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The 2022 Brigham Young University Prelaw Review (Journal) continues to demonstrate Brigham Young University’s commitment to excellence in scholarship and student development. Throughout this past year, it has been a privilege to work with ambitious students who want to produce the best possible undergraduate legal journal.

Continuing the vision of the Journal, this year’s staff has worked arduously to present professional and current legal scholarship. As undergraduates, the depth and breadth of the addressed topics required that these students do much more than just edit. The authors and editors researched to find court cases and law review articles to support their arguments. During the year, as new information became available, authors and editors continually updated and refocused their arguments to provide timely discussions of the current issues. Consequently, each of these articles reflects the latest decisions from the courts and scholarship from the legal community.

The goal is always to produce a reputable legal journal. However, this experience also provides the opportunity for the staff to prepare themselves as members for future professional scholarship and work in the legal field. Each student has become proficient in the Bluebook system of legal citations and all have spent countless hours editing and source checking each other’s legal articles. The students have also learned to analyze pressing issues, incorporate legal citations, and present cogent legal arguments, all while receiving training in journal publishing. These students leave the 2022 edition of this Journal possessing the ability to excel in law and other professional pursuits.

We continue to be grateful for the endowment from the Rawlins Foundation that funds the Journal and the support of Brigham Young University’s resources to create and print this publication. As you read the topics addressed in this Journal, I’m sure that you will agree that this is an impressive work produced by these
BYU undergraduate authors and editors. It continues to be a pleasure to work with such fine individuals and students on a daily basis.

Kris Tina Carlston, JD, MBA
Director—Pre-Professional Advisement Center
Prelaw Advisor
EDITOR IN CHIEF & MANAGING EDITOR’S NOTE

As we continue to navigate the challenges of a global pandemic, we have been honored to continue a tradition of scholarship with the publication of the 2022 edition of the Brigham Young University Pre-law Review. This year’s topics are grounded in issues on the cutting edge of legal thought, ranging from paid parental leave to the new frontier of Esports in collegiate athletics. Authors and editors were selected in July 2021, and since that time, they have honed their ideas and claims through devoted study and conversations with fellow authors and editors. After selecting their topics, authors and editors worked together to research and craft their papers, and participated in thorough and rigorous peer reviews. They effectively navigated the hurdles of new case law and counter opinions, adapting their arguments to present the soundest claims possible. Ultimately, these articles represent the academic resilience and undeterred scholarship of the authors who wrote them and the editors who polished them. We are confident that each piece will bring new awareness and deeper understanding of pertinent legal issues of our day.

We would like to extend our gratitude to all who contributed to this year’s volume of the Prelaw Review. Some staff members sought out the assistance of professors and legal scholars to glean expert insight into specific legal disciplines. Without the assistance of these professors, mentors, and scholars, this final product would not have been possible, and we are grateful for the generous donation of their time and expertise. We also extend a special thanks to the members of the editorial board—Jenica Bunderson and Taylor Percival—for their diligence, patience, and honest feedback that contributed to each author’s paper and the success of the review as a whole. Additionally, we express immense gratitude to Kris Tina Carlston for her continual efforts to uphold the rigor and prestige of this review, and through her unceasing support for every member of the Review. She has been the most tremendous asset to our team. We would also
like to thank the faculty and staff of Brigham Young University’s J. Reuben Clark Law School for the many resources they provided us. Lastly, we express appreciation to Laura Bean who formatted all the papers for final production. It is with great pleasure that we present the 2022 edition of the Brigham Young University Prelaw Review. We wish all those involved the best of luck in all endeavors they will pursue.

Kaitlyn Marquis  
Editor in Chief

J. Caleb Strauss  
Managing Editor
When the COVID-19 pandemic began in early 2020, few predicted the devastating impact it would have on countries and individuals. Governments across the world quickly implemented strict lockdown procedures in an effort to curb the anticipated loss of life. The United States Federal Government implemented its own lockdown campaign in early March 2020. These restrictions were both social and economic, leading to businesses deemed “non-essential”\(^2\) being forcibly closed by government mandate. “Essential”\(^3\) entities which survived forcible closure - such as supermarkets, healthcare providers, transportation systems, and gas stations faced heavy restrictions on customer activity, hours of operation, and operating procedures.

There were many instances in the early months of the pandemic that showed the US government’s willingness to legislate economic controls in times of crisis. For example, the Defense Production Act, invoked by the President of the United States in early 2020, required GM and other US-based manufacturers to produce ventilators. Eventually, the United States’ economy was shuttered with the expectation that COVID-19 would pass quickly, though this hope

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1 Ethan Finster is a senior at Brigham Young University majoring in Supply Chain Management. He is planning to attend law school in Fall 2023. He would like to give special thanks to his editor, Jessica Dofelmire, for her assistance. She is a senior at Brigham Young University majoring in Political Science. She is planning to attend law school in Fall 2023.


3 \textit{Id.}
proved incorrect. Individual states tightened and loosened restrictions on their citizenry in the ensuing months. States acted either in accordance with or in opposition to federally sponsored guidelines set by the Center for Disease Control (CDC)\textsuperscript{4} and the Cybersecurity and Infrastructure Security Agency (CISA)\textsuperscript{5}. While states were acting within their 10th Amendment right to utilize authority “reserved to the States respectively”\textsuperscript{6} when setting their restrictions, federal recommendations still colored their decisions. Thus, they were reliant on federal guidance and assistance, especially considering no individual state has the authority or resources necessary to facilitate a country-wide lockdown. While political and social schisms may have exacerbated the state-to-state differences in response, initial policy creation across the country was primarily based on federal mandates.

By April 2021, over 200,000 small businesses had been permanently closed due to the pandemic and millions more were at risk of closing if the restrictions continued.\textsuperscript{7} The Takings Clause of the 5th Amendment\textsuperscript{8} may allow financial reparations for businesses deemed “non-essential” and forced into bankruptcy by government order during the COVID-19 pandemic. Government rulings that lead to a substantial temporary, recurring, or permanent loss of economic

\begin{itemize}
  \item\textsuperscript{5} U.S. DEPT OF HOMELAND SEC, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, CISA’s Guidance on Essential Critical Infrastructure Workforce (2021).
  \item\textsuperscript{6} U.S. CONST. AMEND. X
  \item\textsuperscript{8} See supra note 13. (“...[N]or shall private property be taken for public use, without just compensation”).
\end{itemize}
viability or potential for the private property of an individual or group constitutes a taking under the 5th Amendment.

However, the invocation of police powers by state governments to restrict business and consumer activity creates a legal protection around government action that cannot be penetrated by 5th Amendment claims.9 This protection persists no matter how well those actions fit within precedential criteria for takings. While police powers are certainly an important aspect of governance in extreme circumstances, the infringement of individual constitutional rights that often accompanies their utilization should be addressed. Moreover, excessive utilization of police powers outside extreme circumstances sets a dangerous precedent for their use in future emergencies.

The COVID-19 pandemic has sparked widespread discussion regarding the legality of actions taken by the government in times of emergency. Concerns surrounding the adequacy of Takings Clause precedent have gained traction, and this paper seeks to build upon and resolve these concerns.10

I propose an exception to governmental immunity when police powers are invoked. Specifically, I recommend the creation of a legal exception to the existing takings criteria which would allow for 5th Amendment takings claims in cases involving state use of police powers. This exception would provide private citizens recourse while still allowing state governments full legal use of their police powers. It would also act as a deterrent against overreaching government restrictions on property that would otherwise go unchallenged due to the preclusive nature of police powers.

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9 Berman v. Parker, 348 U.S. 26 (1954). (This decision allows the state action taken for the benefit of public health without triggering the Takings Clause).

I. BACKGROUND

The extent of COVID-19 lockdowns varied drastically from state to state, but they were all founded in the regulatory guidelines provided by the CISA early in the pandemic. These guidelines advocated direct government intervention in the economy, recommending that companies involved in specific sectors be heavily restricted or closed outright to minimize COVID-19 transmissions; such sectors were termed “non-essential.” The CISA definition for these businesses was:

[Public-facing industries such as entertainment, hospitality, and recreation facilities, including but not limited to community and recreation centers; gyms, including yoga, barre and spin facilities; hair salons and barber shops, nail salons and spas; casinos; concert venues; theaters; sporting event venues and golf courses; retail facilities, including shopping malls except for pharmacy or other health care facilities within retail operations.]

Government restrictions, enabled by police power, had a disproportionate impact on the small businesses in the above listed industries. While large corporations were financially capable of weathering the loss in revenue brought on by these regulations, many small businesses were not.

The definition of “small business” varies by industry, so the US Small Business Bureau developed tests to measure eligibility for “small business status.” For the purpose of this analysis, small businesses will be defined as privately owned corporations, partnerships, or sole proprietorships that have fewer employees and less annual revenue than businesses or corporations. Roughly 200,000 small businesses closed in 2020 alone, with more expected to

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11 See supra note 4.
14 See supra note 7.
shutter permanently as restrictions continue in many states across the country. This drop in overall competition allowed larger entities to consume vacant market shares and price out future entrants into the markets. As of now, there is little legal recourse possible for these smaller entities against the regulations that ushered in their bankruptcy.

There is a long history of the United States government intervening in the economy during times of war and peace alike. In many of these instances, claims have been filed against this government action regarding the seizure of property under the 5th Amendment. Bringing a suit regarding the unconstitutionality of a seizure is also commonly referred to as bringing a takings claim. Broadly speaking, takings refer to the seizure of private property for use by the government, though this definition does not reflect the legal interpretations that have been built up around the concept over time. According to the 5th Amendment, for a government action to constitute legal takings, it must fulfill two separate requirements. First, the property in question must be appropriated for “public use,”15 and second, the government must provide “just compensation”16 to the owner of the appropriated property. Along with these two fundamental rules, various judicial decisions have created a series of hurdles for the government’s action or invocation of eminent domain, regulatory or otherwise, to pass to maintain its legality.

Regulatory deprivation is characterized as government action that restricts the rights of private property owners or the viable usage of property to a point resembling outright appropriation. Restrictions on property use, as well as the outright seizure of property, can be condemned by the courts as illegitimate takings if done without proper invocation of past precedent or police power. Thus, the “substantial deprivation” of the right to freely use one’s property can constitute a taking without the government’s invocation of eminent domain. This interpretation of the 5th Amendment’s Takings Clause was set as precedent, in part, by Lucas v. South Carolina Coastal Council. In a 6-2 decision, the court established that “[W]hen the owner

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15 U.S. Const. Amend. V.
16 Id.
of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good...he has suffered a taking.”

If a government regulation or appropriation is deemed illegitimate, or the “just compensation” provided is ruled insufficient, then it is likely that the court will award financial reparations to the injured private party. “Reparation refers to the process and result of remedying the damage or harm caused by an unlawful act. The purpose of reparation is generally understood to reestablish the situation that existed before the harm occurred.”18 The argument for reparation does not automatically assume liability on behalf of the payee, but it does imply a level of “wrongfulness” regarding their actions. While the issuance and amount of reparation will obviously vary from case-to-case, the court decides what constitutes “just compensation” unless they otherwise waive that responsibility.

