusion and Next Steps

The burgeoning role of artificial intelligence in virtually every field comes with benefits and risks. This section of the paper will scrutinize the role, if any, of artificial intelligence in super due process and capital cases. It is imperative to acknowledge that there are substantial consequences that come with any sort of reliance on artificial intelligence models or blind faith in their data. It goes without saying that death penalty trials and proceedings are centered first and foremost on human judgment; there is a subtle but fundamental philosophical lens to the necessity of human judgment in these proceedings.[80] The utilitarian and retributivist frameworks mentioned above both acknowledge that the life lost in the execution serves something larger than just death. Either it is to acknowledge the dignity of the victim or to deter people from committing this crime in the future thereby making society safer and ensuring a better life for the individuals living in it.[81] The twelve humans that sit in the panel and hear the hours upon hours of evidence and testimony are tasked with making a decision on the value of someone's life and the value of their death.

As such, there is no replacement for human judgment, however fallible, in capital trials. This paper is not advocating for artificial intelligence to replace, in any capacity, the central role of humans in such grave decision-making processes. Replacing human judgment and decision-making with any artificially intelligent entity would effectively rule morality and philosophy as irrelevant and instead center efficiency in death penalty trials. Not to mention, to replace a jury with an ANN would be to deprive the defendant of their Sixth Amendment right to an "impartial jury of the State and district wherein the crime shall have been committed."[82] In trials, like many areas of life, humans are an irreplaceable part of the experience and this paper aims to keep it that way. However, there are concerning patterns in death penalty cases that could be improved or resolved with intentional and effective machine learning models.

Appellate processes should begin to include MIT's vertical models that highlight the entire context of the crime in which it was committed. That is not to say that a broader context excuses or justifies the damage dealt. However, an illustration of the broader context can lend an increased understanding of difficult situations. This understanding can allow the judges and jury to better determine if death is proportional to the crime committed and if the evidence warrants such a decision. However, machine learning algorithms alone can not solve racial discrimination. As Professor Watkins of MIT states, "systemic change requires a collaborative model." [83] Computational advancements will be most beneficial when employed as one tool in an arsenal.

This paper has examined the current structural issues in death penalty trials. The theoretical justifications for the death penalty articulate the idealized standard by which we can measure the practical applications. Whether it be in the name of

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[78] Ibid.

[79] Ibid.

[80] Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143-1186 (May 1980).

[81] Ibid.

[82] U.S. Const. amend. VI

[83] Scott Murray, How AI Can Help Combat Systemic Racism, Massachusetts Institute of Technology News (March 16, 2022), https://news.mit.edu/2022/how-ai-can-help-combat-systemic-racism-0316.

retributivism or consequentialism, the death penalty often symbolizes the gravest consequence the state inflicts on its citizens. As a largely uninterrupted part of American jurisprudence, there is a mandate under the equal protection clause of the Fourteenth Amendment to take all necessary steps to ensure that the death penalty is meted out intentionally and equally.

Scholars should continue to build and test relevant machine learning models to flush out the full extent of their capabilities. With more data on the utility of the relevant models in diverse analytical situations, the adaptive qualities of these machines will strengthen. These algorithms and models will then produce more robust and informed data and analysis that intentionally captures the full scope of any given situation. Such insight will be especially valuable in appellate proceedings, specifically proportionality review. A contextualized perspective will allow the reviewing body a unique vantage point through which to analyze the proportionality of the jury's decision. Instead of restricting the analysis to the facts on paper and the testimony, these models will allow the reviewing body to assess the crime in full context, against other crimes in full context. In doing so, Crenshaw's structural critique is intentionally honored. Additionally, such a systemic approach forces the perpetrator perspective to acknowledge the blame of society, and not just the individual by using vertically integrated machine learning models.

The artificial intelligence models examined in this paper represent three burgeoning tools that legal scholars and lawyers can use in their future analysis of the just implementation of the death penalty. ANNs specialized to predict executions based on 19 non-substantive characteristics demonstrate that there could exist other, subconscious forces at play when determining who receives the sentence of death and who does not. Entities like ROSS can operate as an additional layer of oversight in analyzing complex situations and performing professional, contextually-rooted judgment. However, both must be created using the vertical models of machine learning that ensure an interconnected analysis of seemingly isolated systems. Such analysis is crucial because, as critical legal scholars argue, no system is isolated from the other. Forms of discrimination have woven themselves into the fabric of our society and fundamentally defined the way that we view harm and justice. Without a full understanding of the relevant systems at play, super due process will never scratch the surface of a just method of procedural safeguarding to ensure that the entire context of a defendant's situation is not only explained but understood.[84] With a continued superficial understanding of super due analysis, the death penalty will continue to have disparate impacts on minority populations with no easily identifiable malpractice.

Regardless of one's view on the morality or ethical value of the death penalty in American jurisprudence, there is no indication of imminent removal or profound structural change to the proceedings. As such, the question we must ask ourselves is one of unyielding honesty: are we implementing the most significant, life-or-death decision in a fundamentally fair manner?

[84] This sentence is not to say that understanding the context of a crime necessarily means the defendant must be viewed as innocent, but understanding is crucial to a fair and just sentencing process. This rationale is the reason the Court implemented mitigating and aggravating circumstances in the jury hearings.

Complicating "Parental Rights": Exploring Substantive Due Process and Constitutional Rights for Minors

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Abstract

Substantive due process parental rights have come at the direct expense of children, enabling abuses such as childhood grooming and sexual assault. Empowering children with the same constitutional privileges adults enjoy through substantive due process would rectify many such abuses. As this paper will demonstrate, the framework for investing the privileges of the U.S. Constitution in children already exists, the historical foundations for the current parental rights regime is questionable and unstable, and neither the state nor parents can be fully entrusted with speaking on children's behalf. This work will seek to explore the nature of the contemporary parental rights legal regime, the development of of parental rights substantive due process in both the early twentieth century and mid-to-late twentieth century, followed by a case study exploring the ways parental rights' substantive due process paradigms and laws based on their assumptions have enabled child abuse. Thereafter, this paper will explore ways in which existing substantive due process jurisprudence could be used to formally incorporate children's rights including rights against parents and will address potential opposition to that proposition.

I. Introduction

In recent years, the subject of "parental rights" (the limits of parental powers in the context of child rearing) has become more prevalent as various states attempt to pass reforms to give parents greater power to determine their childrens' idea engagement, schools services, and degrees of privacy, especially when exploring issues of gender and sexual identity.[1] For example, Florida's HB1557 permits parents to deny children access to social-emotional learning, compromises the confidential nature of student counseling services, and denies children the space to explore their identities by effectively barring all discussion of issues of gender and sexuality through an ambiguous standard.[2] While laws like HB1557 have garnered extensive media attention, they are only the latest development in a larger and more discrete legal movement that is deserving of scrutiny beyond the context of ongoing culture wars. The contemporary parental rights' legal regime dates back to the origins of substantive due process from which it has evolved exponentially and on questionable foundations that have overlooked childrens' independent interests. Fortunately, the Supreme Court is empowered to use the mechanisms of substantive due process to fully invest the privileges of the U.S. Constitution in children for their safety and wellbeing, such as the ability to have a significant say in terms of whom and what they engage.

II. Understanding Liberty and Childhood in an American Context

As this work will demonstrate, American children are not granted independent and unambiguous constitutional rights to self-actualize outside of their parents' interpretations of those rights, and in some circumstances, the state and the state's interpretation of those rights.[3] In many contexts, adults have actionable legal recourse which protects them from the kinds of interference with liberty children regularly face at the hands of their parents. In most cases, a child cannot, for example, sue their parents for battery if those parents weaponize "corporal punishment" against the child.[4] Children similarly cannot pursue legal action on the basis of wrongful imprisonment against their state-sanctioned guardians if that imprisonment is done in the name of "disciplining" that child or cultivating the legal guardians' beliefs.[5] The United States is also the only country in the world that has not ratified the Convention on the Rights of the Child, which explicitly enshrines in children independent rights to freedom of association and expression and the right to directly challenge any infringement on their liberties in a court of law, among other rights.[6]

The current parental rights regime is justified by "protectionism," or the premise that those parental rights exist to protect children. Under a system of protectionist parental rights, there are times when extraordinary privileges are warranted. As Samantha Godwin writes, "Under a protection-based system of parental powers, it would make sense for parents to be exempt from laws on battery when seizing an oblivious child about to leap onto subway tracks."[7] However, the right of parents to compel children to engage in "desire-contingent goods", those activities that are good for those who desire them but which are not intrinsically good for

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[1] Bella DiMarco, Legislative Tracker: 2022 Parents-Rights Bills in the States, FUTURE ED (June 6, 2022), https://www.future-ed.org/legislative-tracker-parent-rights-bills-in-the-states/ ; Jackie Valley, 32 States and Counting: Why parents bills of rights are sweeping US, CHRISTIAN SCIENCE MONITOR (March 24, 2023), https://www.csmonitor.com/USA/Education/2023/0324/32-states-and-counting-Why-parents-bills-of-rights-are-sweeping-US;

[2] Jermiah Poff, DeSantis administration targets social and emotional learning in war on woke, WASHINGTON EXAMINER (Apr. 2, 2023, 6:00 AM),
.https://www.washingtonexaminer.com/restoring-america/community-family/desantis-florida-schools-social-emotional-learning; H.B. 1557, 124th Reg. Sess. (Fla. 2022).

[3] *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972). (O'Douglas, dissenting: "The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents, on the one hand, and those of the State, on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.").

[4] Samantha Godwin, *Against Parental Rights,* 47 COLUM. HUM. RTS. L. REV. 1, 1-83 (2015). ("parents may legally hit their children for violating ad hoc rules—or no rules at all—so long as they plausibly believe this to be necessary to control, train or educate their child.")

[5] Samantha Godwin, *Children's Oppression, Rights, and Liberation*, 4 NW. INTERDISC. L. REV. 247, 247-302 (2011) (last updated December 16, 2012). (Godwin explains that states permit parents and teachers to "discipline" children in what would be considered battery if exercised upon another adult, and that "courts refuse to recognize any general liberty interest for children against their parents.")

[6] Denis Fitzgerald, Somalia Ratifies Child Rights Convention, U.S. Sole Holdout*,* UN TRIBUNE (October 1, 2015), https://untribune.com/somalia-ratifies-child-rights-convention-u-s-sole-holdout/.; Convention on the Rights of the Child, arts. 13, 37(d) opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3.

[7]Samantha Godwin, *Against Parental Rights,* 47 COLUM. HUM. RTS. L. REV. 1, 1-83 (2015).

those who do not, are extra-protectionist and illiberal and subsequently should not be entrusted to parents.[8] Rights afforded to parents with the presumption that they are capable of discerning the "best interests" of children and are regularly exercised in ways that privilege the separate interests of parents and reject the interests and will of the child.

One of the consequences of this lack of constitutional rights for children is the limitations in protecting children from grooming and sexual assault. A notable example occurs at the intersection of insulation and religious compulsion, wherein the existence of hierarchical systems within which children have no power, as well as the absence of alternative meaning systems through which children can understand their lives and subsequently rebuff both the advances of privileged members of the faith and their theological justifications for abuse.[9] State laws intended to inform children about child sexual abuse and its prevention are often undermined by the privileges parents are afforded. In Texas, parents may deny their children access to sexual abuse education information courses by refusing to opt their children into those lessons.[10] In Utah, parents are permitted both to opt their children out of such courses and to further undermine program efficacy by exercising a right to observe the courses in action which can dampen childrens' willingness to speak up in those settings.[11] Additionally, parental rights laws restricting the ability of children to freely discuss and explore issues of sexuality and gender identity, in schools or at home, actively facilitates the grooming of queer children into heteronormativity and perpetuates isolation, making children more vulnerable to external grooming.[12] The right of parents' to have their underage children legally marry adults is also inconsistent with the goal of protecting children from sexual harm.[13] As of 2021 child marriage is permissible in most American states provided parental (and sometimes judicial) consent, with the vast majority of these marriages being between underage children and legal adults, and 33 states holding marriage exceptions to statutory rape.[14]

III. A History of Parental Rights' Substantive Due Process

A. Early Parental Rights' Substantive Due Process

Parental rights substantive due process is a relatively novel concept, which has its foundations in *Meyer v. Nebraska* (1923).[15] In the context of post-WWI xenophobia, *Meyer* held that parents and contracted educators held a fundamental right to teach a child a verbal language apart from (and including) English against the wishes of the state. Finding that the absence of a clear showing of harm warrants state interest and/or intervention, the Fourteenth Amendment included a right to pursue one's own career, which the Court treated as an extension of the constitutionally protected "liberty of contract" established in *Lochner v. New York,* 198 U.S. 45 (1905), and the right "*to acquire useful knowledge*, to marry, to establish a home and *bring up children*, to worship God according to the

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[8] *Id.* at 9.