Police power is generally defined as “the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.”19 Use of these powers is solely within the purview of state governments pursuant to the 10th Amendment.20 While the extent of police powers has not been legally defined, they are broadly constrained by statutes and precedent. During the coronavirus pandemic, states invoked police powers to enforce stay-at-home orders and economic shutdowns in an attempt to protect the “health, safety... and general welfare”21 of their citizenry. However

20 See supra note 5 (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).
21 Id.
heavy-handed these regulations may appear, there is no legal protection available to private citizens if the state deems it necessary to take otherwise unconstitutional actions through police powers in the name of public health.

Based on the actions of state and federal government agencies and the precedents in place regarding illegitimate takings, it is likely that the closing of businesses via regulation does not constitute appropriation under the Takings Clause due to state invocation of police power. The COVID-19 pandemic has highlighted the inherent frailty of 5th amendment takings jurisprudence, specifically when police powers are involved. The control wielded by state governments under the 10th Amendment invoked during the initial stages of the pandemic likely precludes small businesses from claiming takings through the 5th Amendment. However, even in a state of emergency, the government is bound by the limits set forth by the Constitution and the precedents that have since been interpreted from it. With this in mind, the use of police powers to justify actions that would constitute illegitimate takings in a normal legislative environment should not be protected against 5th Amendment Takings claims, regardless of intended government relief efforts to reduce the effect of said takings.

An exception must be provided to the Penn Test\textsuperscript{22} established in \textit{Penn Central Transportation Co. v. New York City}\textsuperscript{23} which would recognize legitimate claims of takings violations that are otherwise restricted by police power protections. This change would protect private citizens in future circumstances similar to those encountered during the pandemic and provide a legal hurdle which governments will have to consider before rashly instituting police power-based restrictions.

\begin{itemize}
\item[(1)] the character of the state action; \item[(2)] the economic impact of the regulation; and \item[(3)] the regulation’s interference with the owner’s investment-backed expectations.
\end{itemize}

\textsuperscript{22} Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).
II. Proof of Claim

The 5th Amendment wording cited as specifically prohibiting unlawful takings states: “[N]or shall private property be taken for public use, without just compensation.”24 Business owners argue that government-imposed shutdowns constitute “takings” under the Supreme Court precedents. The Court has also set a high standard for what constitutes a taking. “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”25 This standard, along with the tests put forth to determine whether a taking has occurred, creates an opaque, vague, and ineffective tool with which property owners are supposed to protect themselves.

A. Penn Central Transportation Co. v. New York

In Penn Central Transportation Co. v. New York City,26 the corporate owner of Grand Central Station (“the Station”) in New York City was barred from building taller buildings in the airspace of the station due to the building being designated as a landmark. This was denied under the City’s Landmark Preservation Law. The committee tasked with enforcing this law requested that Penn Central Transportation apply for permission to build through the appropriate channels. They then denied permission to build.

Penn Central appealed the decision to the Supreme Court, alleging an illegitimate taking. While Penn Central Transportation Co’s claim was denied, the Supreme Court’s decision included a three-part test to determine whether a taking has occurred:

24 See supra note 9 (The Fifth Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment); Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).
26 See supra note 15.
When a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a “complex of factors,” including:

1. the economic impact on the regulation on the claimant
2. the extent to which the regulation has interfered with distinct investment-backed expectations
3. the character of the governmental action

This set of prescribed factors was dubbed the Penn Central Test, or Penn Test. A court applies this test to every 5th Amendment takings claim, though *Lucas v. South Carolina Coastal Council* (which will be discussed below) creates an exception. Those who claim that takings occurred based on the government’s pandemic restrictions must first prove the government’s actions meet the standards of the Penn Test.

While this may be difficult to achieve without the suggested prescription, it is made simpler when the recommendation is applied. Police powers provide governments an unmitigated array of capabilities that, as of now, lack adequate restrictions. Currently, almost any action can be taken under the auspices of “police power” so long as it furthers “public safety, public health, morality, peace and quiet, law and order.” While these are noble pursuits, they cannot be used as a shield against illegitimate encroachment by the government.

Police powers were never referenced as a justification for New York City’s institution of the Landmark Preservation Law, therefore the proposed requirement to consider police power overreach as takings would not have affected the *Penn Central* ruling.

28 See *supra* note 7.
B. Lucas v. South Carolina Coastal Council

In *Lucas v. South Carolina Coastal Council*, a private property owner purchased two beachfront lots in an established neighborhood. Two years after his purchase, but before homes could be built that were similar to those in the neighborhood, South Carolina passed the Beachfront Management Act. The act effectively made it impossible for anything to be built on those beachfront lots. Lucas successfully sued South Carolina with a takings claim under the 5th Amendment. In upholding the Circuit court’s decision, the Supreme Court outlined a new principle for consideration regarding the validity of a takings claim.

The Court ruled government regulation that “denies all economically beneficial or productive use of land” requires compensation under the Takings Clause unless the regulation in question is consistent with “background principles of … property law.” These “background principles” are described as concepts akin to eminent domain. A private property owner whose property’s complete economic value was obliterated by government action does not necessitate further investigation with the Penn Test, unless that situation was outside previously established property law principles.

*Lucas* did not challenge South Carolina’s assertion that the regulations were put in place to protect the resources natural to that area and to prevent serious public harm. Instead, the case focused on the implementation of the restrictions stemming from that desire. Similarly, the majority of claims against state and local governments are not arguing against the expressed desire to protect public health during the COVID-19 pandemic, but instead focus on the constitutionality of the actions taken by the government to achieve that goal. When the Court ruled in favor of Lucas, it stated that “the Beachfront Management Act denied a previously permissible productive use and

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29 *See supra* note 10.

30 Id. at 1016, 1031; see also *Horne v. Dep’t of Agric.*, 576 U.S. 350, 361-62 (2015) (extending the Lucas “total deprivation” test to a government appropriation of physical property).

31 *See supra* note 10 at 1020.
did not therefore constitute a background principle of property or nuisance law that would have exempted the state from providing just compensation.\textsuperscript{32}

While there is a stronger case against COVID-related restrictions on businesses when using the \textit{Lucas} rule compared to the Penn Test, it is unlikely that the current precedent would apply similarly to actions taken using police powers as opposed to state legislative power. The court would still find that the South Carolina government had illegally taken Lucas’s property if the proposed exception were in place at the time, unless the state had used police power to do so. Even if the police powers exception was applied in \textit{Lucas}, no decision change would have resulted because of the nature of the legislative power behind the restriction. If South Carolina had seized Lucas’ property after invoking police powers, instead of through the legislative process used in the original case, the proposed exception to the Penn Test would then be triggered and a court would likely maintain a ruling in Lucas’s favor.

If the exception were not in place, and police powers were used, Lucas would have no legal claim against South Carolina for its actions under Police Power Immunity precedents. However, the incorporation of this standard exception would most certainly apply to the current COVID-19 shutdowns. When police powers are used to restrict private property to the point of “total deprivation,” my exception to the Penn Test would permit takings claims. This would directly counteract the exception built into the original \textit{Lucas} loophole requiring the court to ascertain whether the situation was in line with previously established principles of property law.

\textbf{C. Temporary and Permanent Takings}

A private property owner need not have their property physically confiscated from them or have the economic utility of that property regulated away permanently in order for the action to constitute a taking. This fact is crucial to analyzing arguments made against coronavirus-related government restrictions under the 5th Amendment.

\textsuperscript{32} Id. at 1031.
In *First English Evangelical Lutheran Church v. Los Angeles County*, a fire and flood destroyed the recreational center for a religious group sponsoring disabled children. Due to the heavy flooding, Los Angeles County adopted an ordinance that prohibited any further construction in the area that had been destroyed by the floods, including the previous location of the recreation center. The church claimed takings and the Supreme Court ruled that “‘temporary takings which deny a landowner all use of his property are not different from permanent takings, for which the Constitution clearly requires compensation.’” Upon remand, the California appellate court relied on *Mugler v. Kansas* to find that no compensation was owed because 1) the restrictions were put in place to counteract justified health and safety concerns, and 2) that the church was still allowed to use other parts of the property and it could use the restricted property in any way it wanted besides rebuilding.

According to both the Penn Test and *Lucas* exception, no temporary takings had occurred. Any claim made by private citizens regarding the seizure of their property during the COVID pandemic would have to surpass government argument that those seizures took place for the health and safety of the general population, which is the foundational principle upon which state police powers are built and are usually invoked.

Another influential case in the sphere of temporary holdings was *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. This case dealt with the claims of 5th Amendment takings by the plaintiffs regarding a thirty-two-month moratorium placed on the development of private land. The plaintiff’s claims were based on the *Lucas* decision, but the court ruled that the restriction did not

34 *Id.* at 318.
amount to a taking because of the “parcel as a whole” concept. The court explained that the right of private citizens to develop their land was only part of their rights because:

Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner’s use of the entire area is a taking of “the parcel as a whole,” whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Temporary takings can never be considered “total depreciation” as described in the *Lucas* ruling because the value of the property would return immediately after the restriction is lifted. In these instances, total depreciation did not occur as value was not taken permanently, just for the duration of regulation. *Tahoe-Sierra* established that claims of temporary takings can still be made but must pass the Penn Test before gaining legitimacy. Police power can be used to perform a temporary taking, but its use would prevent citizens from bringing claims they otherwise could in non-emergency circumstances. The Penn Test exception would provide protection for citizens and an opportunity to bring claims in cases of temporary takings and total depreciation alike. This principle was further illustrated by the Court’s ruling in *Seiber v. United States*, which provides a glimpse at the complex issues taken into consideration when any takings claims are made:

Supreme Court cases, as well as decisions from our own court, recognize that a temporary taking may arise in one of two ways. First, “a temporary taking occurs when what

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38 *Id.* at 331 (“To sever a 32-month segment from the remainder of each fee simple estate and then ask whether that segment has been taken in its entirety would ignore *Penn Central’s* admonition to focus on ‘the parcel as a whole.’”).

39 *Id.* at 332.

40 *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004).
would otherwise be a permanent taking is temporally cut short.” Temporary takings of this category may result when “a court invalidates a regulation” that had previously affected a taking, “when the government elects to discontinue regulations after a taking has occurred”...

Alternatively, a temporary “taking may occur by reason of extraordinary delay in [the] governmental decision making” process. In such a case, a property owner may be entitled to compensation for property loss incurred while the government was in the process of deciding whether to allow the contested activity. This type of temporary takings claim may be asserted “notwithstanding the failure [of the government] to deny a permit” or affirmatively prohibit a certain use of the property.”

While the invocation of police powers itself does not constitute a “trigger,” the actions taken using its authority can certainly be “triggering events” for purposes of a temporary takings claim. Here, the proposed Penn Test exception would still require a “triggering event,” but the claim would no longer have to pass the Penn Test in order to be recognized as a legitimate claim by the court. Businesses could easily claim takings specifically because police powers were used to create these “triggering events.” This Penn Test police powers exemption would apply just as easily in the case of “extraordinary delays” as described in the court’s decision above.

A “total depravations” claim would likely be precluded by Tahoe Sierra; however, the proposed exception to the Penn Test would allow for an easier claim of temporary takings.

41 Id. at 1364-65 (alterations in original) (first quoting Wyatt v. United States, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001); then Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347 (Fed. Cir. 2002) (analyzing a Fifth Amendment takings claim over the denial of a permit to harvest timber due to the listing of the Spotted Owl under the Endangered Species Act); and then citing Cooley v. United States, 324 F.3d 1297, 1306 (Fed. Cir. 2003)).
D. Public Health and Safety Exceptions to the 5th Amendment

All major court decisions regarding takings have allowed for the possibility of exceptions to the rule for regulations that concern the health, welfare, and safety of the general population. Regardless of whether these regulations are created by legislative or police power, courts have usually deferred to local jurisdictions as the source of these restrictions, since local governments are able to legislate to meet the unique needs of their respective citizens.\(^{42}\) *Mugler v Kansas*\(^ {43}\) is the mainstay case regarding the extent of state authority to regulate the health and safety of citizens without providing compensation for an otherwise illegal taking. In 1877, Peter Mugler built a brewery in Salina, Kansas and obtained all necessary permits to legally produce alcohol in the state. In November 1880, the Kansas Legislature passed prohibitions on the manufacture and sale of alcohol for recreational use. In 1881, Peter was indicted by the state for operating his brewery illegally and argued that he was deprived of the economic value of his investments by the Kansas government’s

\(^{42}\) See *supra* note 27 (stating that the police powers of a state “determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety,” subject to constitutional limits); Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 306 (1905) (holding that an ordinance limiting garbage burning to certain areas was not a compensable taking under the city’s authority to regulate public health); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (“If this ordinance is otherwise a valid exercise of the town’s police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.”); see also id. at 596 (“Our past cases leave no doubt that [challengers to police power] had the burden on ‘reasonableness.’”) (citing Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (arguing that the exercise of police power is presumed to be constitutionally valid))); Salsburg v. Maryland, 346 U.S. 545, 553 (1954) (“The presumption of reasonableness is with the State.”); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (stating that the exercise of police power will be upheld if “any state of facts either known or which could reasonably be assumed affords support for it”).

\(^{43}\) Id. at 623.
actions. Mugler’s initial convictions were upheld by the Supreme Court, which commented on the questioned principles of taking law.

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. 

This decision allowed massive authority to be left in the hands of federal, state, and local legislatures regarding the supervision of the concept represented as “public health.”

In Goldblatt v. Town of Hempstead, the Supreme Court referred to Mugler when it denied compensation to the owner of a private gravel mine within Hempstead’s town boundaries. The mine was sued by the town for failing to comply with new ordinances that restricted its activities. The owners of the mine claimed that the new law was an unlawful exercise of police powers since the mine had been in operation for decades beforehand without issue.

44 Id. at 668-69 (emphasis added).
The Supreme Court upheld the ordinance restricting the use of the mine because it was in the public’s interest, and the restriction was not “unduly burdensome.”

This power was further exhibited in *Berman v Parker*, when Congress passed the District of Columbia Redevelopment Act and created the District of Columbia Redevelopment Agency. The Agency’s purpose was to redevelop areas of the nation’s capital it deemed unseemly. This was to be done through the use of eminent domain. Berman, and others whose property was appropriated, brought claims against the agency under the 5th Amendment. The initial decision was appealed up to the Supreme Court, which finally ruled in favor of the government. So long as just compensation was provided, property could be seized for any specific purpose. In this case, the court described the nebulous nature of the typical applications of police powers:

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it.

### E. Government Response to the Coronavirus Pandemic

There is debate over whether the general government reaction to the coronavirus pandemic fulfilled the police powers mandate to protect health and public good. Generally, state governments expressly stated that regulations put in place were to reduce the spread of COVID-19 by limiting person-to-person interactions through social distancing. They contended that any damage these restrictions caused small businesses was offset by their promotion of the common good.

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46 *Id.* at 594-95 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).
47 *See supra* note 7.
The Coronavirus Aid, Relief, and Economic Security (CARES) Act,\(^49\) and the Paycheck Protection Program (PPP) were established in the spring of 2020 to mitigate the harm created by government restrictions. The CARES Act provided $350 billion to assist small businesses in avoiding layoffs and closures,\(^50\) while the PPP provided forgivable loans to businesses that needed to maintain staff during initial lockdowns.\(^51\) Along with these protections for businesses, measures were put in place to secure housing for both residential and commercial tenants.

While the federal government did implement some measures to placate the initial needs of businesses shuttered by the use of police powers, the continual extensions of restrictions in some states, contrasted with the swift re-openings of others, has left some parts of the country with far greater burdens than others. Even the implementation of restrictions, where big-box companies were allowed to remain open while smaller shops were forced to close, provides evidence of a drastically uneven application of the law. Precedent set in Armstrong v. United States\(^52\) barred the Government from forcing a select few to bear burdens that should be borne by the entire public. “[The] Fifth Amendment guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

The exception proposed by this paper would provide an avenue for those disproportionately affected by the implementation of police power to maintain their right to bring legitimate claims under Armstrong. While standard regulatory power could still discriminate in the manner seen during the pandemic, police power would be restricted in its implementation. Legitimate power would remain in the hands of government bodies, but the emergencies that necessitate its use would have to be broadly applicable enough to warrant


\(^{50}\) Id.

\(^{51}\) See Andy Puzder, Despite the Rocky Publicity, the Small-Business Loan Program Is Really Working, WASH. POST (Apr. 30, 2020, 2:38 PM).

restriction of the “public as a whole” as opposed to small segments as seen previously. The overarching restrictions put in place in reaction to COVID-19 serves as a basis for this standard. These restrictions failed to distribute the burden across the public as a whole, instead placing their most strenuous effects on small business owners. In order to avoid claims under the proposed Penn Test exception, the government would have to be sure that extreme actions taken with police power cannot be construed as discriminatory. The distinction between the use of eminent domain and the invocation of police powers forms the foundation for the implementation of the Penn Test exception. While eminent domain involves the appropriation of private property for use by the public, police powers provide regulatory power over private property for the public interest.

This distinction between property taking and property regulation can be avoided in cases where police powers are used by allowing any property restriction created through police powers to immediately constitute a taking and thereby require just compensation. Police power use must be relegated to extreme circumstances, and this additional rule would not limit their use in times of necessity. This exception would provide a level of protection to private citizens in situations where the government is using police powers to protect its own interests. The knowledge that legitimate 5th Amendment takings claims could still be brought against that government action would disincentivize arbitrary utilization of police powers to regulate property.

III. Conclusion

The extent of the damage done to individual businesses by government-sponsored lockdown restrictions is immeasurable. While some struggled but were able to survive through luck or skill, many more closed their doors forever because of their inability to do business. Restaurants, retailers, and small grocers were particularly devastated, leaving owners and employees alike reeling under the restrictive economic weight of these regulations. All the while, large corporations remained open to serve the populace during the height of the pandemic. Unfortunately, current law surrounding the use of
police powers precludes those devastated businesses from seeking just compensation through the Taking Clause of the 5th Amendment.

There is inadequate legal protection in place for citizens faced with regulations made via police powers as opposed to typical legislative processes. While state governments should not be restricted in their use of police powers in times of emergency, the proposed exception to the Penn Test, that activates in circumstances where regulation was created using police powers, would provide security for citizens and legitimize government action. The security of property owners would be better ensured as their 5th Amendment rights are upheld in extraordinary circumstances. Government action would gain legitimacy because government agencies acting with near-limitless police powers would be inclined to consider all possible alternatives to overwhelmingly restrictive measures. Safety restrictions could still be put in place, but individuals would be protected as well.

Adding this determining exception to the Penn Test would safeguard the interests of private citizens while still allowing society as a whole, rather than select individuals, to bear the burdens of catastrophic events necessitating the use of police power.
The Copyright Act of 1976 (Copyright Act) was written with the goal of promoting innovation and creativity among the general public. Based on the technologies and information available at the time, the Copyright Act offered unprecedented protection to both current and future technologies. However, as time passed and technology advanced, courts found it difficult to establish precedents when dealing with certain provisions in the Act, particularly when it comes to computer code. This difficulty made apparent that the Copyright Act needed to be amended. As time passed, new technologies emerged. As this occurred, the courts interpreted and reinterpreted the Copyright Act, often with conflicting results.

The unrivaled explosion in popularity and influence of computer code on our lives in such a short time frame made it difficult for courts to fully cope with the legal nuances that need to be in place in order to ensure the proper protections are granted to the correct code. Currently, the courts do not have enough experience

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3 See Oracle Am., Inc. v. Google Inc., 750 F.3d 1339 (9th Cir. 2014) (showing judicial disagreement regarding the copyrightability of computer code).

4 Id.
with computer code to understand it fully, which limits their ability to make consistent and informed decisions. This leads to turmoil among major companies and small firms alike; all would like to have the code that they wrote be proprietary, but courts have in some cases inadequately protected and in other cases over enforced the limits of copyright on computer code.

Part of the confusion surrounding the copyrightability of computer code involves how it is included in the Copyright Act itself. Computer code is currently defined as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”\(^5\) It is also classified as a “literary work.”\(^6\) The Copyright Act defines literary works as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.”\(^7\) There are clear discrepancies between what a literary work is and what computer programs are in this definition.

Given the limitations *Google v. Oracle* and other cases have exposed in the Copyright Act of 1976, computer code should be redefined and, as a whole, computer code should be removed from the literary works copyright classification and be granted a new classification. This redefinition and reclassification would clarify the complexities inherent in resolving disputes regarding fair use of different types of code, specifically Application Programming Interfaces (APIs) and declaring code.

In this article, we will argue that most code is copyrightable, and will explain the history of copyright protections for computer code. We will then introduce a new and expanded definition of computer program and propose a new classification for computer code within the Copyright Act. In the final section, we will discuss copyright protection and fair use under the new category and definition.

\(^6\) See id.
\(^7\) Id.
I. BACKGROUND

While current copyright law is governed by the Copyright Act of 1976, copyright protection in the United States started with the Constitution. Article I, Section 8, Clause 8 says, “The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” This clause became the basis for both copyright and patent laws, the first of which—the Copyright Act of 1790—was passed just three years after the ratification of the Constitution.

In 1976, Congress rescinded all previous copyright laws and passed a new copyright law. This law offered creators greater protection of their original works by creating different classifications, each of which can be protected by copyright. Congress intentionally included computer code in the Copyright Act of 1976 under the literary works category, though it was so new that they were unsure how to best protect it. They appointed a committee to research and provide recommendations to Congress on how to protect computer code under the new law. The current definition of computer code in the Copyright Act came from the recommendations of this committee.

After a few years, it became apparent that the Copyright Act of 1976 did not offer sufficient protection for certain types of works. Architectural works in particular were not protected under copyright law until Congress granted them a separate category within the Copyright Act in 1990. These works won copyright protection with the argument that “architecture performs a significant societal purpose, domestically and internationally.” They were afforded explicit, well-defined protection. While computer code is currently included in the Copyright Act, the definition and protections offered

8 U.S. CONST. art. I, § 8, cl. 8.
to it are very ambiguous and subject to interpretation. This paper proposes ways to change that.