[9] Stephen A. Kent, Susan Raine, *The grooming of children for sexual abuse in religious settings: Unique characteristics and select case studies*, 48 AGRESSION AND VIOLENT BEHAVIOR 180, 180-189 (2019). (an exploration of the unique ways religious environment facilitate grooming found the aforementioned factors and documented how groomers in these setting can justify their abuse as a form of religious education).

[10] Eleanor Klibanoff, *After governor's veto, parents now must opt-in for students to learn about dating violence, child abuse,* TEXAS TRIBUNE (Dec. 15, 2021, 10 AM CT).

[11] Child sexual abuse prevention, 53G Utah Code Ann. § 9-207 (2022)("(a) An elementary school student may not be given the instruction described in Subsection (4) unless the parent of the student is:… (iii) allowed to be present when the instruction is delivered").

[12] Susan Roberts, *Experiencing Sexual Victimisation in Childhood: Meaning and Impact - the Perspectives of Child Sexual Abusers*, UNIVERSITY OF SWANSEA DOCTORAL THESIS, 1, 31 (2017). 'https://cronfa.swan.ac.uk/Record/cronfa40839/Download/0040839-28062018101437.pdf. ("victims to extra-familial abuse…are likely to suffer from deprivation, rejection or physical abuse within the family and to be looking for their social needs to be met outside the family. They are, thereby, easily drawn into intimate relationships with strangers or friends of the family who are seen as gratifying emotional needs that have gone unmet within the family. Such victims of abuse outside the family often feel helpless, unprotected, rejected or abandoned by the family").

[13] Fraidy Reiss, Child Marriage in the United States: Prevalence and Implications, 69, J. OF ADOLESCENT HEALTH. 8, 8-10 (2022) ("Child marriage also undermines statutory rape laws… at least 34,943-40,224 marriages since 2000 occurred at an age or with a spousal age difference that should have constituted a sex crime under the relevant state's law").

[14] Kaya Van Roost, Miranda Horn, Alissa Koski, *Child marriage or statutory rape? A comparison of law and practice across the United States,* JOURNAL OF ADOLESCENT HEALTH 70, S72-S77 (2022)

[15] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[16] Prior to *Meyer*, twenty-two states had similar cultural assimilation laws on the books.[17]

Two years after the *Meyer* decision, the Supreme Court expanded its substantive due process regime for parents in *Pierce v. Society of Sisters* (1925). In *Pierce,* an Oregon-based organization, the "Society of Sisters", managed a network of schools and orphanages for children between the ages of eight and sixteen, and sought the ability to teach Oregon children in both a combination of regular state-mandated curricula and religious education.[18] This desire was in contention with the Oregon Compulsory Education Act, which permitted only public education for individuals in the aforementioned age range.[19] The Supreme Court ruled that the aforementioned act was unconstitutional both because "the right to conduct schools [is] property" (the Society of Sisters' firm would be destroyed by the restriction)[20] and because it "denied the liberty of parents and guardians to direct the upbringing and education of children under their control."[21]

Prince v. Massachusetts (1944) departs from that *Lochner*-era tradition of prioritizing liberty of contract, which defined half the reasoning for the prior precedents.[22] The Constitutional complaint in *Prince* concurrently addressed the limits of parents and guardians' liberty interest to raise their children and the right of children to act on the First Amendment guarantees of free expression, particularly in the context of religion. In *Prince*, Sarah Prince, a devout Jehovah's Witness and the aunt and custodian of Betty Simmons (age 9), brought Betty along to distribute texts about the faith after Betty asked to be allowed to join Sarah in her work. The form of proselytizing that Betty partook in was considered a transactional affair due in part to the potential of optional donation in return for the magazines. Massachusetts' child labor laws forbade the labor of girls under the age of 18 and explicitly held that no one, including parents, could distribute goods to children with knowledge that those children would use those goods to solicit, or else they would be fined.[23] After a confrontation with law enforcement, Sarah Prince brought her case and Betty's case to the Supreme Court. The Court ruled that the right of parents to raise their children did not extend infinitely,[24] that the state had the legal prerogative to ensure that "children be both safeguarded from abuses and given opportunities for growth into free and independent well developed men and citizens,"[25] and that the state had a greater ability to regulate the rights of children than adults (including on religious matters). *Prince* built a strong basis for government curtailment of the excesses of parental rights, especially in the context of religion. At the same time, the Court was presented with the question of children's independent religious freedoms but did not explicitly communicate what the contours and limits of those freedoms were. In his dissent, Justice Murphy argues that childrens' right to religious activity is protected by the Fourteenth Amendment, that states cannot indirectly regulate childrens' religious expression by threatening their parents or guardians with criminal consequences, and that state laws could only regulate childrens' religious activity should those regulations be reasonable and "adopted for the protection of the public health, morals and welfare."[26] Justice Jackson's dissent argues that the state's ability to regulate religion is limited to instances wherein an individual's

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[16] *Id.* at 399.

[17] William G. Ross, *Meyer v. Nebraska, A Lutheran Contribution to Constitutional Law,* 43, no. 2, 21, 21 (2009). ("The prohibitions against foreign-language instruction in twenty-two states that *Meyer* invalidated were enacted to hasten the so-called 'Americanization' of all immigrants and their children, especially those of German extraction").

[18] *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925).

[19] *Id.* at 534.

[20] *Id.* at 532.

[21] *Id.* at 534.

[22] *Prince v. Massachusetts*, 321 U.S. 158 (1944).

[23] *Id.* at 161.

[24] *Id.* at 166 (Justice Rutledge, writing for the majority: "Acting to guard the general interest in youth's wellbeing, the state, as *parens patriae,* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds").

[25] *Id.* at 165.

[26] *Id.* at 171-173 (Justice Murphy dissents: "This attempt by the state of Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained… The state court has construed these statutes to cover the activities here involved, cf. State v. Richardson, 92 N.H. 178, 27 A.2d 94, thereby imposing an indirect restraint through the parents and guardians on the free exercise by minors of their religious beliefs. This indirect restraint is no less effective than a direct one. A square conflict between the constitutional

exercise of religion infringes on the liberties of unwilling parties and/or those not part of that faith, an idea which raises essential questions concerning what ways children can and cannot be incorporated into into faith communities.[27]

B. Parental Rights Substantive Due Process in the Burgher and Rehnquist Courts

While the independent religious freedom of children is mostly unexplored in *Prince*'s holding, the issue resurfaces in *Wisconsin v. Yoder.*[28] Basing their analysis in part in *Meyer* and *Pierce,* the *Yoder* Court found that Amish parents had a right to cease their childrens' public education at an eighth-grade level (which taught fundamental mathematical and literacy skills). Petitioners argued that they needed to shield their children from the values of higher education which conflicted with the Amish lifestyle.[29] While the ones most affected by this ruling are children, the majority opinion deflects this concern in three ways. First, the Court notes that Frieda Yoder (one of the petitioner's children) articulated her religious desire to live in accord with Amish values.[30] Second, the Court asserts that children's wishes are not relevant in this context because there were no Amish children involved who sought to bring forth a constitutional claim against their parents or the state. And third, the Court notes that even if children had done so, they would not have standing considering it was their parents who were vulnerable to criminal penalties should they refuse to bring their children to public schools."[31] As Justice Stevens writes in his dissent, the fact that a single child may desire to live an Amish lifestyle should not have permitted the Court to issue precedent that enables all parents to disregard the religious wishes of their children.[32] All the while, the Court meaningfully misinterpreted *Pierce*, which required that children's educations meet state standards, even if they were to incorporate parochial education into their curriculum.[33]

The latter 20th century saw a largely indifferent approach to childrens' constitutional liberties in holdings that afforded parents the semi-exclusive right to determine what is in their children's best interest. In *Reno v. Flores,* the Court weighed the rights of children detained by immigration to have a say in their placement, pending decisions in their case by Immigration and Naturalization Services. The Court determined that the "best interest" standard, often invoked in deciding child custody matters, did not govern the exercise of parental custody, and that "...so long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves."[34] Thus, the Court found no constitutional requirement that a hearing be conducted regarding the private placement of children in the

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guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children is thus presented… As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children").

[27] *Id.* at 177 (Justice Jackson dissents: "Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom. My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free -- as nearly absolutely free as anything can be").

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

[29] *Id.* at 211-212 (it is noteworthy that the *Yoder* Court addresses the potential psychological distress Amish children might experience from traversing two distinct cultures - Amish and modern - with little note of the psychological harms of staying within Amish communities).

[30] *Id.* at 243.

[31] *Id.* at 230-231 (Majority finding: "...our holding today in no degree depends on the assertion of the religious interest of the child, as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point, since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and, indeed, the record is to the contrary. The state's position from the outset has been that it is empowered to apply its compulsory attendance law to Amish parents in the same manner as to other parents -- that is, without regard to the wishes of the child. That is the claim we reject today").

[32] *Wisconsin*, 406 U.S. at 242-243.

[33] *Id.* at 243.

[34] *Reno v. Flores*, 507 U.S. 292 (1993) at 304

custody of the state and explicitly rejected the notion that the children had the substantive due process prerogative to decide with whom they ought to be housed.[35]

In *Troxel v. Granville*, the Court held that a Washington state law that permitted "any person" to file for child visitation rights and which authorized the court to decide what was in the best interests of the child violated the parent's 14th Amendment right "to direct the education … of one's children."[36] *Troxel* also articulates that lower courts must begin with the presumption that parents tend to act in their children's best interest and fully consecrated the legal construct that parents have a fundamental right to make decisions regarding the care, custody, and control of their children.[37] The facts in *Troxel* established that these basic rights trounced Washington state's judicial prerogative to create and enforce determinations based on the children's best interests.[38] That said, Washington state's strategy of reallocating custody powers from parents to judges is not a desirable outcome, as will be demonstrated in the context of the Larson case later in this paper.

III. The Legal Foundations of Children's Substantive Due Process

Substantive due process protections and special privileges protected under the U.S. Federal Constitution as they apply to children have been relatively insufficiently explored by the U.S. Supreme Court. A plain reading of the 14th Amendment demonstrates that its protections can and should apply to all citizens. The 14th Amendment includes a birthright citizenship status clause,[39] and since human beings are born as children, the mere use of deductive reasoning dictates that the amendment must apply to children. Since the Supreme Court began incorporating the federal constitutional protections against the states through the 14th Amendment's Due Process clause, the vast majority of these cases have not explicitly focused on children's rights. There are exceptions, such as *West Virginia State Board of Education v. Barnette,* which established that the state of West Virginia and its Board of Elections could not compel students who identify as Jehovah's Witnesses to pledge allegiance to the Flag of the United States in public schools.[40] As Justice Jackson writes "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures… These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[41] Additionally, *Tinker v. Des Moines Independent Community School District* (1969) addresses the issue of children's free speech, however, it does so conditional to what is determined to be disruptive in educational settings.[42] Because this paper has a broader focus the author has chosen to set *Tinker* aside and instead chooses to focus on *Barnette* which has a more holistic applicability.

In re Gault is arguably the foundation of criminal substantive due process for minors. In 1964, then fifteen-year-old Gerald Gault allegedly made a lewd phone call to a neighbor, after which he was sent to a Detention Home. Normal facets of due process were regularly denied to Gault: neither he nor his family received relevant petitions in a timely manner, his habeas corpus hearing did not permit him to face his accuser, and neither transcript nor recording was prepared for that hearing, among other indignities.[43] *In re Gault* finds children are entitled to *some* substantive due process protections. The majority opinion cites Justice Douglas's finding in *Haley v. Ohio* that "[n]either man nor child can be condemned by methods which flour constitutional requirements of due process of law"[44] and that previous case law, which addressed only select aspects of juvenile justice "unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[45] The *In re Gault* Court's unwillingness to fully articulate the array of children's rights resulted in future benches choosing not to incorporate those remaining

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[35] *Id.* at 292, 293 (Scalia, who wrote the majority opinion, found that the rights being asserted were not "so rooted in the traditions and conscience of our people as to be ranked as fundamental, framework derived from *United States v. Salerno*. This criterion is questionable given it rejects a plain reading of the text of the Constitution for a reading that roots all rights in a history that is less than in equitable.).

[36] *Troxel v. Granville,* 530 U.S. 57 (2000); at 66, citing *Meyer* and *Pierce.*

[37] *Id.* at 57, 60, 63.

[38] *Id.* at 63.

[39] U.S. CONST. amend XIV §2.

[40] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[41] *Id.* at 637.

[42] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506-514 (1969).

[43] In re Gault, 387 U.S. 1, 1-12 (1967).

[44] *Id.* at 45.

[45] *Id.* at 13.

rights. For example, a few years after *In re Gault* the Court found that minors were not constitutionally entitled to a jury trial in *McKeiver v. Pennsylvania*.[46] Nonetheless, *In re Gault* still holds the door open for expanding children's substantive due process.

The focus of exceptions like *West Virginia v. Barnette* and *In re Gault* do not explicitly pay attention to incorporating constitutional rights for children to exercise *against parents*, but rather, *against the state* because the Federal Constitution protects Americans against the state. A child in an abusive household can, at the age of majority, end association with abusive parents, and the state cannot generally compel reunification against the offspring's will. Extra-protectionist parental rights require the enforcement power of the state to compel children to nearly unconditionally obey the whims of their parents and legally enforce association with those parents through "runaway" laws among other mechanisms.[47] Subsequently, it is not beyond the ability of the Court to implement structures using substance due process to liberate children from government-compelled association and eventually critically assess and dismantle the quasi-property status children bear due to the extra-protectionist regime.

IV. Argumentative Section

A. Applying Pro-Children's Substantive Due Process Precedent

While the reasoning of cases such as *in re Gault* and *West Virginia v. Barnette* is not explicit in extending to children the full array of constitutional rights the Court extends that adults currently hold, they continue to hold relevance as a foundation from which more explicit protections and constitutional rights for young people and minors can emerge. If parents are to be entrusted with children's best interests by an enforceable legal regime then parents may be considered "creatures of the state" per *Barnette* even in spite of the contention between the state and parents in that case. A modest interpretation therefrom may assert that parents are bound to the protections found in the Bill of Rights, and subsequently, children are so protected by those protections. *In re Gault* established that substantive due process may be implemented to ensure children's rights against the state, and could subsequently apply the protections of the First Amendment to do away with the power of parents to compel children to and from association. This would be especially effective in giving children the religious freedom to practice (or not practice) any religion they so desire and free themselves from the abusive people and practices they may otherwise be forced to associate with. Thereafter, children could voluntarily leave parents who are perpetrating abuse or who do not share their values for other caretakers and guardians who do. Most importantly, children would be entitled to the same legal recourse opportunities adults have and prerogative (independent of the whims of a parent or the state) to protect themselves from the predators who would take advantage of them.

When the Court centers the question of what children can or cannot due alone, what scholar Eileen McDonagh refers to as "decisional autonomy", it encumbers children and their advocates with a nigh infinite burden of proof to prove that children can ably and independently navigate life and all of its challenges. Instead, the Court should adopt a "bodily integrity" framework which would concern itself with the ways others can or cannot encroach on one's body or one's liberties.[48] Such a framework would leave intact many of the good faith practices of parentage (for example, being able to withhold rewards for misbehavior) while creating real incentive for parents to change any harmful behaviors knowing that the child can determine who they want to raise them.[49] Similarly, the Court ought to recognize that the ability to exercise a right and have a right are two distinct situations. As scholar Samantha Godwin explains, a nonverbal four year old lacks the faculties to articulate their wishes, but that child still ought to be understood as having inalienable rights that are dormant until such time as they have the faculties to articulate them.[50] Where children are not capable of acting in their own interests they could delegate authority to trusted adults as a proxy, and be able to withdraw that consent at any time, until such time they assert their right to further engage in the process.

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[46] *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

[47] Samantha Godwin, *Against Parental Rights,* 47:1:1 COLUM. HUM. RTS. L. REV. 1, 20 (for an examination of the criminal mechanisms through which runaway children are forcibly reunited with their parents, punishable as a carceral offense for both the children and anyone who aids them).

[48] EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 6 (1996).

[49] Samantha Godwin, *Children's Oppression, Rights, and Liberation*, Vol. 4, 2011, NW. INTERDISC. L. REV. 267, 269-270 March 7, 2011, Updated December 16, 2012. ("...all of the material things that parents typically give their children for entertainment are not things that anyone is legally entitled to; access to toys and desserts purchased by others are privileges, not rights, among adults, and so would they remain mere privileges if children had rights commensurate with adults").

[50] Samantha Godwin, *Against Parental Rights,* 47:1:1 COLUM. HUM. RTS. L. REV. 1, 20.

B. Challenging the Characterization of "Best Interest" in Troxel and Yoder

The Court's decisions in *Wisconsin v. Yoder* (1972) and *Troxel v. Granville* (2000) exhibit explicit expression of parents' rights not only to determine what is in their children's best interests but also to subordinate children's wishes and best interests to those of the parents'. The Court asserts that the holdings in *Yoder* and *Troxel* articulated a fundamental liberty interest in the rearing of children which in turn find their foundations in *Meyer* and *Pierce*. However, a historical examination of the context of those decisions and the accounts of the respective petitioners' in question should put into question how the Burger and Rehnquist Courts applied them.

As explained earlier, in *Pierce*, the Society of Sisters claimed that the state was wrongfully placing limitations on the rights of children to inform parents of their educational preferences, to which they were constitutionally enabled. While the Court does not directly address the limits of this idea, it does acknowledge it in *Pierce's* holding.[51] Likewise, the *Meyer* holding makes reference to a right to acquire knowledge in the broader context of child education but is not explicit as to what that right entails.[52] This is a point which is further complicated by the absence of easily available oral argument transcriptions. Nonetheless, the substantive due process right to "acquire knowledge" is an idea that has not been meaningfully defined or explored, but the language itself does leave the door open for future decisions to articulate an expansive right of children to independent intellectual discretion of the sort that is incompatible with the holding in *Yoder*.

In a separate issue, the *Meyer* holding articulates a right of parents to "[govern] the education of their own." This is a premise that the *Troxel* and *Yoder* Courts needlessly treat as definitively expansive in ways that neglect the xenophobic historical context in which *Meyer* was decided. In the years surrounding and after WWI, American hysteria surrounding foreign infiltration prompted states to restrict the spread of German and other foreign languages and identities through intrusive education regulations, with the Nebraska Siman law at issue in *Meyer* being one such law.[53] The verbiage of the Nebraska Supreme Court majority opinion upholding the law's constitutionality articulates the thinking of the time and the true reasoning for the legislation and others like it by asserting that the right of immigrants living in America to educate their children in foreign languages should be understood as a threat to national security.[54] This is why the holding in *Meyer* explicitly articulates both that "[the] Court has not attempted to define with exactness the liberty thus guaranteed [in the due process clause]" and that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful."[55] Subsequently, one should treat the substantive due process rights *Meyer*'s holding established as having the purpose of protecting the rights of immigrants and minorities from paranoia laws designed by the state to foreclose opportunities to pass their heritage down to willing children. In short, this is how "the power of parents to control the education of their own" should be understood and it should not be taken to mean that parental rights are infinite, especially rights against children.[56]

One could argue the aforementioned interpretation in favor of the Amish cultural preservation entreaty in *Yoder*, but once again it was assumed in *Meyer* that the child in question concurred with the assessment of the parents, which is not necessarily the case for all Amish children. By no means should the Court's determination in *Meyer* be taken to mean that the Court ruled out the issue of the child's independent interests. In *Prince*, Justice Rutledge's majority opinion directly addresses the state's interest and prerogative to interfere with the religious parental rights to ensure children grow into "free and independent minded" adults, which are virtues at odds with *Yoder*'s holding that parents can compel religiosity and deny access to liberal education.

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[51] *Pierce*, 268 U.S. at 532.

[52] *Meyer*, 262 U.S. at 399.

[53] Frederick C. Luebke, Legal Restrictions on Foreign Languages in the Great Plains States, 1917-1923, *University of Nebraska-Lincoln Faculty Publications* (1980).

[54] Meyer v. Nebraska, 262 U.S. 397 (1923).

"The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state." *Pohl v. State*, 102 Ohio St. 474, 132 N.E. 20; *State v. Bartels*, 191 Iowa 1060, 181 N.W. 508.

[55] *Meyer* v. *Nebraska*, 262 U.S. at 399-400.

[56] *Id.* at 401.

Questions contending the rights of parents and children when such interests are in competition are all but absent in *any* of the parental case law examined so far, all of which constitute the foundations of *Troxel* in *Reno*. It should be noted that *Reno* is distinct from all other case law mentioned herein in that it does not address the keystone cases of parental rights law. Rather, it is *Reno*'s determinations of children's rights (or the lack thereof) that find themselves in *Troxel*'s understructure. Citing *Reno*, the *Troxel* Court finds that "there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[57]

Troxel's failing is its presumption that parents have the exclusive ability to determine children's best interests. Given the facts of the case, *Troxel* decided correctly on the issue, but not on the reasoning. From a perspective of children's rights, *Troxel* is correct in asserting that courts should not have the unmitigated authority to intrude on the goings-on of the family. Rather, *Troxel* should have broken the binary in the tug of war between the state's and the parents' powers to determine who has control over children, affording some deference to children and their determinations.

C. Ty and Brynleee Larson

From late 2022 to early 2023, Ty Larson (age 15) and his sister Brynlee Larson (age 12) actively refused association with their father, who they claimed physically, sexually, and emotionally abused them over the better part of a decade and allegedly threatened to kill them if they spoke publicly about the abuse.[58] Allegations of abuse are supported by a Child Protective Order issued in August of 2018 in the interest of the children's safety by Judge Gary Stott of Utah's Third District against the father, Brett Pullman (although the order did still permit select, state-mandated supervised visitation hours).[59] Beginning on December 8, 2022, a day before Ty and Brynlee were scheduled to be reunited with their father, the children barricaded themselves in their room after which they refused both school attendance and court-mandated reunification. One week later, on December 16, 2022 a Writ of Assistance requested by the father, issued by Judge Derek Pullan of Utah's Fourth District Court (which did not acknowledge the 2018 CPO)[60] found that the children were obligated to engage in "make-up parent-time" with their alleged abuser in a program called "Turning Points For Families." The Turning Points program required that the children be forcibly reunified with their estranged father and alleged abuser for a period of four weeks.[61] Prior to reunification the Turning Points program regularly requires that participating children be sent to an undisclosed location for several days.[62] Thereafter, Ty Larson began streaming on Twitch and TikTok, broadcasting his story to a broader audience, giving him and his sister comfort in sleeping knowing there was an audience watching over them, and received support from his extended maternal family and Brett Pullman's ex-wife.[63] After the Larson siblings took to TikTok to report on their circumstances, multiple outlets reported on their situation and they were able to garner financial,[64] legal, and political support[65] from the associations they made online. It is similarly notable that at the same time the Larsons were able to

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[57] *Troxel,* 530 U.S. at 58; *Reno,* 507 U. S. at 304.