One of the major principles of computer code is abstraction. Computer code is written in a layered approach. For instance, to write a code that can add two numbers together, you need two different pieces. The first layer is the code that adds the number together. This is called a function or method. But, to save time while coding, programmers use “interfaces,” which are shortcuts that allow them to run the “add two numbers” function, without having to rewrite the function every time. These interfaces have recently become the subject of a massive dispute between Google LLC and Oracle America, Inc., which will be discussed later.

The debate over computer code as intellectual property began in 1970 when computer makers began selling computer software separately from the hardware that ran it. Up to that point, computer code had been written for specific machines, but computer manufacturers quickly began to realize that they were spending much more money on the software development than they were spending on the hardware. They also realized that there was an enormous potential market for software. In 2020, the computer software industry was worth almost $390 billion.11

However, with the rise of software for sale came the rise of software piracy. This piracy took two forms: piracy by individuals and piracy by developers.12 The former happens when a user copies the software for him- or herself, a friend, or a coworker, which was often done innocently. This is akin to “burning” someone a copy of a CD or DVD. The latter occurs when a software developer uses code developed by another developer and calls it his or her own. The changes to the Copyright Act that this paper proposes mostly affect


piracy by developers. The next few paragraphs contain overviews of cases that shaped software copyright law.

In 1986, the Supreme Court heard Whelan v. Jaslow.13 Jaslow, a dentist, envisioned a piece of software that would help dentists better manage their dental practices. After failing to create the software himself, he outsourced the development to a company called Strohl where Whelan worked. Since Whelan was the developer, when the software was finished, Strohl held the copyright. When Whelan changed jobs, she took the copyright with her. Jaslow later created another dental practice management software, which was more widely accessible and was marketed as a successor to the first product. Whelan sued Jaslow for copyright infringement.14 The court found that the structure, sequence, and organization (SSO) were similar enough to constitute copyright infringement. This decision shows that even if component parts are not copyrightable, the organization of a computer program can be.

Several years later, a tech developer named Computer Associates (CA) created a scheduler that used a “translator.”15 This translator made it possible to run the same program on different operating systems, which made it much more accessible.16 Altai, a rival company, wanted to develop a similar product. They recruited an employee from CA with knowledge of the program and the translator, though they claimed they did not know about his experience with the translator. The recruit copied 30% of the original translator code exactly as it appeared in CA’s product. CA sued, and a court found in their favor, awarding them a large amount of money.17 This case introduced the Abstraction-Filtration-Comparison (AFC) test, which

14 See Whelan Associates v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1225-1227 (3rd Cir. 1986).
16 Id.
courts use to determine whether two computer programs are substantially similar enough to constitute copyright infringement. 18

In 2021, the Supreme Court decided Google LLC v. Oracle America, Inc, which examined the fair use of copyrighted code. 19 When Google acquired and finished the development of the Android operating system. When the program was complete, it used 11,500 lines of an API developed by Java SE. This API allowed programmers to work in a language they already knew, rather than learning a new programming language if they wanted to develop Android apps. Oracle claimed this was copyright infringement; Google claimed fair use, 20 the legal doctrine that permits the use of a copyrighted work as long as it meets certain conditions. 21 Unlike the first two courts that heard the case, the Supreme Court did not address the issue of copyrightability of APIs, but ruled in Google’s favor, arguing that Google’s use of the code met the standards for fair use.

For most people in the coding community, this ruling came as a relief. A narrow definition of fair use of computer code would have made development prohibitively expensive for all but the richest of developers, but a broad understanding of fair use promotes creativity and innovation. However, because code is complex, case law is not sufficient to address all of its multifaceted issues. The new definition and reclassification provide a statutory framework which will simplify judicial decisions about the fair use of computer code.

II. PROPOSED DEFINITION

When the Copyright Act’s current definition of computer program was written in the 1970s, software development was still a new field, and lawmakers were certainly not experts on the topic. The definition introduced in the Copyright Act of 1976 is, “a set of statements or instructions to be used directly or indirectly in a computer in

20 Id.
order to bring about a certain result.”

This all-encompassing definition has functioned for the last 45 years, but it should be expanded to reflect a greater understanding of the nuance of computer code. We propose the following definition:

A ‘computer program’ is a set of original statements or instructions, literal and nonliteral, written with particular sequence, structure, and order to be used directly or indirectly by a computer to bring about a desired result.

This definition is informed by several landmark decisions about the copyrightability of software and by several key principles of copyright law (the “idea-expression dichotomy” and “scenes a faire”) influenced this definition. These considerations will provide increased protection for both creators and those making fair use claims.

The proposed definition includes the sequence, structure, and order of the proposed computer code. In *Whelan v. Jaslow*, a third circuit court decided that the sequence, structure, and organization (SSO) of a computer code are important in determining copyright infringement. While some elements of code must occur in a certain order, much of a computer program is flexible in terms of the order in which a programmer chooses to organize it. In *Whelan v. Jaslow*, the court found there was copyright infringement because the SSO of the two codes was substantially similar.

The sequence, structure, and organization of a program are expressions of the programmer and should be copyrightable. For this reason, they are included in the proposed definition. In particular, this allows for the explicit protection of things like software application programming interfaces, or API’s. APIs are written to access


23 *See* Whelan Associates v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3rd Cir. 1986); *see also* Google v. Oracle, 141 S.Ct. 1183 (2021); *see also* Computer Associates International, Inc. v. Altai, Inc., 61 F.3d 5 (2nd Cir. 1995).


25 *Id.*
different methods or functions within the program. The general idea of accessing prewritten functions within a program should not and in fact cannot be copyrighted, however the structure, sequencing, organization, and naming used in the API are most certainly a unique expression of this idea and should thus be afforded copyright protections. This would have benefited the courts in cases such as *Google v Oracle*, as a key point in determining the outcome of the case was whether or not APIs are copyrightable.

Structure, sequence, and organization are only three examples of nonliteral aspects of code. More examples of nonliteral aspects of code include “screen displays, menu structures[,] and *user interfaces.*”26 *Computer Associates v. Altai* was a landmark case because it afforded copyright protection for non-literal aspects of the computer code beyond SSO. These non-literal elements of code deserve copyright protection because they often drive much of the base innovation and invention that is done when developing code. For example, user interfaces and menu structures are both vital to most end-user experiences, and a lot of development time goes to ensuring that both of these meet the best criteria. Were these not protected by copyright, there would be little incentive to create new ones, and the market as a whole would suffer.

Another important facet of the definition is the word “original,” which is inspired by the copyright doctrine of the idea-expression dichotomy. Under copyright law, an expression of an idea can be copyrighted, but the idea itself cannot be. For example, a program that listens to and identifies songs is copyrightable, but a programmer cannot obtain a copyright for the idea of a program that listens to and identifies a song. If another programmer decides to write a similar program, so long as the code is original and the SSO is substantially different, there is no copyright infringement. In fact, for any work to qualify for copyright protection, it must be an original work of authorship. For this reason, the word “original” appears in the proposed definition.

While not new in this definition, the phrase “set of statements or instructions” is also important because a single line of code that fulfills a single task is not copyrightable. There are only so many expressions of the idea behind that line of code. This is an application of the merger doctrine. This doctrine states that where the idea behind something and the expression of that idea are one and the same, the idea and the expression are not copyrightable. In cases where the size, scale, and scope of computer code are limited and it is demonstrably difficult to implement in unique ways, then the code should not be granted copyright protection. As the code becomes more complex and accomplishes more tasks, the argument for its copyrightability gains proportional traction. This must be tackled on a case-by-case basis. However, cases in which copyright is not granted should be rare, as the majority of copyright seekers have implemented a sufficiently complex code base that will be granted copyright protection.

III. Effects of New Definition on Copyrightability of Software

The proposed new definition will go a long way to help resolve some of the confusion surrounding copyright and computer code. Currently, computer code is defined as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” To those familiar with coding, this implies that close to any program one writes is copyrightable. However, Google v. Oracle made it all the way to the Supreme Court and even they refused to make a commitment as to the copyrightability of the code. In the specific case of Google v. Oracle, the interfaces are of course copyrightable. Even though they themselves are not operating methods, but instead calling the methods, they are still “statements that bring about the result” of calling the methods. If the courts at every level of Google v. Oracle had been working from

the new definition, it is likely that there would have been consensus about the copyrightability of the API, rather than confusion.

There are certain dangers associated with arguing that some code is copyrightable, and some code is not. If any firm line is drawn between code that is and is not copyrightable, there is the potential to inhibit further innovations and inventions. The code that is deemed uncopyrightable will suffer as incentive to create innovations on it would drop to zero. Conversely, if all code were to be copyrightable, then it would become prohibitively expensive to develop technology, as expensive licensing fees for generic code would impede progress. This would go against the very nature of the Copyright Act, which seeks to foster technological advancement by ensuring owners of intellectual property the rights to whatever they create.30 However, this is not to say that a line should not be drawn. As discussed above, there is code that is inherently uncopyrightable. The proposed definition makes it clear which code falls into both the copyrightable and uncopyrightable categories.

IV. PROPOSED RECLASSIFICATION

To clarify the law surrounding copyrightability of software and the accepted use of copyrighted code by someone other than the copyright holder, a new classification should be added to the Copyright Act of 1976 granting computer code its own classification. This classification would include the expanded definition of “computer program” and provide guidance on matters of fair use.

Creating such a category under the Copyright Act is not unprecedented. In 1990, architecture was added as a new legal category to the Copyright Act. One of the main considerations in favor of adding this protection was that “Architecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art. It is an art form that performs a very public, social purpose.”31 This, along with the multitude of amendments made to the Act since its inception, shows a pattern of modifying the

31 Copyright Amendments Act of 1990, Pub. L.
Copyright Act when the current provisions are either insufficient or incorrect, which is the current situation with computer code. Placing computer code into its own legal category would provide assurance of copyright protections for computer code as well as provide clarification regarding copyright infringement and fair use.

V. COPYRIGHT INFRINGEMENT AND FAIR USE

There are also some aspects of computer code that are unavoidable. For instance, it is common practice to abstract sections of the code into smaller blocks called “functions” or “methods” that perform individual tasks. This is done to improve code readability and to allow the same section of code to be referenced throughout the program without the need to rewrite the same block of code multiple times. It is also common practice to abstract meaningful numbers and characters that a program uses to fulfill its task into “variables.” Variables are used in almost every single computer program, and they act as one of the main pillars that allow any program to execute its task successfully and efficiently. Within copyright law, there is a doctrine called “scenes a faire,” which protects similarities that occur naturally because of a situation. In Cain v. Universal Pictures, a novelist sued a movie production company for copyright infringement over a scene in a movie. In both the movie and the book, characters find refuge from a storm in a church. The court found that other than hiding in a church, there were few similarities between the two scenes, and therefore, there was no copyright infringement, only scenes a faire. Similarly, variables, functions, and other elements of code that occur frequently across programs should be considered scenes a faire. A developer may not allege copyright infringement for using universal elements.

The fair use doctrine also impacts developers and programmers. In fact, fair use was the point at issue in the Supreme Court’s decision in Google v. Oracle. According to the Copyright Act, “Fair use is a legal doctrine that promotes freedom of expression

by permitting the unlicensed use of copyright-protected works in certain circumstances.”33 These circumstances are typically limited to “criticism, comment, news reporting, teaching, scholarship, and research.”34 However, the nature of computer code once again denies the sufficiency of such limitations. While computer code can be used in teaching, scholarship, and research, the vast majority of it is used to bring about a result in a computer or to accomplish a series of tasks.