[58] Srishti Marwah, Who are Ty and Brynlee Larson? Barricaded Utah Siblings go viral on Tiktok amid battle with abusive father, SPORTSKEEDA, (Feb. 27, 2023). https://www.sportskeeda.com/pop-culture/who-ty-brynlee-larson-barricaded-utah-siblings-go-viral-tiktok-amid-battle-abusive-father

[59] In Child Protective Order, Case No. 184901441, 3rd District Court of Utah (Salt Lake County), Dated August 02, 2018, found that Brent Joel Larson was prohibited from frequenting spaces his children would regularly attend. The order gave B.J. Larson "4 Hours of Supervised Parent Time" at a "Professional Agency." [Link]

[60] In Writ of Assistance, Case No. 224402590, 4th District Court of Utah (Utah County), Dated Dec. 16, 2022, [Link].

[61] *Id.* at 2.

[62] Dreyfus, H. (2023) *In court-ordered Family Reunification Camps, kids allege more abuse*, *ProPublica.* Available at: https://www.propublica.org/article/family-reunification-camps-kids-allege-more-abuse (Accessed: 23 May 2024).

[63] TikTok video, Ty Larson's maternal uncle discusses Ty and Brynlee's family support, https://www.tiktok.com/@sticauti/video/7192342351568719146?is_from_webapp=1&web_id=7173443321949161006

[64] TikTok video, Ty Larson's maternal uncle discusses Ty and Brynlee's family support, https://www.tiktok.com/@sticauti/video/7192342351568719146?is_from_webapp=1&web_id=7173443321949161006

[65] Lisa Hadley, Utah Protest: State Capitol, ONE MOM'S BATTLE, (Feb 1. 2023). https://www.onemomsbattle.com/blog/utah-protest-state-capitol

find support on TikTok, the Utah state legislature passed a law that required parental consent (and potentially state identification) for young people to use social media platforms such as Facebook and TikTok.[66]

The Writ issued by Judge Pullan refused the mother and the children the right to an evidentiary hearing prior to its publication, all the while explicitly denying any abrogation of liberty interests or due process rights for the mother and the children. *Troxel*'s reasoning asserts that parents have a fundamental liberty interest in deciding who their children associate with, while actively refuting the notion that parents hold a burden of proof to articulate why denying their children associations is in their childrens' best interest. As the Larson case demonstrates, the *Troxel* framework fails children by denying them solvency in challenging even the most dangerous choices their parents make, all the while seeing children as lesser persons whose lived experiences are to be doubted and disregarded. In this case, the court assigned the Larson children the burden of proving that they would be harmed by a continued relationship with their father, all the while rejecting their emotional turmoil as a valid enough reason to end the relationship.

The Larson case study also demonstrates that judges can fall short in acting in the best interest of the children. In the proceedings, Judge Pullan embraced an application of "parental alienation" argued by the father, dismissing the children's concerns as the product of manipulation by their mother. Parental alienation is a controversial argument raised in custody cases to assert that children who make accusations against one parent are doing so (only) because of the conditioning of another parent and therefore the child or childrens' litigable contributions and stated preferences should be disregarded.[67] Dr. David Corwin, past president of the American Professional Society on the Abuse of Children, has explicitly discouraged judges from considering arguments derived from this premise because, among other reasons, it bears a presumption that children cannot provide trustworthy accounts of their own experiences and disregards allegations of abuse.[68] Though disability precedent is set to make sure determinations in dismissing the rights of adults would require delusionallness to be proven (and even then, it isn't usually effective),[69] Judge Pullman asserted that the children's youth invalidated their right to be considered reasonable, and stated instead that the determinations of custody were the exclusive prerogative of adults, including parents, teachers, and "(when necessary) judges."[70] In a ruling rejecting the mother's objection to his writ of assistance, Judge Pullan explicitly belittles the Larson children for being under the false impression that they were entitled to make demands in the proceeding.[71]

The Larsons' experience is an indictment of *Troxel* and further illustrates the extent of the parental rights regime's myopia. The court in question did not deem it proper to place a burden of proof on Brett Larson to demonstrate that it was in the best interest of the children to be reunited with him, nor does the court independently detail how it is in the best interest of the children to be reunited with a father they so clearly fear. The court actively rejects the arguments made by the children's mother that this

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[66] Maanvi Singh, Utah bans under-18s from using social media unless parents consent, THE GUARDIAN, (March 23, 2023) https://www.theguardian.com/us-news/2023/mar/23/utah-social-media-access-law-minors ("...[the new law will] prohibit minors from accessing social media without their parents' consent would also allow parents or guardians to access all of their children's posts. The platforms will be required to block users younger than 18 from accessing accounts between 10.30pm and 6.30am unless parents modify the settings. Civil liberties groups have raised concerns that such provisions will block marginalized youth including LGBTQ+ teens from accessing online support networks and information. Tech groups have also opposed the laws. "Utah will soon require online services to collect sensitive information about teens and families, not only to verify ages, but to verify parental relationships, like government-issued IDs and birth certificates, putting their private data at risk of breach," said Nicole Saad Bembridge, an associate director at NetChoice, a tech lobby group. "These laws also infringe on Utahans' first amendment rights to share and access speech online – an effort already rejected by the supreme court in 1997").

[67] Vinita Mehta Ph.D., Ed.M. The Devastating Effects of Parental Alienation, PSYCHOLOGY TODAY (Dec. 27, 2021). https://www.psychologytoday.com/us/blog/head-games/202112/the-devastating-effects-parental-alienation

[68] David Corwin, et. Al, Assertions of Parental Alienation Syndrome (PAS), Parental Disorder (PAD), or Parental Alienation (PA) When Child Maltreatment is of Concern, The American Professional Society on the Abuse of Children, Pages 1, 3-4 (Jan. 22, 2022) https://www.apsac.org/_files/ugd/c59607_6ded410c91594a878aec3c91bd17514d.pdf (noting how Court precedent established a framework for admissibility of soft science testimony s in in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), how any assertion Parental Alienation Syndrome does not meet those admissibility criterion).

[69] *O'Connor v. Donaldson*, 422 U.S. 563, (1975) "A State cannot constitutionally confine, without more, a non dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

[70] In Writ of Assistance, Case No. 224402590, 4th District Court of Utah (Utah County), (Page 4) Dated Dec. 16, 2022, [Link].

[71] In Order Re: Objection to Writ of Assistance, 224402590, 4th District Court of Utah (Utah County) (Page 1) Dated December 22, 2022 "Petitioner Jessica Zhart objects to the form of the writ of assistance issued by the Court on December 16, 2022. She contends that the writ should have included the Court's order authorizing her to explain to the children the Court's order, the Court's reasoning, and the consequences for non-compliance. She further notes that in response to the Court's order, the child (presumably the oldest child) issued a 14-point compromise in response. The objection is without merit… *Finally, the Court notes that the child's issuance of a 14-point compromise in response to the Court's ruling only confirms the prior finding of the Court. The children do labor under the misperception that they are in the driver's seat and are free to determine when, where, and on what terms parent-time will occur. They are not.*"

reunification would cause more harm than good while also filing a contempt of court order against her which was only to be purged if she did everything reasonably within her power to facilitate the reunification.[72] In summary, the court dismisses the stated fears of the children which are not incorporated into the judicial calculation of best interest and the mother is threatened with legal action if she does not compel the children to act against their will. All the while, the judge threatens the children with police officers who are "authorized to enter [the mother's] home [or wherever the children are located]" and use "reasonable force necessary to compel compliance" including placing the children in detention should they run away from their allegedly abusive father until "such time as they agree to be released [to their father]."[73]

Conclusion:

Despite what various recent statewide legislation might suggest, the movement to disabuse children of their rights to direct their own self-actualization is not an immediately recent development. Instead, it is the inevitable consequence of a half century of substantive due process privileging parental interests above childrens' interests all the while neglecting to articulate what competing rights children have. The parental rights movement as it currently stands justifies its exhaustive powers based on fallacious arguments about protecting children, all the while enabling parents to leverage those same powers to abuse children. The answer to this predicament lies in a combination of reassessing the legal decisions which have created the parental rights substantive due process regime and extending constitutional privileges to children. Adopting a framework of "desire-contingent good" analysis is a healthy place with which to begin the process of incorporating childrens' constitutional rights through substantive due process, including against parents who through their powers granted by the state may be interpreted as state actors. Empowering children with constitutional privileges will inevitably require a balancing act. If such a project were to be implemented, structures must be built to protect children from those who would take advantage of their lack of mental agility. Nonetheless, as seen in the Larson case, the status quo is one where children are already being exploited for being deprived of those liberties and freedoms of self-determination and association that adults enjoy.

[72] In Writ of Assistance, Case No. 224402590, 4th District Court of Utah (Utah County), (Page 2) Dated Dec. 16, 2022, [Link].
[73] *Id.* at 3.

Reason for Randomness:
A Justification for Random Sampling of Policy-Makers in Democracies

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1. Introduction: Defining Participatory Democratic Government

To many political philosophers and scholars, the most pure form of democracy would be direct votes from every polity member on every issue concerning its population. The idealistic proposal could take form in a small enough community. For example, a four-person household could easily vote on either Chicken or Fish for dinner. Nevertheless, some complexities could arise. Someone could suggest Steak as another candidate. However, within such an intimately small population, one would hope that deliberation and discussion on three or more options could be coherently organized.

As the population grows, the seemingly simple question of "dinner" becomes more complex. Picking out the main course for an entire block involving several homes, each containing four or so residents, is much more complicated. There are new dietary restrictions, allergies, and preferences to consider. There are also more issues at hand, like fixing the pothole in the road, setting property boundaries, or deciding how to deal with the raucous teenagers making noise at one a.m. As the scope for governance increases, the impracticality of pure democracy grows exponentially.

The favored remedy for the impossibility of full participatory democracy—prescribed by democratic theorists and practitioners alike—is representative democracy, or the selection of some subset of the population to serve as conduits of the will of the people in republican governmental institutions. In Federalist 10, James Madison wrote, "A republic…promises the cure for which we are seeking."[1] Around the world, at all levels of government, there are assemblies, parliaments, councils, boards, and congresses that bear the responsibility of developing and executing policies agreeable to the populations they serve. What is the preferred mechanism for selecting representatives? Among healthy democracies, the answer is virtually unanimous: "free and fair elections." This essay will argue for an alternative solution that bolsters both descriptive and substantive representation: the random selection of polity members into "mini-publics."

2. Failures of Modern Representative Governments

In practice, executing free and fair elections has been difficult since the conception of democracy. Of course, there were the Ancient Greeks, who did not even prefer open elections; in *The Republic*, Plato even explicitly outlines his fear of democracy and his preference for aristocracy, or "rule by the best."[2] But even in modern democracies, which purport to be fair and equal, only particular subsets of the population are more likely to "rule." Look no further than the Republican Bushes or Democratic Kennedys; wealth or well-connectedness are necessary when the average seat in Congress costs $10 million to win—hardly "free."[3] There are also unofficial—and oftentimes expensive—qualifications that are abundant among American politicians. Lawyers make up just 0.36% of the US population, yet 51% of senators possess a JD.[4] The "elite" leading the legislature is not a trait exclusive of American politicians; in 2015, one in five MPs in the United Kingdom attended either Oxford or Cambridge before their matriculation into parliament, compared to 1% of the overall population.[5] In her critique of representative democracies, Hélène Landemore wrote, "a core feature of representative democracy is the delegation of agenda-setting, deliberation, and decision-making to a sub-
set of the polity that is distinct from ordinary people and explicitly identified and
chosen as a separate elite."[6]

Concern over minority interests prevailing over the will of the majority was a significant motivator for the construction of the US Constitution. For Madison, however, a looming concern was "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective," which he claimed, "may justly be pronounced the very definition of tyranny."[7] Madison's conception of a minority was likely very different from the modern definition. During the writing of the Federalist Papers, he did not envision such a prominent role for American parties, and it was already substantial that America's "open" democracy featured landowners and tenants alike.

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[1] James Madison, *Federalist 10*, 1787.

[2] "Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils." From Plato, "Book V," *The Republic*, ~380 BC.

[3] "Election 2012: The Big Picture Shows Record Cost of Winning a Seat in Congress," *OpenSecrets News*, June 19, 2013.

[4] "What Percent of the US Population Do Lawyers Comprise?," October 3, 2023; "Membership of the 118th Congress: A Profile," *Congressional Research Service*, October 4, 2023.

[5] Peraudin, Frances. "Private school and Oxbridge educations over-represented among likely new MPs," *The Guardian*, February 4, 2015.

[6] Hélène Landemore, "Deliberative Democracy as Open, Not (Just) Representative Democracy," *Daedalus* 146, no. 3 (July 1, 2017): 54.

[7] James Madison, *Federalist 10*, 1788.

Since then, voting and social dialogue have advanced to the point where there are many more acknowledged facets through which a person could be a political minority: ideology and partisan affiliation, racial identity, sexuality, gender identity, etc. Legislatures around the world have seen varying degrees of success with substantive political representation, depending on electoral structure (proportional representation v. single-member districts) and perspective. Descriptive forms of diversity have failed almost universally. Internationally, only six countries have legislatures with a gender composition that is at least 50% female.[8] The US faces a particularly notable lag in some forms of descriptive representation along the dimension of ethnicity; 10% of legislators in Congress are Hispanic, relative to 18.9% of the population.[9]

This might not be universally perceived as a failure of democracy. Some might argue that descriptive representation, though it has its place, is not nearly as important as substantive representation when deciding on a representative. So long as a person has the right politics, it shouldn't matter their gender, race, or socioeconomic status. Even forgoing the issue of descriptive representation in legislature, there is evidence to suggest that descriptive representation has substantive benefits by reaffirming the legitimacy and trust of the government in the eyes of the polity and by improving the quality of deliberation to better express the perspectives of minority citizens.[10] Consequently, descriptive representation is a form of substantive representation; racial group interests can be "voluntary constituencies that choose to combine because of like minds, not like bodies."[11]

There do exist solutions for this representation problem in representative governments; some scholars advocate for race-conscious districting because it "[ensures] that legislators represent unanimous, not divided, constituencies."[12] But this logic extends beyond just race. Perhaps some computer program could be developed to form districts around every conceivable facet of identity. Still, there will always be the question of which identities matter, substantively, and which are just noise. In contemporary democracies, electoral systems have failed to facilitate descriptive *or* substantive representation for minority populations. Random selection would allow for a diverse, deliberative government led by those with real incentives to care about outcomes and *without* perverse incentives to maintain power.

3. The Merits of Random Selection in Democracy

For the sake of a fair fight, one must imagine that—like free democracies today—any hypothetical government with random selection for representatives or policymakers would have buy-in. So long as the form of selection is consented to by those in the polity, some political theorists are relatively optimistic about deliberative democracy, painting it as aspirational for democracy. In a 2017 article on the subject, Cristina Lafont wrote, "To the extent that citizens can mutually justify the political coercion they exercise over one another, they can see themselves as co-legislators or political equals in precisely the way the democratic ideal of self-government requires."[13]

One of the primary benefits of deliberative democracy is the opportunity for expansive descriptive representation. In an introductory statistics course, one of the concepts students are introduced to is the Central Limit Theorem, which states: "if you…take sufficiently large random samples from [a] population…then the distribution of the sample means will be approximately normally distributed."[14] To apply this concept to the issue at hand, taking random samples from a population will produce a distribution of groups with average opinions and characteristics centered around the true preferences of the entire population. And, as the population grows, the deviation of aggregate statistics between the groups becomes increasingly small. At the scale of a country, state, or even major city, a decently large sample is almost guaranteed to be descriptively representative and feature a distribution of political ideologies like that of the population.

There are a few different ways to bring random selection into practice, ranging from citizens' assemblies to forms akin to jury duty. One of the more flexible proposals is mini-publics, or randomly selected deliberative bodies composed of polity members. The

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[8] "Facts and Figures: Women's Leadership and Political Participation," UN Women – Headquarters, October 17, 2023.

[9] Katherine Schaeffer, "U.S. Congress Continues to Grow in Racial, Ethnic Diversity," *Pew Research Center* (blog), accessed October 20, 2023.

[10] Jane Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes,'" *The Journal of Politics* 61, no. 3 (1999): 628–57.

[11] Lani Guinier, "Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes," *Texas Law Review* 71 (1992-1993): 1633.

[12] Lani Guinier, "Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes," *Texas Law Review* 71 (1992-1993): 1638.

[13] Cristina Lafont, "Can Democracy Be Deliberative & Participatory? The Democratic Case for Political Uses of Mini-Publics," *Daedalus* 146, no. 3 (July 1, 2017): 85.

[14] "Central Limit Theorem," accessed October 20, 2023.

desired outcome of a meeting of the mini-public is a "transformation of raw, uniformed public opinion into considered public opinion."[15] Whether the implementation is put back into the hands of the citizenry or passed along to some other governmental entity, the point of the mini-public is to give citizens some agency over the conceptualization of public policy.

Mini-publics, as a product of random selection, feature another suggested benefit of deliberative democracy—an enlightened and engaged citizenry. Part of it is the element of uncertainty; while not everyone trains to be a juror, if selected for jury duty, many citizens still take the responsibility seriously because they understand the stakes of their ordained task. The political efficacy of the average citizen is, by default, heightened. This is a feature not found in electoral democracies. Landemore aptly summarized that "representative democracy does not, in theory, require any form of popular participation besides voting and, because it also does not credibly accommodate, let alone commit to, agenda-setting by ordinary citizens, it even weakens voting as a form of effective participation."[16] With mini-publics, the citizen is elevated from a distant observer to an active player in policymaking.

There are also normative benefits affiliated with deliberation in democracy.[17] Citizens placed in a room with those distinct from them, coming from different walks of life within the same communities, are likely to find the quality of their internal agenda-setting greater than it would have been if they were merely voters. Lafont summarized this well: "The more informed, impartial, mutually respectful, and open to counter-arguments participants are in deliberation, the more likely it is that they will reach substantively better political decisions[…]."[18] In a mini-public, though there might be some descriptive characteristics that are the majority in some dimension, the deliberation also benefits from a lack of a formal political majority. In addition to members of minority groups speaking to the experiences of other members of the polity who share their minority affinity, they can externalize the experiences of isolated or misunderstood minority groups without bearing the burden of interacting with a domineering majority coalition. If such a coalition were to form, it would be dismantled by the time the following selection of deliberators occurs.

In practice, random non-electoral selection has already seen some success as a deliberation tool. In the United Kingdom, a citizens' assembly was used to generate a report on climate change. All participants were selected through a civic lottery. Then, they met together to engage in a balanced discussion on how the UK should meet its net zero targets before casting their final decisions by secret ballot. Members of parliament claimed that the work done by the assembly was critical to the development of a strategy for COP26.[19]

In Iceland, citizens were given a role in answering fundamental, constitutional questions. 950 citizens were sampled quasi-randomly to participate in a National Forum, which informed the drafting of a constitution by 10 men and women sampled from a group *excluding* career politicians. A referendum approved the crowdsourced basis of the constitution with two-thirds of voters, but the bill ultimately died in parliament.[20] The next part of the deliberative democracy experiment appears to be what Lafont calls an "empowered" mini-public, which could directly order implementation without cycling back to a representative governmental body.

4. Questions for Advocates of Random Selection in Democracy

Even amidst a myriad of theoretical benefits, there are many reasons to doubt the use of random selection in modern democracies. It is undoubtedly one of the more radical solutions to the issue of substantive representation. This radicalism, and the consequent aversion it provokes in members of the polity, might make its implementation just as impractical as that of full-scale, direct, participatory democracy. However, some of the questions that attempt to paint the system's absurdity have rational answers that will appeal to those who prioritize diverse representation over traditional electoral institutions.

4.1. Accountability

A major critique of mini-publics and non-electoral systems is an apparent lack of accountability. Theorists speculate that one of the primary mechanisms through which politicians are inspired to pass effective policy is electoral sanctions; bad policy leads to reduced vote shares, which leads to reduced power.[21] To some, this retrospective voting habit is actually a feature of democracy. In

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[15] Lafont, "Can Democracy Be Deliberative & Participatory?"

[16] Landemore, "Deliberative Democracy as Open, Not (Just) Representative Democracy."

[17] "Open democracy explicitly places deliberation at its normative core." From Hélène Landemore, "Deliberative Democracy as Open, Not (Just) Representative Democracy," *Daedalus* 146, no. 3 (July 1, 2017): 60.

[18] Lafont, "Can Democracy Be Deliberative & Participatory?"

[19] "About Citizens' Assemblies," UK Parliament, accessed October 20, 2023.

[20] Hélène Landemore, "We, All of the People," *Slate*, July 31, 2014.

[21] James D. Fearon, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance," in *Democracy, Accountability, and Representation*, ed. Adam Przeworski, Bernard Manin, and Susan C. Stokes, Cambridge Studies in the Theory of Democracy (Cambridge: Cambridge University Press, 1999), 55–97.

response to proposals of deliberative democracy, Issachroff & Bradley (2021) argued that "what unifies…various forms of democratic governance is the role of elections as prospectively setting policy and retrospectively assessing governance."[22] Though accountability is a necessity for *representative* democracy, it is not the end-all-be-all for deliberative democratic systems. Elections are subject to the fundamental problem of causal inference: there is no way to reward candidates who will make better policies going forward because you cannot know what they will do unless they win.

While there is no direct sanction in mini-publics, there is a collective responsibility—and risk of collective consequence—for policy decisions made by the mini-public. Though the process is more internal, deliberation can also be perceived as a constant, ongoing form of accountability. There are mounds of evidence across the literature on retrospective voting that, in representative democracy, politicians mostly face pressure to act accountably during election years. In deliberative democracy "popular pressure does not jeopardize representatives' independence but supposedly ensures…a form of accountability and responsiveness, including, crucially, in the period between elections."[23] Immunity from electoral sanctions conversely supplies immunity from the corruption of the political business cycle, due to structural inhibitors to the quest for permanent power.

4.2. Qualification

Aside from accountability for actions taken after being elected, elections serve a secondary function of evaluating if the life a candidate led prior to the election qualifies them to govern. There are various traits that the polity might value in a representative—education, candor, work ethic. With random selection, the probability of ignorance, dishonesty, and laziness is as prevalent as it is in the population, which might make some people uncomfortable.

The flaw in that logic is that elections are not particularly strong proxies for qualification. After the primary stage, qualification is completely subordinate to metrics like political ideology.[24] There is also the matter of bias in what person is deemed to be qualified. Earlier, it was acknowledged that legislatures are typically less female, less ethnically diverse, and certainly not socioeconomically diverse. The public's implicitly biased evaluation of what is "qualified" might inherently lead to the suppression of direct representation in government.

There is also an issue with the use of jury selection as a model for mini-publics when it is an intentionally non-random process—at least in the United States. Prosecutors and defense attorneys both play a role in selecting jurors deemed "neutral," and eliminate jurors with a preference for the opposing counsel. It seems unfathomable for mini-publics to retain their legitimacy *and* for parties to play a similar role in selection. Any non-random influence on the selection process has the possibility to bias agenda-setting in the mini-public. A truly random selection process requires the public to accept deliberators as they come, without parsing for characteristics that float to the top in an election. Through deliberation with one another, there is a possibility for all deliberators to leave the process more informed than they came in.

Another quality of interest in elections is that of substantive representation. A mini-public with the "perfect" racial and gender composition isn't necessarily guaranteed to allow each citizen a direct mirror in the deliberative process. But—especially with a sufficiently large sample—descriptive representation should have an inherent substantive effect.[25] There are benefits to merely having a diverse perspective in the room. For example, in Morocco, it was found that female representatives selected through quotas improved substantive representation for women.[26]

4.3. Platforms & Competition

A final, and very valid, criticism of deliberative democracy is the elimination of a space for the construction of competitive political platforms. In representative democracies, parties are required to put forward a compelling argument as to why their proposal for governance is superior. Deliberative democracies strip away this feature.[27] Issachroff & Bradley (2021) were particularly concerned with this deficit in formal agenda-setting, writing: "Plebiscites are constantly hostage to agenda-setting biases. In addition to the lack of general knowledge on the technical needs of governance, there is the issue of which questions will be submitted to the

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[22] Samuel Issacharoff & J. Colin Bradley, "The Plebiscite in Modern Democracy," in *Routledge Handbook of Illiberalism* (Routledge, 2021), 508.