To copy any section of code that has been granted copyright protection would inherently infringe on the copyright. Under the new definition of computer code it is acknowledged that there exist unique and original ways the code could have been written. It seems apparent, then, that fair use of copyrighted code should almost never be granted. Such a strict limitation on the fair use of code, however, would limit the collaborative nature of programming as a whole, causing a decrease in innovation. While it would increase incentive to write and seek a copyright for original code, it does not guarantee that the quality of the new code is any better than what was previously written.

Therefore, when evaluating fair use of software, courts should continue to use the four criteria used to evaluate other cases of fair use: the “purpose and character of the use,” the “nature of the copyrighted work,” the “amount and substantiality of the portion used in relation to the copyrighted work,” and the “effect of the use upon the potential market for or value of the copyrighted work.”35 In making this determination, courts should weigh the “amount and substantiality of the portion used in relation to the copyrighted work” the most heavily, followed by the “purpose and character of the use,” and then the other two.

VI. CONCLUSION

Computer code and computer programs contribute significantly to American culture and society, influencing everything from how we
work, to how we entertain ourselves, to how we sleep and wake up. Because of computer code’s prevalence, it is in the best interest of the United States to foster innovation and problem-solving, a task which has been left up to copyright. Congress passed the Copyright Act when computer programming was in its infancy, and since 1976, the field of computer code has grown and expanded to encompass much more than legislators could even imagine at the time.

The definition of computer code is broad and not particularly useful for the courts trying to make decisions about the copyrightability of computer code. The proposed definition would clarify what is and is not copyrightable and better inform the courts about what constitutes copyright infringement. Code currently falls into the literary works category of copyright protection, but that classification is inaccurate and has led to confusion and ambiguity. To reduce this ambiguity and provide programmers and judges with clearer direction, computer code should receive its own classification. Google’s victory earlier this year was celebrated by programmers all over the country, but much of the arguing could have been avoided with clear guidance, which would be best accomplished by redefining and reclassifying computer code under the Copyright Act of 1976.
Crime and Unequal Punishment: Proving Racial Intent in Felony Disenfranchisement

Abel Huskinson\textsuperscript{1} and Kaitlyn Long\textsuperscript{2}

I. Introduction

Marion Scraggs is a 57-year-old former felon who started using drugs after high school.\textsuperscript{3} She served her sentence in jail, and, while she was incarcerated, her son was murdered. Upon her release, Marion went to school and got a master’s degree specializing in addiction, and she now works as a supervisor for the housekeeping division of a luxury hotel. Marion has not touched drugs since her conviction. She changed her life. She is the model for rehabilitation. She is entirely out of the criminal justice system and is a fully functioning citizen, except for one thing: she is not allowed to vote.\textsuperscript{4}

Felony disenfranchisement, or barring convicted felons from voting, is a punishment used in almost every state. Although states

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\textsuperscript{4} Id.
differ in their severity of felony disenfranchisement, these laws resulted in 5.1 million Americans being unable to participate in the 2020 national election.⁵ The United States Supreme Court ruled in Richardson v. Ramirez that the language of the 14th Amendment, specifically the condition of “participation in rebellion or other crime,” offers a clear legal path for felony disenfranchisement to exist outside of legal contentions, such as the 14th Amendment’s equal protection clause.⁶ The Court later found in Hunter v. Underwood that felony disenfranchisement would violate the equal protection clause if it contained “both [an] impermissible racial motivation and racially discriminatory impact.”⁷ Recent scholarship has found felony disenfranchisement to disproportionately affect marginalized racial groups.⁸ As such, it becomes the burden of felony disenfranchisement constitutional challenges to prove racial intent, a process that has been markedly difficult. This paper argues that felony disenfranchisement’s constitutionality should be determined using a more comprehensive racial intent qualification that accounts for not only explicit intent, but also an expanded definition of intent: lethargic intent.

A. Disenfranchisement History

The United States derived the concept of disenfranchisement from its colonial history, specifically the medieval principle of “civil death”. Given to the equivalents of felony offenders, civil death described a state in which an individual forfeited all legal protections, even those pertaining to murder. English law maintained this ideal with strict punishments for felony-level offenders, “which resulted in forfeiture of all property, inability to inherit or devise property, and loss of all civil rights”. The British colonies in the Americas were influenced by this heritage in 1792 when Kentucky began the trend of legislatures writing felony disenfranchisement provisions into their respective state constitutions. Following 1792, twenty-four out of thirty-three states wrote felony disenfranchisement provisions into their constitutions.

Following the ratification of the Fifteenth Amendment in 1870, a large portion of the U.S. had a newfound interest in finding ways to disenfranchise Black voters. In addition to overtly punitive and Black-targeting black codes, felony disenfranchisement’s expansion following the Fifteenth Amendment allowed states to erase


11 Id.


13 Id.

14 We’d like to acknowledge Erin Kelly and their article Racism & Felony Disenfranchisement: An Intertwined History for being a valuable resource throughout the research and writing process.
Black political power.\textsuperscript{15} These felony disenfranchisement provisions remain in several states and continue to systematically and disproportionately affect the Black population and have been repeatedly documented. For instance, today, “one in 16 African Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-African Americans.”\textsuperscript{16}

\begin{table}
\centering
\caption{Status of Felony Disenfranchisement Laws At Year End 2021}
\begin{tabular}{lll}
\hline
Final Stage of Felony Disenfranchisement & N & States \tabularnewline
\hline
None & 3 & Maine, Vermont, District of Columbia \tabularnewline
Prison Inmates & 18 & Oregon, California, Nevada, Utah, Colorado, Montana, North Dakota, Michigan, Illinois, Indiana, Ohio, Pennsylvania, Maryland, New Jersey, Massachusetts, New Hampshire, Rhode Island, Hawaii \tabularnewline
Parolees & 2 & New York, Connecticut \tabularnewline
Probationers & 19 & Washington, Idaho, Minnesota, Wisconsin, South Dakota, Nebraska, Kansas, Missouri, Arkansas, Oklahoma, Texas, New Mexico, Alaska, Louisiana, Georgia, South Carolina, West Virginia, Delaware \tabularnewline
Some or All Ex-Felons & 9 & New Mexico, Wyoming, Iowa, Tennessee, Mississippi, Alabama, Florida, Virginia, Kentucky \tabularnewline
\hline
\end{tabular}
\end{table}

\textit{Source: ACLU}


As shown in Table 1, felony disenfranchisement differs significantly by state. Felons are re-enfranchised at different points in their sentences. A few rare states never disenfranchise felons, while most re-enfranchise felons at either parole or probation. A fair number never restore voting rights or only restore them after special requirements are met, such as after the felons pay a fee or receive the governor’s permission. The 5.1 million Americans disenfranchised by these laws are not evenly distributed.\textsuperscript{17} For example, “in seven states—Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming—more than one in seven African Americans is disenfranchised, twice the national average for African Americans.”\textsuperscript{18}

\textbf{B. Felony Disenfranchisement in Court}

The first case in which the Supreme Court considered the constitutionality of felony disenfranchisement was \textit{Richardson v. Ramirez} in 1974. In this case, three individuals who had previously been convicted of felonies and completed their sentences and parole were denied voter registration in California.\textsuperscript{19} The case was brought to the California Supreme Court under the argument that it violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{20} The Court agreed, stating that California’s disenfranchisement of ex-felons could not pass strict scrutiny. However, the United States Supreme Court reversed the California Supreme Court’s decision on the grounds that the disenfranchisement of felons was not to be held


to the same standards as other voting rights cases.\textsuperscript{21} The majority opinion held that Section 2 of the Fourteenth Amendment explicitly makes an exception for denying the right to vote “for participation in rebellion, or other crime”,\textsuperscript{22} and since this language remained unaltered throughout much debate on the syntax of the Amendment, those who wrote it clearly intended for states to be able to disenfranchise felons.\textsuperscript{23} Thus, the Court determined that felony disenfranchisement need not be held under strict scrutiny and allowed these laws to continue.

Only months after Richardson, in Thiess v. State Administrative Board of Election Laws, the District Court of Maryland found that Maryland’s felony disenfranchisement law was not unconstitutional.\textsuperscript{24} Although the law was not overturned, it did leave open the possibility for disenfranchisement laws to be ruled unconstitutional if they were arbitrarily enforced. Selective enforcement was examined once again in Williams v. Taylor, in which the Fifth Circuit Court of Appeals also decided that an otherwise constitutional disenfranchisement law could be ruled unconstitutional in the case of selective enforcement.\textsuperscript{25} Even without overturning felony disenfranchisement laws, these cases illustrated that there is a path for determining these laws unconstitutional.

The constitutionality of felony disenfranchisement was examined once again by the Supreme Court with Hunter v. Underwood in 1985.\textsuperscript{26} In this case, Alabama’s felony disenfranchisement laws were challenged after two men were convicted of presenting a worthless check and lost the right to vote under a new provision to the Alabama Constitution allowing for disenfranchisement after crime of any kind. Plaintiffs challenged this disenfranchisement under the Equal

\begin{thebibliography}{99}
\bibitem{21} Richardson, 418 U.S. 24 at 25.
\bibitem{22} U.S. Const. Amend. XIV, § 2.
\bibitem{23} Richardson, 418 U.S. 24 at 45.
\bibitem{25} Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982).
\bibitem{26} Hunter v. Underwood, 471 U.S. 222 (1985).
\end{thebibliography}
Protection Clause, arguing that its purpose was discriminatory.\textsuperscript{27} The District Court ruled that the law was constitutional because although it did have discriminatory effects, it could not be proven to have racist intent.\textsuperscript{28} However, the 11th Circuit Court of Appeals reversed the decision on the grounds that the defendants could not prove that the outcome was not dependent on having a discriminatory purpose.\textsuperscript{29} The Supreme Court upheld the Circuit Court’s decision that the provision did violate the Equal Protection Clause. The Court argued that since the law was facially neutral with racially disproportionate effects, its constitutionality depended on whether the law was passed with a discriminatory purpose.\textsuperscript{30} Using statements by those who adopted this provision that advocate for white supremacy in Alabama, the Court showed that the purpose of the law was discriminatory.\textsuperscript{31} This case established that for a felony disenfranchisement to be ruled unconstitutional, it must have “both [an] impermissible racial motivation and racially discriminatory impact”.\textsuperscript{32}

The impact portion specified in \textit{Hunter v. Underwood} has been shown through decades of modern scholarship. The impact is not only limited to individual voting rights loss; the effects of felony disenfranchisement are correlated with other social contentions. For instance, studies have shown that felony disenfranchisement also reduces turnout amongst those eligible to vote, hurting not only felony offenders, but the community at large.\textsuperscript{33} The racial impact of felony disenfranchisement is not a matter of debate; the overwhelming scholarly consensus rules in favor of impermissible racial impact on

\textsuperscript{27} Id.
\textsuperscript{28} Id. at 224.
\textsuperscript{29} Id. at 225.
\textsuperscript{30} Id. at 227.
\textsuperscript{31} Id. at 229.
\textsuperscript{32} Id. at 232.
Although the racist impacts of felony disenfranchise-
ment have been proven through scholarship, the question of what
constitutes racial intent is left unanswered.