[23] Landemore, "Deliberative Democracy as Open, Not (Just) Representative Democracy."

[24] Shigeo Hirano and James M. Snyder, *Primary Elections in the United States* (Cambridge University Press, 2019).

[25] Jane Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes,'" *The Journal of Politics* 61, no. 3 (1999): 628–57.

[26] Lindsay J. Benstead, "Why Quotas Are Needed to Improve Women's Access to Services in Clientelistic Regimes," *Governance* 29, no. 2 (2016): 185–205.

[27] Ian Shapiro, "Collusion in Restraint of Democracy: Against Political Deliberation," *Daedalus* 146, no. 3 (2017): 77–84.

people and when, and how those questions will be phrased and interpreted – these are all problems that must of necessity be settled outside of the plebiscite itself."[28] Deliberative democracy allows for short discussion, but does not sustain conversations in the public realm.

There are two elements of this to discuss. First, there is the technical issue of agenda-setting. To Issachroff & Bradley's point about manipulation in the process, theorists interested in direct democracy posit that deliberative polls could be a mechanism through which the public expresses and ranks its policy preferences.[29] One could argue that the elite class could influence the public's decisions on the deliberative polls. If this is true then the second issue—the end of public discussion on policy priorities and platforms—is a non-issue. Through linkage institutions, there is still an opportunity for the public to be engaged in discussions of the policies they will forward to their mini-publics. A lack of formal parties and traditional electoral legislature is not equivalent to a lack of public opinion. The greater threat is an outsized influence from elite classes and elite manipulation—which is already a challenge in free democracies around the world.

5. Conclusion

Like direct democracy, random sampling of deliberators is a far-fetched and likely impractical idea. But, if representative democracy continuously fails to provide reflective representation and deliver on policy of importance to the polity, perhaps it is time to introduce more radical forms of democracy. Randomly selected mini-publics are more representative and inspire political efficacy in their participants. A governmental system that is more deliberative and inclusive is more conducive to normative aspirations for modern democracies.

[28] Samuel Issacharoff & J. Colin Bradley, "The Plebiscite in Modern Democracy," in *Routledge Handbook of Illiberalism* (Routledge, 2021), 508.

[29] Lafont, "Can Democracy Be Deliberative & Participatory?"

Defensible Deplorables: Ramsey Clark and the Heart of International Humanitarian Law

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Abstract

Ramsey Clark's transformation from an organ of the government to one of the most prominent skeptics of American foreign policy in the 20th century offers a unique lens through which to examine U.S. interventionism, conduct in war, and violations of international law. In the following three case studies of Clark's private role as a defense attorney for Dr. Philip Berrigan, the Rwandan genocidaire Elizaphan Ntakirutimana, and former Liberian President Charles Taylor, I analyze how Clark's defense of war criminals exposed the United States' culpability in violence both within the country and internationally. In drawing attention to examples where he believed the U.S. was indirectly or directly guilty of delegitimizing international humanitarian law, Clark challenged his contemporaries to reconsider the driving factors behind U.S. foreign policy since his time in office, and in doing so, urging them to hold hegemonic powers accountable to the moral conduct they espoused as the basis of civilization.

In 1971, just two years after the end of his service as Attorney General, Ramsey Clark rose to deliver a startlingly brief defense for his private clients. The "Harrisburg Seven" stood trial for conspiracy to "'seize, kidnap, abduct and carry away presidential advisor Henry Kissinger' and blow up steam tunnels in Washington 'thereby rendering inoperative the heating system in government buildings of the United States.'"[1] Their representation was also notable; in 1968, Clark had successfully prosecuted the "Boston Five," another group of anti-war protestors. "Your Honor," Clark said to the Harrisburg courtroom, "the defendants shall always seek peace. They continue to proclaim their innocence. The defense rests."[2]

[1] Joshua Saunders, *Ramsey Clark's Prosecution Complex*, LEGAL AFFAIRS (November – December 2003), *https://www.legalaffairs.org/issues/November-December-2003/feature_saunders_novdec03.msp.*
[2] Lonnie T. Brown, DEFENDING THE PUBLIC'S ENEMY: THE LIFE AND LEGACY OF RAMSEY CLARK 126 (2019).

I. INTRODUCTION

Born in 1927, Ramsey Clark was a Kennedy Democrat and a member of the New Frontier. The son of Tom Clark, Harry Truman's Attorney General and later a Supreme Court Justice, Ramsey rapidly ascended to the role of Attorney General, serving from 1966 until 1969.[3] As Attorney General, Clark achieved critical New Frontier Liberal objectives, namely in terms of school desegregation, the first Voting Rights Act, and the 1968 Fair Housing Act.[4] Clark had an impressive political lineage and an extraordinary record as U.S. Attorney General, but of particular lasting interest is his defense of alleged war criminals, from a centenarian Nazi to Saddam Hussein.[5]

Due to attorney-client privilege and the confidentiality of prosecution case materials, Clark's vision is difficult to grasp fully. To understand Clark's vision, one must examine the cases he took on, the words he said that *did* reach the public, and secondary analyses. Taken together, these materials portray Clark as a man disenchanted with the U.S. and its role in the uneven international application of justice, skeptical of the moral premises undergirding U.S. international hegemony. Focusing first on the infancy of Clark's post-A.G. career aids in identifying the factors that contributed the most to his dramatic shift in opinion on the United States' role in the world: namely, American neo-imperialism as manifested by the Vietnam War.

A. The Great Reversal: The Harrisburg Seven and the Tragedy of Vietnam

The Harrisburg Seven was a group of religious activists —- including six nuns and priests —- who in 1971 faced charges of conspiracy to raid federal offices, bomb government property, and to kidnap Henry Kissinger.[6] The evidence held against them was largely comprised of letters among the defendants while Berrigan was imprisoned that alluded to their plots.[7] In their trial, Clark pursued a passive defense strategy without summoning the defendants or any witnesses to the stand, perhaps hedging on the jury's preconceived notions of the accused. They were nuns and priests, after all, asserting a non-violent creed; and they had not blown up and steam tunnels or even tried to, let alone succeed at, kidnapping Kissinger. The Harrisburg Seven were not convicted of any major crimes: the jury was hung.

Ramsey Clark's defense of the Harrisburg Seven is a landmark in his post-A.G. career for several reasons. Though Clark maintained that he had privately opposed the Vietnam War while serving in Johnson's administration.[8] Clark's decision to defend the militant anti-Vietnam Harrisburg Seven marked a diametric ideological shift from his 1968 prosecution of the anti-Vietnam Boston Five. Second, the case established Clark's independence from government interest despite his previous government service, a trait that would characterize his later legal work. Clark's departure from the policies and legacy of the administration he served reified the moral independence he considered crucial to impartial judgment. Finally, in ideological terms alone, Clark's public opposition to the Vietnam War after his support of the conflict as A.G. represents a staggering reversal in faith; Clark had transformed from the U.S. government's chief litigator to one of its most outspoken international legal opponents.

From the beginning of his post-A.G. career, Ramsey Clark signaled his opposition to the war that the administration he served had waged. Unlike his predecessors and successors who, excepting the Nixon Era, pursued other high office or lucrative private and corporate legal work after office, such as Nicholas Katzenbach or William Rogers, Clark's biographer Lonnie Brown writes that Clark assumed "a significant quantity of non–income-generating public interest litigation" regarding public opposition to the Vietnam War.[9] This came at the cost of Clark's livelihood, his clients rarely had vast resources at their disposal, with *Legal Affairs* reporting in 1971 that he "has trouble paying his travel expenses, not to mention his rent."[10] There stood a stark contrast between the Clark who prosecuted the Boston Five and the Clark that professed that "the United States government was tragically wrong in

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[3] Alexander Wohl, FATHER, SON, AND CONSTITUTION: HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK SHAPED AMERICAN DEMOCRACY (2013); Douglas Martin, *Ramsey Clark, Attorney General and Rebel with a Cause, Dies at 93*, THE NEW YORK TIMES, April 10, 2021, https://www.nytimes.com/2021/04/10/us/politics/ramsey-clark-dead.html.

[4] *Id.*

[5] The Associated Press, *Ramsey Clark, Attorney General Who Represented Saddam Hussein, Dies at 93,* THE GUARDIAN, April 11, 2021, https://www.theguardian.com/us-news/2021/apr/11/ramsey-clark-attorney-general-critic-us-policy-saddam-hussein-dies-aged-93.

[6] William O'Rourke, The Harrisburg 7 and the New Catholic Left. Introduction (2012).

[7] Eric Papenfuse, Before the incinerator, the 'Harrisburg 7' was national news (2012).

[8] Brown, *supra* note 2, at 118.

[9] Douglas Martin, Nicholas Katzenbach, 90, Dies; Policy Maker at '60s Turning Points, (2012); *Id.* at 119.

[10] Legal Affairs (Nov. & Dec. 1971).

its military actions in Vietnam."[11] Clark's defense of the Harrisburg Seven reveals a transformed vision of the United States' international role.

The Harrisburg defense exhibits the emergence of a core tenet of Clark's worldview that would come to greater significance in the future, and indicates key departure from his Brown writes that Clark's personal involvement in the enforcement of the Vietnam War; Brown suggests that "guilt over his complicity in this historic episode," is what spawned "such a strident opponent of the war."[12] Clark feared that the U.S. government was lying to its citizens about their non-targeting of Vietnamese civilians and the general objectives of the war to the point that Americans were "saturated with disinformation, misinformation, [and] falsehoods" from the state.[13] The Harrisburg case is evidence of his burgeoning "skepticism regarding the U.S. government and his abhorrence for what he perceived as its violent imperialism."[14] Clark chose to work in cases where he identified a subversive interest in the application of international law. The former A.G. was developing critical independence from his tenure and actions as a government official.

In his article "The Vision of Ramsey Clark," written in 1971 in response to Clark's publication of *Crime in America*, criminologist Sir Leon Radzinowicz defines the "perfect penal reformer" as possessing "unquenchable idealism" and "clear-headed realism."[15] Clark's professional development exhibits how his flawed idealism gave way to a realism that, if subversive of the status quo, ultimately supported the same moral end. While some noted the inconsistencies between what Clark espoused as A.G. and afterward, Clark argued that it only mattered that he supported justice in the present. More directly addressing his past prosecution of the Boston Five while circumventing personal responsibility, Clark urged amnesty for draft-dodgers, saying "we are going to forget those offenses because we believe in justice, and we have the power to control our destiny through law."[16] Clark was accused of lacking the ideological or moral backbone to stand up for himself and the anti-war movement while serving President Johnson. *Esquire* wrote that "both [Democrats & Republicans] called him a hypocrite," and *Legal Affairs* that "to the extent that the American press has considered Clark's work, it has been to excoriate him. He's been vilified by the right (The Washington Times suggested that Clark move 'his Terrorists 'R' Us law practice' to Afghanistan) and by the left (Salon has called him 'the war criminal's best friend')."[17]

This theory has been espoused in less partisan terms by Clark's law partner of five years, Mel Wulf, who said "my pop psychology is that he did some terrible things when he was AG and maybe he's been trying to atone ever since…I think part of his problem is that he's always so totally uncomfortable with the hypocrisy."[18] Analysis of how Clark's contemporaries viewed his reversal on Vietnam with the Harrisburg Seven case is nonetheless valuable in illuminating the transition from idealist to pariah. The ideological transformation that saw Ramsey Clark working alongside both President Johnson and Saddam Hussein was rapid as evidenced by the Harrisburg Seven case, but it did not occur overnight. If the Harrisburg Seven case was only two years after Clark's last government service, he had undergone further ideological development (and witnessed more American aggression) by the time of Hussein's trial in 2006.

Radzinowicz notes the stark contrast between Clark's support of liberal domestic objectives while he was A.G. and the notion he was beginning to cultivate that perceived the United States as an instigator of international violence. Radzinowicz's central criticism of Clark's vision for reform is that his "realism comes in bits….whereas the idealism spills over everything."[19] The result, per the author, is Clark's hypocrisy and unoriginality; "issuing contradictory mandates or adventuring heroically down some well-known cul-de-sac."[20] In later years, Clark questioned his idealism; he claimed that President Kennedy "inspired [his] idealism, [if] part of it was artificial."[21] Either way, Clark's disenchantment with the role of the U.S. internationally upon first leaving office was 'idealistic' and insufficiently pragmatic.

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[11] *Id*. at 121.
[12] *Id*. at 119.
[13] *Id.* at 121.
[14] *Id.* at 123.
[15] *Id.* at 123.
[16] Lonnie T. Brown, DEFENDING THE PUBLIC'S ENEMY: THE LIFE AND LEGACY OF RAMSEY CLARK 130 (2019).
[17] John H. Richardson, How The Attorney General Became Saddam Hussein's Lawyer, Esquire (2007); *supra* Legal Affairs at 10.
[18] Peter Carlson, The Crusader, The Washington Post (2002).
[19] *Id.* at 460
[20] *Ibid.*
[21] CITIZEN CLARK: A LIFE OF PRINCIPLE (La Paloma Films), 39:48-40:42.

In 1972, after defending the Harrisburg Seven, Clark traveled to North Vietnam. There, he began to articulate a vision that more explicitly identified American war crimes and the moral imperative to hold the U.S. accountable to the international humanitarian laws they claimed to uphold. "There are no real military targets in Vietnam," Clark said of the justifications underpinning U.S. aerial bombardments, "just little villages."[22] Clark accused the U.S. of indiscriminate slaughtering of civilians while distinguishing between the culpability of the U.S. government and its people: "We have to love all the children of the world….I believe that when the U.S. realizes what they have done they will be grieved and shocked."[23]

After establishing his moral independence from the Johnson administration by defending the Harrisburg Seven, Clark's perception of the U.S. clarified: from the neo-imperial aggressor to an active violator of international humanitarian law that used its military to advance "special economic interests [and] corporate wealth," a "clear and present danger" to the safety and wellbeing of the international theater.[24] In 1974 and 1976, Clark ran as a Democrat for the U.S. Senate but lost handily in the primaries both times. He did not run for office again.

B. Elizaphan Ntakirutimana & The Illegitimacy of U.N. War Tribunals:

In 2003, Elizaphan and his son, Dr. Gerard Ntakirutimana, stood trial at the International Criminal Tribunal for Rwanda. The two led the Seventh-Day Adventist Church in Kibuye, Rwanda; despite their Hutu ethnicity, during the 1994 genocide, the Ntakirutimanas were alleged to have offered refuge to 8,000 fleeing Tutsi in their church complex, only to then direct Hutu genocidaires to the church where they massacred the Tutsi refugees, including women and children.[25] In response to the U.N.'s first request to extradite Ntakirutimana from Laredo, Texas, Clark successfully argued, if "ironically for a case originating in Texas," as Brown suggests, that the pastor faced execution upon extradition.[26] From the beginning, Clark alleged that not only was his client's extradition from Texas to the tribunal in Arusha, Tanzania, unconstitutional on technical grounds.[27] He further claimed that Ntakirutimana had been framed by the Tutsi and that the evidence presented by the Tribunal was "concocted and not credible."[28] Clark was not permitted to know the identities of the sixteen eye-witnesses that testified against Ntakirutimana, a prohibition that caused him to suspect the witnesses' veracity. Beyond questioning the evidence and witnesses provided by the Tribunal, Clark explained why Ntakirutimana could not have committed the crime for which he faced trial. That Ntakirutimana Sr. was married to a Tutsi woman, and that Gerard Ntakirutimana was her part-Tutsi son, decreased the possibility that either could possess the inter-ethnic hatred to abet the killings of thousands of which they were accused.[29] Ntakirutimana's wife testified to her husband and son's innocence [36] Clark similarly noted Ntakirutimana's "peacefulness, moral character, and respect for the law up to the point of the 1994 genocide."[30] A second attempt to prevent extradition was unsuccessful and ultimately, despite Clark's defense, the Tribunal sentenced Elizaphan Ntakirutimana to ten years in prison, nine of which he served.[31]

Though Clark's attempt to vindicate the Ntakirutimanas ultimately failed, the case offers remarkable insight into Clark's burgeoning misgivings toward hegemonic powers. And, notably, Clark was not the only one to raise this concern. One of the judges on the Fifth Circuit Court of Appeals that ultimately extradited Ntakirutimana based on precedent said that he could not see how "a man who has served his church faithfully for many years…who has for his long life been a man of peace, and who is married to a Tutsi" could in days "become a man of violence and commit the atrocities for which he stands accused."[32] The judge ultimately added: "I am persuaded that it is more likely than not that Ntakirutimana is actually innocent."[33] Nonetheless, the Ntakirutimanas were ruled guilty by a unanimous Tribunal.

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[22] *Ibid.*
[23] *Id.* at 41:45-42:22.
[24] *Id.* at 1:16-2:30.
[25] Brown, *supra* note 2, at 185.
[26] *Id.* at 186.
[27] Charles Zewe, Ex-pastor faces U.S. deportation on Rwandan genocide charge, CNN (2000).
[28] *Id.* at 187.
[29] *Ibid.*
[30] *Id.* at 188.
[31] Rory Carroll, *Pastor Who Led Tutsis to Slaughter Is Jailed*, THE GUARDIAN, February 19, 2003, https://www.theguardian.com/world/2003/feb/20/rorycarroll1.
[32] Ntakirutimana v. Reno, (5d Cir. 1999), https://caselaw.findlaw.com/us-5th-circuit/1261219.html.
[33] *Id.*

C. Charles Taylor & The Crimes of Neoliberal Internationalism:

In 2003, Charles Taylor faced charges in the U.N. Special Court for Sierra Leone, where he was accused of having committed war crimes in fomenting Sierra Leone's civil war. Unlike Ntakirutimana, as a former President and having attended Bentley University in Massachusetts, Taylor was well-known internationally before his trial. Besides Clark, Taylor was also friends with prominent American liberals like the Congressman Donald Payne Sr. and the Reverend Jesse Jackson Sr., while sharing an "especially close relationship" with President Jimmy Carter from their Baptist faith and the Carter Center's democratic and humanitarian work in Liberia.[34] As the Second Liberian Civil War came to a close in 2003 and Taylor's grasp on power slipped, his case went before the international criminal courts.

Taylor was alleged to have ordered his soldiers to commit crimes that lack comparison. Many of the soldiers in the conflict were teenagers and younger, many on drugs and some believing themselves impervious to bullets; they had nicknames like "General Fuck Me Quick Babykiller, and Dead Body Bones…;[they] arbitrarily executed civilians and decorated checkpoints on the roads with human heads and entrails."[35] Taylor was accused of directly encouraging cannibalism.[36] Clark had represented Taylor since 1985 when the latter had escaped from a prison in Plymouth, Massachusetts where he had been imprisoned after being arrested for embezzlement of over $1 million as Director-General of Liberia's General Services Agency.[37]

Ramsey Clark gained experience in Liberia between his first representation of Taylor and when Taylor began the First Liberian Civil War of 1989 when he helped dismantle a coup attempt that involved local Liberians and American conspirators in 1988 attempting to overthrow President Samuel Doe.[38] Before his imprisonment in the United States, Taylor had served under President Doe, who himself had led a coup in 1980 that replaced over a century of elite Americo-Liberian control over Liberia.[39] Doe was nonetheless a frequent White House visitor of Ronald Reagan and "declared his commitment to Reagan's neoliberal[ism];"[60] Reagan doled out $500 million in military aid and economic assistance to Doe's Liberia during his administration.[40] According to historian Colin Waugh, Clark was himself "critical of the U.S. stance in Liberia"[62] under Doe, who had overthrown a previous administration that was less economically liberal and more sympathetic to communism.[41]

Clark's 1988 involvement in Liberia before Taylor's 2003 trial, in addition to his admiration for the leader who "went to war against the repressive Doe regime," led him to view Taylor as a victim of American neo-imperialism and interventionism.[42] President George W. Bush said that "one expectation is Mr. Taylor has got to leave. And that message is clear. And I can't make it any more clear," as Clark continued to call attention to U.S. war crimes in Iraq (along with sixteen other 'major aggressions' and war crimes committed internationally for the profit of "transnational corporations, domestic industries, and the corporate media" from 1953-2004) and advocated for Bush's impeachment.[43] Furthermore, Clark praised Taylor and the Liberians' ability to modernize without excessive dependence on foreign powers or compliance with Bush's Millenium Challenge Accounts' objectives of economic development, "fighting corruption and observing human rights."[44] Thus, Clark's defense of Taylor was at least in part a product of his sympathy for Taylor's isolation from U.S. neo-imperialism; of the prosecution Taylor's war crimes had the effect of removing

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[34] Jon Lee Anderson, *The Devil They Know*, THE NEW YORKER, July 19, 1998, https://www.newyorker.com/magazine/1998/07/27/the-devil-they-know.

[35] *Id.*

[36] *Id.*

[37] Niels Hahn, TWO CENTURIES OF U.S. MILITARY OPERATIONS IN LIBERIA: CHALLENGES OF RESISTANCE AND COMPLIANCE 118 (2020); *Taylor, Stubborn Since His Childhood*, THE NEW HUMANITARIAN, March 29, 2006, https://www.thenewhumanitarian.org/fr/node/225877.

[38] Hahn, *supra* note 56, at 117.

[39] *Id.* at 101.

[40] *Id.* at 110; Anderson, *supra* note 53.

[41] Colin M. Waugh, CHARLES TAYLOR AND LIBERIA: AMBITION AND ATROCITY IN AFRICA'S LONE STAR STATE 101 (2011); Hahn, *supra* note 56, at 92.

[42] Anderson, *supra* note 53.

[43] Maura Reynolds & Esther Schrader, *Bush Says Taylor Must Go*, THE LOS ANGELES TIMES, July 4, 2003, https://www.latimes.com/archives/la-xpm-2003-jul-04-fg-liberia4-story.html; *The People vs. George W. Bush: Iraq War Crimes Tribunal, Articles of Impeachment Against George W. Bush,* 109th Cong. (2006) (statement of Ramsey Clark, former U.S. Attorney General); *Former U.S. Attorney General Ramsey Clark Calls for Bush Impeachment*, DEMOCRACY NOW!, January 21, 2005, https://www.democracynow.org/2005/1/21/former_u_s_attorney_general_ramsey.

[44] Reynolds & Schrader *supra* note 65.

Taylor from office. Ultimately, Taylor was sentenced to fifty years in prison for his war crimes; he was the first sitting head of state to be sentenced at a Tribunal since the Nuremberg Trials.[45]

II. DISCUSSION

Spanning from his service as Attorney General during the Vietnam War and his prosecution of anti-draft protestors to his subsequent defenses of militant pacifists and then alleged war criminals, Ramsey Clark articulated an evolving vision of the United States' role in international politics. Examinations of Clark's defenses of the Harrisburg Seven in 1971, the Ntakirutimanas in 2003, and Charles Taylor from 1985 reveal how Clark's perception of the U.S. and the severity of its criminal activity, both in war and in international legal proceedings, developed over time. Clark's deviation from his Johnson Administration record to defend anti-Vietnam protestors indicated his burgeoning realization that the U.S. government *misled its citizens* to support a *neo-imperial* war.

A.