C. The Development of Discriminatory Intent

Before discriminatory intent became a necessity for determining
constitutonality, racially disparate impacts were more often consid-
ered as enough to overturn a law. *Yick Wo v. Hopkins* established
that facially neutral laws can still be unconstitutional under the
Equal Protection Clause. In this case, a law regulating laundries
in wooden buildings was implemented so that it gave permits to vir-
tually all white applicants and no Chinese applicants; additionally,
Chinese applicants who did not comply were arrested, while com-
parable white applicants were not. The Supreme Court ruled this
regulation unconstitutional based on these effects. Thus, this case
established that racially disparate impacts, even in light of facially
neutral laws, can demonstrate the constitutionality of a law under the
Equal Protection Clause. Although intent was not used to determine
the ruling, it became clear that such obvious racial impacts demon-
strated racially discriminatory intent to some extent. If the racial
impacts were so obvious, the legislative body clearly meant for these
impacts to occur.

The importance of considering racial impacts was further estab-
lished in later cases, such as the Supreme Court’s ruling in *Brown
v. Board of Education*. This case was largely based on the effects
that segregated schooling would have on children, such as a feeling

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34 E.g., Angela Behrens, Christopher Uggen, and Jeff Manza, *Ballot Manipu-
lation and the “Menace of Negro Domination”: Racial Threat and Felon
Journal of Sociology 559, 559 (2003); Debra Parkes, *Ballot Boxes behind
Pol. & Civ. Rts. L. Rev. 71, 74 (2003); Christopher Uggen & Jeff Manza,
*Voting and Subsequent Crime and Arrest: Evidence From a Community


36 *Id.*
of inferiority and the possibility of permanent stigmatizing mentalities. This consideration of effects became even more important in *Palmer v. Thompson*. The Supreme Court’s opinion discussed the importance of considering impact over motive, arguing that previous cases focused on the “actual effects of the enactments,” rather than “the motive which led states to behave as they did”. To the Court, intent need not be considered on its own because the impacts could demonstrate whether a law violated the Equal Protection Clause.

The current standard for intent is described in *Washington v. Davis*, which established that intent must be discerned by observing the “totality of relevant facts.” The Court argued that racial discrimination must be shown to be a motivating factor behind the law’s enactment for it to be ruled unconstitutional. Discriminatory intent was further solidified into constitutional law when the Supreme Court decided that “official action will not be held unconstitutional solely because it results in a racially disproportionate impact”. There must also be racial motivation behind the law for it to be a violation of the Equal Protection Clause.

Determining this intent can be difficult and problematic. Often, intent is determined through direct evidence, such as quotes stated directly by those who create the laws; however, those who create discriminatory laws are rarely straightforward about such intent, so explicit evidence is not found often. Thus, the relevant facts for determining intent include statistics that demonstrate an undeniable discriminatory impact, the historical background of the decision, the sequence leading up to the decision, and the legislative history or statements made by those who created the action.

41 *Id.*
42 *Id.*
Even with this definition of intent, it is still unclear how exactly it can be proven, especially because of issues of facial neutrality. Courts can easily consider only the facts that they view as relevant when it comes to the entirety of relevant facts, while they fail to consider others that are also relevant. Often, discriminatory impacts and discriminatory intent are considered separately, as seen in Underwood, rather than considering how impacts may reveal intent. However, it is important to consider how these effects prove intent when considering all the evidence, particularly when they have been in place for years. Although impacts are “not the sole touchstone of invidious racial discrimination,” they can demonstrate intent when the only impacts of a law are discriminatory.

The standard idea of intent is often rudimentary and fails to look at the totality of factors, focusing arbitrarily on obvious ones, such as statements made by policymakers and selective enforcement. By failing to look at the complete picture, discriminatory laws often stay in place despite racially motivated intent. The Supreme Court has already established that obvious racial impacts at the start of a law can clearly demonstrate a racial motivation; however, it is important that courts consider the complete lifespan of these laws, not only their creation. Lethargic intent is necessary to consider when observing the history of felony disenfranchisement laws, as it explains how the actions, or lack thereof, of legislatures in regard to these laws displays their intent just as much as the facts regarding the creation of these laws do.

III. PROOF OF CLAIM

A. Explicit Intent

Before examining the framework of a more lateral definition of intent, it remains pertinent to understand the role that explicit discriminatory intent played in the institution of felony disenfranchisement. Just after the Civil War, the criminalization of the newly freed

44 Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982).
Black population was of the highest priority to the White South, which relied on slave labor to maintain its economy. The Thirteenth Amendment’s slavery exemption for “punishment for crime whereof the party shall have been duly convicted,” allowed the South to over-criminalize and over-convict Black populations to maintain its forced-labor economy. Most laws did not specifically target Black individuals by name, but it was “widely understood that these provisions would rarely if ever be enforced on whites.” In fact, eight-five to ninety percent of those convicted and sentenced to labor were Black. These individuals were then “leased” out as cheap labor to the very institutions that had enslaved them prior. This targeted criminalization of the Black population would be used in tandem with felony disenfranchisement laws to erase Black political power in the following decades.

As mentioned before, felony disenfranchisement laws had been instituted prior to the Civil War and had historical precedence. However, in the decade following both the enfranchisement of Black males, felony disenfranchisement laws were expanded in almost every state. This new wave of disenfranchisement provisions promoted all felonies to disenfranchisement status, while the prior definitions usually only included robbery and murder. This combination of overcriminalization and punitive disenfranchisement show that felony disenfranchisement’s utility was intentionally discriminatory.

45 Douglas A. Blackmon, Slavery By Another Name: The Re-Enslavement Of Black People In America From The Civil War To World War II 53 (2008).
46 Id.
48 Id.
50 Id. at 565-566.
There are cases where explicit intent was both found and considered by the Court. For instance, Mississippi’s legislature altered its felony disenfranchisement law in 1890 to include only crimes that the legislature assumed Black men would commit. These crimes included bigamy, forgery, burglary, arson, and perjury, all of which were easier to over-criminalize within specific communities.\textsuperscript{51} It was only six years later that while upholding these new provisions, the U.S. Supreme Court explicitly stated the racially discriminatory intent of the law: “restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker member were prone.”\textsuperscript{52} While explicit intent was found in a timely manner in Mississippi, there are very few cases in which an obvious timely statement of discriminatory intent can be found. Even when the Court did recognize explicit intent, felony disenfranchisement was upheld, making historical context exceedingly important to consider for any felony disenfranchisement challenge.

In the absence of a legislature’s explicit intent, the timing and placement of these laws can speak to their true intentions. An argument could be made that felony disenfranchisement laws cannot have discriminatory intent because they are equally applied to all felons. The historical context is essential for refuting this point. While the law itself might apply equally across all convicted felons within a given state, the history of over-criminalizing Black individuals as a mechanism of disenfranchisement makes felony disenfranchisement a de facto discriminatory practice. However, we acknowledge that discriminatory intent is unlikely to be proven by historical context alone, which is why a more expansive definition of intent is necessary.

\textit{B. Lethargic Intent}

A more expansive definition of intent would not only consider the foundational context of the law, but also the totality of facts that

\begin{itemize}
\item \textsuperscript{52} \textit{Williams v. Mississippi}, 170 U.S. 213 (1898).
\end{itemize}
become visible once the law is enforced. This is possible by considering lethargic intent, which is the intent demonstrated by policymakers’ contentment with or defense of a policy. This intent, though largely based on effects, is not the same as simply considering effects. It contains an important distinction: it considers whether or not the law fulfills its stated purpose. Discriminatory side effects alone are not a violation of the Equal Protection Clause, but in the absence of a law’s intended consequences, side effects, when prevalent, become the primary effects. When laws are upheld and defended for a long period of time, legislatures are implying that they are content with the results and that these laws are fulfilling their intended purpose. Once effects become discernible, legislatures should replace laws that do not fulfill their purpose with laws that do.

Though legislators do not always follow this principle, there are instances in which they have changed or repealed laws that had primarily discriminatory impacts. A clear example of this is the Massachusetts 1913 law, which prevented non-residents from getting married in Massachusetts if their marriage would be invalid in their home state. At the time of enactment, the intent behind the law was not completely clear, though many have argued that it was to prevent interracial marriages. The law remained in place long after interracial marriages were made legal nationwide, making the intended purpose defunct. Despite its obsolete purpose, the law continued to be discriminatory in a way not originally intended by preventing many same-sex couples from getting married. These unintended discriminatory effects became the driving factor behind the law’s repeal in 2008. The legislature observed the harmful effects of the law, and rather than continuing to be complacent in them, decided to

56 Id.
repeal it. In doing so, they demonstrated that the discriminatory side
effects were not the intended effects of the law.

The standard for discriminatory intent relies on determining
a racial motivation behind the enactment of a law. Lethargic intent
expands upon this by examining the effects of a law years later.
Although this measure focuses on the intent of legislatures long after
the law was created, it can also reveal the motivation behind its cre-
ation. The current narrow concept of intent assumes that intent is
always stated intentionally and cannot account for its often-uncon-
scious nature. By observing whether legislators are complacent in a
law’s discriminatory effects, courts can determine reasoning behind
its enactment that may be more implicit. Even if policymakers do
not state their racist motivation or even realize they have it, lethargic
intent can reveal this intention by demonstrating contentment with
discriminatory effects while the stated purpose is not fulfilled.

C. Lethargic Intent and Felony Disenfranchisement

Establishing racial intent proves to be a difficult hurdle when chal-
lenging felony disenfranchisement. Although disenfranchisement
policies can have a palpable racist stench, they do not often announce
themselves as such. This makes it imperative to outline causal ave-
nues on which racial intent can be proven. Inquiries should focus
upon the role of lethargic intent when challenging felony disenfran-
chisement provisions.