As Clark's career progressed and his distance from the policy positions of the U.S. government broadened, his criticisms of the U.S. expanded to encompass American interference in the mechanisms of the international justice system, thus undermined the fundamental legitimacy of international criminal courts. Clark's defense of the militant pacifist Harrisburg Seven was not merely a middling atonement for the former A.G.'s service in the administrations that escalated the Vietnam War. Rather, it stands as a crucial initial step in Clark's exposure of the artifice of both domestic and international legal systems. Clark was not repelled by a defendant's violent history or character; instead, he was galvanized by an international morality that decried the arrogance of self-proclaimed international justice-keepers who excused or ignored violence that upheld their hegemony. Examining contemporaneous criticisms of Clark, which paint a portrait of an idealist and contrast with more recent public portrayals of Clark as a friend-of-the-devil, aids in determining what Clark saw as the factors underpinning U.S. international crimes, then and in the future. He recognized where the U.S. government had grown too intrusive, too presumptive of responsibility, and too criminal to act in the interest of its citizens. For a person with Clark's background to defect from the administrations he served seemed to challenge the very basis on which those administrations and that government, were built. Clark's logic in future defenses, grew from the intellectual courage of Clark's initial skepticism.

Increased international U.N. and multilateral military activity in the post-Soviet Era shaped Clark's conception of international humanitarian law as a fig leaf, designed to legitimize the liberal world order and conceal its treachery at the cost of justice. In 1995, Clark defended Radovan Karadžić, the Bosnian Serb accused at the U.N.'s International Criminal Tribunal for the Former Yugoslavia of genocide for ordering the 1995 Srebrenica Massacre.[46] In 2001, he defended the former Yugoslavian President Slobodan Milošević, who had been accused of crimes against humanity by the same Tribunal.[47] Clark had condemned NATO bombings in Yugoslavia, traveling to Novi Sad in Kosovo to investigate evidence that American bombers had dropped cluster bombs, an offense he characterized as illegal under the "most basic international criminal statutes."[48] He associated the hegemonic economic ambitions that caused NATO's initial bombing with the employment of the U.N. and international law to pursue their geopolitical objectives. Clark said the Tribunals "did not have facts" and were "marred with injustice and flawed;" he asserted that "history will prove that Milošević was right" and attended the Serbian's 2006 funeral.[49]

B.

For somebody as deeply embedded in U.S. government and history as Ramsey Clark to voice such support for the convicted war criminal Milošević is jarring, but one must wonder why. Western society heavily stigmatizes war criminality, rendering taboo and unquestionable the process of evidence collection and due diligence that could prove an alleged war criminal's innocence. In both the Ntakirutimanas' and Charles Taylor's cases, Clark declined to accept at face-value what international courts claimed to be true. In the case of the former, Clark identified the U.S. as a neo-imperial power, exhibiting the extent to which hegemonic governments could conceal the injustices they commit through the prosecution of others, especially the internationally vulnerable. According to

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[45] *Liberia Ex-Leader Charles Taylor Gets 50 Years in Jail*, BBC NEWS, May 30, 2012, https://www.bbc.com/news/world-africa-18259596.

[46] Peter Carlson, *The Crusader*, THE WASHINGTON POST, December 15, 2002, https://www.washingtonpost.com/archive/lifestyle/2002/12/15/the-crusader/9de49dd7-43fd-45e0-a4ef-3df4475cb4a0/; Robert Rauch, *Srebrenica Massacre: Radovan Karadžić*, in ENCYC. BRITANNICA, July 24, 2008, https://www.britannica.com/event/Srebrenica-massacre.

[47] John Cherian, *Balkan Scapegoat*, FRONTLINE, April 7, 2006, https://frontline.thehindu.com/world-affairs/article30208922.ece.

[48] La Paloma Films *supra,* note 16.

[49] Cherian, *supra* note 41.

Frank Serpico, the police whistleblower, Clark's longtime political supporter, and the producer of Citizen Clark, in the Ntakirutimanas' and similar cases, the "central thing [to Clark] is whether the people he is dealing with are the oppressors or the oppressees."[50] Beyond simply accusing the U.S. of perpetuating neo-imperialism, with the Ntakirutimanas, Clark accused the U.S. of corrupting the institutions of international law, undermining justice to promote a false history that aligns with their ambiguous 'special economic interests.' Clark's refusal to accept a black-and-white interpretation of the Ntakirutimanas' supposed guilt in the killing of thousands during the Rwandan Genocide hinged on his belief that 'plutocrats' would go to great lengths to uphold a false narrative of justice that corresponds with their material enrichments and the belief that the plutocrats' capacity to pervert justice could obscure the Ntakirutimanas' innocence to a legally meaningful extent.

Clark defended the Ntakirutimanas based on the technical illegality of their prosecution as well as the more paradigmatic notion that, as members of a historically and politically marginalized ethnic group, the Ntakirutimanas were victims of neo-imperial interests hidden by the facade of the U.N. He dismissed the international purview of the war tribunals as illegal because there was "no provision for them in the U.N. Charter" and because the U.N. could not sustain justice so long as it maintained its inherent inequalities (e.g. the permanent members of the Security Council) and susceptibility to international power politics. Clark implicitly accused the U.S. of violating the universality of international humanitarian law and delegitimizing the supposed impartial and culturally-relative morality of the liberal international order. Clark reframed the alleged war crimes of the Ntakirutimanas' through the lens of historic and present Tutsi control of Rwanda with the support of neo-imperial powers. Because he interpreted the Ntakirutimanas' case within the context of historic and continued rule of the Tutsi in Rwanda, Clark viewed his Hutu clients as "subjects of persecution." That the Tutsi, who were victims in the genocide but were supported as elites by the colonial Belgians, remained in power after the genocide with U.N. support was evidence enough for Clark of the survival of imperial power dynamics. Clark decried the Tribunal as an "extension of colonial power in Africa…foreign power intervention taking sides to maintain its control over the majority Hutu through Tutsi surrogates." His unorthodox approach granted Clark the analytical leeway to examine more nuances in the case than might otherwise be deemed morally permissible in judging war criminals.

According to Clark, not only were the Ntakirutimanas innocent, the hegemons were guilty. In 2002, Clark asserted that he felt "strongly that Pastor Ntakirutimana is innocent," and derided the unanimous conviction as a "travesty of justice." Clark was not alone. His sentiment was echoed by the same judge on the Fifth Circuit Court who ruled to extradite Ntakirutimana, writing: "I fully understand that the ultimate decision in this case may well be a political one that is driven by important considerations of State that transcend the question of guilt or innocence of any single individual." The judge indicated his respect for "the political process that necessarily is implicated in this case," asserting that a similar respect for the duty of his office caused him to assent to Ntakirutimana's extradition. In the judge's case "adherence to precedent compel[led his] concurrence," superseding their belief that the accused could be innocent. Clark continued to campaign against international war tribunals. In 1998, between the 1994 genocide and the 2003 Tribunal, Ramsey Clark traveled to Baghdad, Iraq to attend a conference on human rights. In his keynote address, Clark decried how "the governments of the rich nations, primarily the United States, England and France," had strong-armed the phrasing of the Universal Declaration of Human Rights, demonstrating "little concern for economic, social and cultural rights" of other nations, especially the formerly-colonized, like Rwanda. Still, Clark saw the potential for U.S. criminal meddling in other areas where they had significant interest. In place of the tribunals, Clark supported the notion of an international criminal court with "universal jurisdiction…independent of all political influence [with] the power to prosecute the high and the mighty as well as the weak and the defeated." In a rebuke of Radzinowicz's assessment of his insufficient realism, Clark dismissed U.N. tribunals as reflective of international power politics, claiming in both cases that instead of humanitarian justice he saw "just power politics persecuting a guy."[51] To Clark, the epiphenomenalism of the U.N. and the international balance of power undermined its capacity to uphold justice where it was not beneficial for hegemonic Western powers.

Clark's defense of the Liberian ex-President Charles Taylor reflects Clark's disapproval of U.S. meddling in foreign affairs, from supporting regime changes to providing massive international aid in exchange for neoliberal economic dynamics and anti-communism. His defense of Taylor hinged on his sympathy for those who asserted their independence from liberal global hegemony and his conviction that the U.S. could profoundly subvert international justice by misrepresenting Taylor and his alleged crimes to fortify their geopolitical objectives. The Taylor example exhibits Clark's ability to suspend judgment on an individual if he viewed that person as a victim of aggressive American political and economic interventionism or the artifice of international humanitarian law. The judge had found Taylor "responsible for aiding and abetting some of the most heinous crimes in human history," including

[50] La Paloma Films *supra,* note 16.

[51] Carlson, *supra* note 40.

"cutting off the limbs of victims and cutting open pregnant women to settle bets over the sex of their unborn children."[52] Examining his client's case within the context of the regional diplomatic pressures and broader destruction impelled by U.S. nation-building, Clark interpreted Taylor as a victim, rather than a despicable war criminal.

III. CONCLUSION

Ultimately, his defense of Taylor was an indictment of the phony morality underpinning the international legal order: cognizant of how plutocratic interests might obfuscate the actual or potential innocence of his client, and aware of the capacity for hegemons to pervert international law through the U.N. Though Clark's clientele had evolved from militant anti-war activists to alleged cannibals and genocidaires, what remained consistent throughout his post-A.G. career was his quixotic crusade to expose neo-imperialism and undermine the false legitimacy of the U.N.s international law. It had began with his defense of the Harrisburg Seven and his well-informed fear that the U.S. could and would oppress its own citizens and would redefine justice domestically according to its own ambitions. In the aftermath of Harrisburg, Clark continued to identify the subversive of 'real' international justice wherever it arose. From Vietnam to the Balkans to Rwanda, his mission evolved from a campaign against Western neo-imperialism in the Vietnam War (and the harm it wrought domestically) to a far broader, far-reaching, and sinister criticism of the fundamental legitimacy of the U.N. and liberal world order. Clark's career is a testament to the fallibility of the international justice system. Decade to decade, case to case, Clark clung to the notion that our current international legal processes are not conducive to unearthing truth, but rather may obscure or pervert justice. It is remarkable that a former Attorney General could be so convinced of the illegitimacy of international law and so committed to exposing its superficiality, to the extent that they would risk their own reputation in the defense of the alleged worst of the worst.

Careful analysis of Clark's post-A.G. career belies the notion that his perception of the U.S. was monolithic, that he was spurned by the failure of the Vietnam War, that he was "the war criminal's best friend" or a "friend of dictators."[53] Rather, in the context of contemporaneous and more recent analysis, the development of Clark's career from 1971 to his death in 2021 represents his perception of the ever-increasing scope and intensity of American international criminality.[54] Clark's critiques transformed from excessive 'idealism' to aid of war criminals, reflecting how Clark's vision of U.S. foreign crimes evolved from the parasitic, neo-imperialist exploitation of other countries (as in Vietnam) to a more sinister and inextricable hijacking of the fundamental morality of international humanitarian justice. It's tempting to dismiss Clark as reprehensible based on his clientele: an oft-defeated, high-and-mighty "renegade….with [unilateral] impudence" who not only ran with the worst of them but helped keep them in power.[55] Nonetheless, Clark was an eyewitness to U.S. crimes in the Vietnam War who cultivated a singularly unique paradigm through which to interpret both the international crimes of the U.S. and those it targeted. Though Clark's defenses of war criminals are at best bewildering, his example prods us to reconsider acceptance of the present international legal system and its judgments. It disrupts our tendency toward moral conformity and challenges us to question the moral and material legitimacy of contemporary standard.

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[52] Eric Witte, 5:00 – "Zigzag" Marzah: Taylor ordered me to cut open pregnant women, kill babies and amputate limbs, International Justice Monitor (2008); Jon Lee Anderson, Charles Taylor and the Killing Tree, The New Yorker (2012).

[53] Ian Williams, *Ramsey Clark, the War Criminal's Best Friend*, SALON, June 21, 1999, https://www.salon.com/1999/06/21/clark/; James Snell, *Ramsey Clark, Friend of Dictators*, THE WASHINGTON EXAMINER, April 16, 2021, https://www.washingtonexaminer.com/opinion/op-eds/ramsey-clark-friend-of-dictators.

[54] Associated Press *supra* note 5.

[55] Brown, *supra* note 2, at 116.

Georgetown University Undergraduate Law Review

Volume X
2024