The most common reasoning behind disenfranchisement laws
is a causal story guided by the following logic: felons have broken
the social contract and have shown that they have poor judgment;
therefore, they should not vote. This intended result has never been
the reality. At its best, this line of thinking is misguided, at its worst,
systemic discrimination. For instance, research has shown that the
effects of increased voting by ex-felons have not been successful in
keeping away incapable voters. Rather, the effects have been imper-
missibly negative for people of color. For example, a study of felony

57 Sylvia A. Law, Where Do We Go from Here- The Fourteenth Amendment,
disenfranchisement over the years 1850-2002 found obvious racial impacts of felony disenfranchisement laws. It found that just a ten percent increase in a state’s nonwhite prison population increased the odds of passing ex-felon disenfranchisement laws by almost fifty percent.\textsuperscript{58} These laws do not only have influence over ex-felons, but even on Black individuals who have not committed a crime. In states with lifetime disenfranchisement laws, eligible and registered Black voters are twelve percent less likely to vote than in states without those laws, whereas white voters are only one percent less likely.\textsuperscript{59} This is likely to happen because felony disenfranchisement “exacerbates the bias against low socioeconomic status racial and ethnic minorities in electoral outcomes and policy responsiveness.”\textsuperscript{60}

Felons can often re-enter society without further incidents, and research has found that offenders who vote are less likely to be rearrested than those who do not.\textsuperscript{61} A 2011 report by the Florida Parole Commission found that ex-prisoners who did not have their voting rights restored had recidivism rates of thirty-three percent, while those who did have their rights restored saw that rate drop to eleven percent.\textsuperscript{62} Felony disenfranchisement, rather than a method of keeping incapable voters away from the voting booths, is a tool that causes ex-felons to be seen and treated as illegitimate and apart


\textsuperscript{60} \textit{Id.} at 741.


from society.\textsuperscript{63} Another stated purpose of these disenfranchisement laws is to deter people from committing felonies; however, there is no evidence that they act as a deterrent at all.\textsuperscript{64}

As mentioned earlier, the most common reasoning behind felony disenfranchisement policies is a form of protecting the social contract; these goals are abstract and shield the actual, discriminatory results. This intent should not be permissible in light of extensive racially discriminatory impact. Were these laws to fulfill their intended purposes of preventing people with poor judgment from voting and deterring people from crime, the racially disproportionate impacts could possibly be argued to be side effects of these laws. However, they cannot be considered side effects if they are the only significant impacts. Since most of these laws extend back to the 1800s, legislatures can easily observe whether these laws fulfill their purpose and what their effects have been and continue to be. Since the purposes are not fulfilled and the effects have a racially disproportionate impact, legislatures’ inaction in altering these laws demonstrates their intentional contentment with the harmful effects. This lethargic intent must be considered when determining the constitutionality of intent under the Equal Protection Clause.

IV. Application to Farrakhan v. Gregoire

In an effort to apply lethargic intent to recent felony disenfranchisement discourse, we will now examine the applicability of lethargic intent through the case history of \textit{Farrakhan v. Gregoire} (2010). Although this case’s contentions center around the Voting Rights Act, it serves an example of a court attempting to meter different measures of both discriminatory intent and impact. \textit{Farrakhan v. Gregoire} (initially \textit{Farrakhan v. Locke}) involved a challenge to Washington State’s felony disenfranchisement laws, specifically if


said laws violated section two of the federal Voting Rights Act. The various rulings in this case directly relate to the topic of racial intent within felony disenfranchisement challenges.

The initial Farrakhan ruling occurred on December 1st, 2000 within the Eastern District of Washington. In their decision to uphold these laws, the court held that the plaintiffs did not prove that Washington’s felony disenfranchisement laws were “motivated by racial animus, or that its operation by itself has a discriminatory effect.” The court did not feel as if proper racist impact and intent were demonstrated, a decision similar to that of Hunter v. Underwood. The three essential rulings in this case are known to those familiar as Farrakhan I, Farrakhan II, and Farrakhan III.

A. Farrakhan I

The Ninth Circuit later overturned the district ruling on July 25th, 2003. This ruling found that racial bias in the criminal justice system is relevant under Section 2 of the Voting Rights Act. This decision promotes the use of historical racial analysis in felony disenfranchisement decisions.

B. Farrakhan II

Upon transfer to the Eastern Court of Washington in 2006, and after denial of review by the U.S. Supreme Court, the second Farrakhan ruling found “Washington’s history, or lack thereof, of racial bias in its electoral process and in its decision to enact the felon disenfranchisement provisions, counterbalance the contemporary discriminatory effects that result from the day-to-day functioning of Washington’s criminal justice system.” Farrakhan II’s refutation

66 *Id.*
67 *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).
68 *Id.*
of Farrakhan I’s reasoning demonstrates the legal elasticity when considering racial impacts and intent in felony disenfranchisement challenges, further promoting the use of a more expansive measure of intent.

C. Farrakhan III

In 2010, the Ninth Circuit reviewed the Eastern Court’s decision and initially found felony disenfranchisement to violate Section 2 of the Voting Rights Act. The Ninth Circuit later ordered the case to be read En Blanc and finds that disenfranchisement laws “predate the Jim Crow era and, with a few notable exceptions … have not been adopted based on racial considerations,” and thus the court found that “felon disenfranchisement laws are categorically exempt from challenges brought under Section 2 of the VRA.”

D. Application to Lethargic Intent

_Farrakhan v. Gregoire_ is a clear example of a felony disenfranchisement case that lethargic intent could be effectively applied to. Legal arguments in defense of felony disenfranchisement usually follow a similar line of logic to that of Farrakhan III. The court held in Farrakhan III that because most felony disenfranchisement laws were passed in the far past, we cannot definitively define any specific law as being passed with racist intent. This ruling, even with its questionable logic, strikes at the core of why racial intent is a problematic requirement for challenging felony disenfranchisement and why lethargic intent is a helpful counter-argument to this line of thinking.

Farrakhan I is an example of a ruling that sides with a more expansive definition of racial intent and racial impact, specifically the allowance to view larger historical bias and racism as relevant when challenging felony disenfranchisement. Lethargic intent takes this more expanded view and applies it directly to the logic seen in

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70 *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).
71 _Id._ at 3-4.
72 _Id._
Farrakhan III. Even if the court’s logic in Farrakhan III held true, that initial intent was not discriminatory, lethargic intent would still be a viable pathway for challenging felony disenfranchisement. Within the lethargic intent framework, the initial authors’ intent is considered but does not ultimately decide the intent of the policy. Rather, as the policy ages, and discriminatory effects reveal themselves, the intent now falls upon the current agents of the law (i.e., the legislature). If the receiving agents of intent do not alter a law when its discriminatory effects are clear, this racially discriminatory intent is then assumed. An expanded definition of intent is necessary in the light of issues like racism, in which those who enact racially discriminatory laws often do so without indicating their racist intent, or without realizing it themselves.

V. Conclusion

The intent qualification for determining the constitutionality of felony disenfranchisement should be determined by analyzing the totality of facts. This analysis should include lethargic intent, or the intent established by the lack of action by legislatures after these laws are in place. When legislatures’ inaction allows discriminatory impacts to persist, they demonstrate their support for these unintended effects and thus illustrate their intent for these laws to be continually discriminatory.

This does not mean that all felony disenfranchisement laws are to be immediately removed. Instead, these laws should be faced with this expanded definition of intent when they are challenged in courts. When held under the test of lethargic intent, it is unlikely that these laws will be held constitutional under the Equal Protection Clause of the Fourteenth Amendment. Furthermore, legislatures themselves should reflect upon the discriminatory impact of felony disenfranchisement laws and examine their own lethargic intent while upholding these laws.
CROSSING BORDERS: THE OVERLAP AND CONFLICT OF INTERNATIONAL AND DOMESTIC LAWS REGARDING REFUGEES AND ASYLUM SEEKERS

Yunha Hwang¹

The devastating death toll was estimated to be over a hundred, with an additional 120 to 140 wounded after two suicide bombings took place near Afghanistan’s main airport in Kabul on August 26 of last year.² This recent set of explosions and the consequent deaths thereof came together to form yet another trigger towards displacement for the Afghan people—a grim and unfortunate addition to the country’s 40+ years of suffering violent conflict, natural disasters, chronic poverty, and food insecurity. After August of 2021, the United Nations Refugee Agency (UNHCR) reported nearly 6 million Afghans in total that have been forcibly displaced from their homes; the numbers indicating that this is one of the largest as well as long lasting refugee crises in the world.³

Throughout history, the United States has been recognized for having the largest resettlement program for refugees, with a total

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of more than three million refugees that have been settled in its 50 states over time. Refugee is defined as,

\[\text{[A]ny person who is outside any country of such person’s nationality, or in the case of a person having no nationality, is outside of any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.}\]

Despite the reputation of having such a generous program historically, reality is that now, thousands of refugees struggle to overcome the barriers of different policies and caps before they are granted asylum in the United States.

“You just wait...You see how the years pass. You get older, you cannot make any plans. You watch your dreams die with every second you spend waiting.” Sarah, who fled from Afghanistan after receiving personal death threats expressed her exasperation as she was yet again faced with the news of another indefinite suspension. Her case is representative of countless others that have waited for years already; the continual reductions in refugee quotas of the United States has extended her status in limbo from over three years to unexpectable once again.

Sarah is only just one of the millions left with no choice but to leave the violent and inhumane conditions of their homeland. Given the highly contentious events evident in some parts of the world, the

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number of refugees hoping to resettle each year is on the rise more so than ever before—not just Afghanistan.

The United Nations, considering the circumstances of the people behind such wars and the conflicts, has deemed the topic of refugee and asylum seeker resettlement as a key global issue.\(^7\) This declares the refugee crisis to be a responsibility for nations across the world, particularly those in the United Nations, to partake in answering and aiding the issue. However, such expectations have been met with disregard and oversight by the United States in recent years. Concerns and cases have surfaced since many executive actions made by the United States government such as Executive Order 13769, 13676, and the recent ceilings for refugee acceptance appeared to be contrary to the empirical history of refugee acceptance by standards set forth with international laws.

This paper will analyze the discrepancy that exists between international and domestic laws of the United States in a descriptive manner, following the mentioned policies above, and illustrate how that discrepancy impacts the overall immigration climate of the United States. International laws and protocols as existent in the status quo will be referenced, and the different policies from the United States that are not in line with such standards will be pointed out. It will then be contended that such policies need modification to fit with the definitions presented by the international courts and councils of law, especially given the current climate and trends.

I. INTERNATIONAL LAWS REGARDING REFUGEES

A. The International Standard of Human Rights

In December of 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR).\(^8\) The Declaration is composed of 30 different articles that outline basic rights

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and fundamental freedoms for individuals across the international sphere. Article 14 specifically establishes the following standards: 1. “Everyone has the right to seek and to enjoy in other countries asylum from persecution” and the related 2. “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.\(^9\) This indicates and ensures protection towards non-discrimination, non-penalization, and non-refoulement, and is both status and rights based.

In 1969, the United States’ adoption of this international standard was visible through the American Convention of Human Rights. Looking at the Preamble, it states,

> Recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protecting provided by the domestic law of the American states;\(^{10}\)

According to this premise, the United States has agreed to uphold the internationally understood principle of human rights, acknowledging there is no distinction existent between nationals and non-nationals. It may be argued that in Article 22, although the right to leave any country is easily granted\(^{11}\), the right to enter another is dependent on factors such as the possession of nationality, however, refugees are exceptions to this because Article 14 of the Universal Declaration of Human Rights extends such protection for those who hold valid humanitarian reasons.\(^{12}\)

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9 \(^{Id.}\)


11 \(^{Id.}\)

B. Convention and Protocol Relating to the Status of Refugees

Inspired by the UDHR, three years later the Convention and Protocol Relating to the Status of Refugees was declared by the UN General Assembly. The Protocol Relating to the Status of Refugees of 1951 was then followed by a consequent convention in 1967, as well as Resolution 2198. Deriving from Article 14 of UDHR, the collective Convention and Protocols emphasized the international standard and duty for protecting persons from political and other forms of persecution. This covers both status and rights-based protections, ranging from non-discrimination, non-penalization, and non-refoulment. Additionally, it assures refugees that they will not be penalized for their illegal entry or forced to stay in foreign states.

In the case of INS v. Stevic, although a primary decision to deport Yugoslav national Stevic was declared, the circuit courts after an appeal ruled in favor of Stevic, citing the Protocol. In the case, the standard of “well-founded fear of persecution” from the Convention overrode the previous decision based on federal law requiring an evidentiary standard to demonstrate a “clear probability of persecution” by the asylum seeker. This decision would set the precedent standard for basing rulings off of the UNHCR Handbook.

C. The General Significance of International Law

Although UN legislation and international law oftentimes is not legally binding, states international actors in general are socially or politically obligated to comply for self-interest reasons. Despite the non-legality of the UDHR, a wide consensus upholds that the Declaration holds provisions that are incorporated into customary


15 UN G.A., supra note 13.
international law itself. Customary international law signifies actions to expected to be upheld by those in the international community, simply because it is created through generally accepted principles.

Customary international law is usually understood to be consisting of two parts: the consistent practice of states, and _opinio juris_, the states’ understanding of their legally binding obligations. It is evident that the United States both understands and intends to uphold international standards, starting with the American Convention of Human Rights, of which the United States is a signatory. The American Convention of Human Rights is at the core of the Organization of American States (OAS), and although non-binding like the UHDR, it has come to be accepted as a part of the Inter-American System, which all OAS State Parties are to promote.\(^\text{16}\)

Following this was the Refugee Act of 1980 being passed in reflection of the 1967 Refugee Protocol.\(^\text{17}\) This piece of domestic legislation not only just answered the ongoing international crisis, but also better mirrored the objectives set forth through standards set by the UN. The Refugee Act of 1980 was passed at a time of hundreds of thousands of refugees fleeing Vietnam and Cambodia during the aftermath of the Vietnam War. The Refugee Act came as an amendment of the earlier Immigration and Nationality Act, as well as the Migration and Refugee Assistance Act. Part of the Act included raising the annual ceiling for refugees from 14,500 to 50,000 and overall set a more stable system of immigration and resettlement.\(^\text{18}\)

Also, as per the Vienna Convention of the Law of Treaties of 1969 (VCLT), by being a party of the 1967 Protocol, the United States has given its consent of policies carried out by the UN.\(^\text{19}\) The VCLT requires its member states and signatories to follow any treaties and conventions that have been established. Additionally, the legal obligations of the VCLT indicate that a party State agrees, in good faith,

\(^{16}\) See Organization of American States Charter art. 91.


\(^{18}\) Id.

to “not to defeat the object and purpose” as stated by Article 18 and
to accept the obligations thereof.\textsuperscript{20} Given that the United States is
not only a charter member of the UN, but also because they are one
of the five permanent members of the UN Security Council, there is
more weight to their actions in the international sphere.

Generally, it is also worth noting that although legislation may
not be intended to be legally binding, customary international law is
one of the main sources of international law; Article 38 of the Statute
of the International Court of Justice (ICJ) sets forth the significance
of customary international law by stating,

1. The Court, whose function is to decide in accordance with
international law such disputes as are submitted to it, shall
apply:
   a. International conventions, whether general or particular,
establishing rules expressly recognized by contesting
states;
   b. International custom, as evidence of a general practice
accepted by law;
   c. The general principles of law recognized by civilized
nations;”\textsuperscript{21}

Despite the ICJ’s rulings ultimately being non-binding as per Article
59 of the Statute, because the core purpose of international law is to
regulate the relationships between states, it can be seen to be bind-
ing to a certain degree, and it is the case for international customary
humanitarian law.\textsuperscript{22}

\textsuperscript{20} Id.
\textsuperscript{21} Statute of the International Court of Justice, art. 38.
II. THE IRREGULARITIES IN U.S. POLICIES TOWARDS REFUGEES

A. Executive Order 13769

Beginning with Executive Order 13769, the United States significantly lowered its numbers of refugees to be admitted in 2017 down to 50,000. Along with suspending the Refugee Admissions Program (USRAP) for 120 days, the executive order also suspended the entry of Syrian refugees indefinitely and directed several cabinet secretaries to suspend the entry of those whose countries do not meet the adjudications standards under the U.S. immigration law for 90 days. The executive order was set to be in effect from January 27, 2017, to March 6, 2017.23

Overall, refugee resettlement was halted as individuals from seven majority Muslim nations (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) seeking asylum in the United States were banned from legal entry. The State of Washington was first to raise a lawsuit, finding that sections of the policy violated the Due Process, Equal Protection, and Establishment Clauses of the Constitution. The argument brought forth claimed that states have an interest in protecting the “health, safety, and well-being of its residents”, along with “ensuring that its residents are not excluded from the benefits that flow from participation in the federal system”. Eventually, claims went to argue that Immigration and Nationality Act, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, as well as the Administrative Procedure act were violated.24

The next lawsuit was filed by Hawaii Attorney General Douglas S. China, citing the same violations as Washington v. Trump.25 The Hebrew Immigrant Aid Society (HIAS), then joined the legal action.

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by bringing forth other organizations in the creation of an amicus curiae brief on two aspects of violations: The first being that the administration shows explicit favoring of one religion over another, and the second being that it halts the reuniting of vulnerable refugee families that were about to be resettled to the United States. On March 10, 2017, HIAS resumed its legal challenge of the refugee ban, along with other plaintiffs to file a motion blocking the Executive Order.

B. Executive Order 13888

On September 26, 2019, President Trump signed Executive Order 13888, titled “Enhancing State and Local Involvement in Refugee Resettlement” along with another significant decrease in the cap regarding the number of refugees allowed into the country. A few governors jumped on the initiative and publicly refused the settlement of new refugees, such as Texas.

Another consequent lawsuit led by HIAS was founded on the basis that the EO attempts to dismantle the Refugee Act of 1980, as well as have the potential to restrict the entering of refugees that have passed all vetting and have been waiting for years to enter the United States to be reunited with families. The U.S. Court of Appeals for the 4th Circuit blocked President Trump’s policy, stating that the administration’s act undermines the national resettlement program created by Congress.

The ruling written by Judge Keenan along with Judges King and Harris rejected the government’s claims and concluded that the policy would allow the officials in question to refuse the matter at hand “for any reason or for no reason at all and need not provide

26 Id.
27 Id.
any explanation for their decision”.29 It was also stated by the U.S. District Judge Messitte that the Order gave power to states that are “arbitrary and capricious as well as inherently susceptible to hidden bias”30. This decision to uphold the Refugee Act of 1980 passed by Congress emphasizes the standards that are set internationally and highlights the necessity of following international law.

C. The Trend of Refugee Admittance

Included within the Refugee Act of 1980 is the power reserved for the president in setting the cap for refugee admissions annually.31 However, there is a clear pattern of restrictiveness presented by the Trump presidency when revisiting the past few years’ worth of the annual refugee resettlement ceilings. Starting with the year 2017, the Administration reduced the annual ceiling from 85,000 to 50,000—the lowest since the passing of the Refugee Act of 1980.32 However, this was only the start of the trend: in 2018, the 50,000 dropped even further down to 45,000, 2019, 30,000, with the finale of 18,000 set for in 2020.33 Given the high numbers of refugees at this time, and by looking at how in 2019, there were exactly 30,000 refugees admitted, it is evident that the caps were devastating on populations desperate to escape from persecution.34

30 Id.
33 Id.
34 Id.
III. LASTING IMPACTS OF THE POLICIES

Just revisiting the ratio between the annual refugee admittance ceilings and the actual numbers of refugees accepted into the United States each year, it’s clear that the refugee crisis is more imminent than ever. Considering not only the Afghan refugee crisis, but the events taking place in Ukraine, as well as considering the general impact of the COVID-19 pandemic suggests that this discussion is critical, as are the needs of those that are being forced to leave their homes, those have already been displaced, and those that have been waiting to find relief after years of being on hold in their reunion with loved ones.

Through examining both international policies, as well as domestic policies, it is evident that the past few years have brought nothing but digression. When the Refugee Act of 1980 was first passed, it was done so in order to have a clearer and more flexible basis for policies regarding refugees and immigrants; the amendments of previous policies were undertaken to accommodate for current events and better admit refugees.35 At a time where civil wars, terrorism, and other forms of violence ravage the world, these policies have been just a reversal in progress, and a backward step from the original intentions of legislation made decades ago.

Although with the new Biden administration, there are changes being brought forth, such as the raise of the refugee cap to 62,500 in 2021, and 125,000 for the fiscal year 2022, the impacts of previous policies are still imminent.36 The ongoing pandemic is often at the center of blame for the drop of numbers, but the policy decisions by the Trump administration is also at the cause of decline in refugee admissions as they are behind the lowest refugee admissions caps since 1980, when Congress created the modern refugee program.37

37 Id.
Although the recent caps, especially for 2022, are highly ambitious and suitable for the global climate in the status quo, given that the past five years have brought nothing but desperation and difficulties for many refugees attempting to settle in the United States, it is likely that there will be some time needed to adjust back to where we were before the beginning of stricter policies. The underwhelmingly lower numbers of refugees still admitted after the cap raise in 2021 is suggestive of this. However, overall, this is a direction towards improvement as raising the refugee cap realigns the U.S. with common legal precedent and serves to strengthen our international legal compliance.

VI. CONCLUSION

We return to the story of Sarah and the others that have been displaced during what was introduced to the world as the Afghan refugee crisis. Also, we think back to the hundreds, if not thousands of others that have been impacted because of the restrictive policies that came in the way of their successful resettlement. This comes as an inconsistency in the realm international standards of the treatment of refugee; there are clear laws and standards that guarantee the safe resettlement of such individuals. In the United States, these policies that hinder the safety of these refugees demonstrate a clear deviation from the expectations and the binds of both de facto and de jure international laws. With this gap existing between the domestic and international standards, there will inevitably be further conflict regarding the legality of U.S. policies, and the refugee population attempting to enter the United States will be at the forefront of facing the impacts thereof. To mitigate the differences and overcome these differences, recognition for how inconsistent these policies were, as well as determinations to create future policies that are not reflective of such patterns is necessary as the United States government and its administration moves forward.
In March of 2021, members of the LGBTQ+ community and former students at religious universities filed suit against the United States Department of Education. In what is now known as Hunter v. Department of Education, plaintiffs claimed that the inaction of the Department in confronting discrimination against LGBTQ+ students by religious universities was causing them damage to “mind, body, and soul.” The plaintiffs argued that the Title IX Religious Exemption was unconstitutional and “seemingly permits the Department to breach its duty” to prevent sex discrimination at universities that receive federal funds. Moreover, they asserted that the exemption

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3 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.

fails under the Equal Protection and Establishment Clauses of the United States Constitution.\(^5\)

Tensions between LGBTQ+ rights and religious liberty have escalated in the past decade. For example, issues ranging from housing disputes to adoption vetting illustrate the increased scrutiny and strain on the expression of religious conviction.\(^6\) In the former landmark case legalizing gay marriage, *Obergefell v. Hodges*, the Supreme Court stated that belief in traditional marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world”.\(^7\) Now, only five years later, expressions of personal religious views on the sanctity of marriage are questioned and criticized at every front.

Students attend Brigham Young University for the niche environment it provides them during a crucial and developmental stage in life. The Title IX Religious Exemption allows BYU to maintain traditional views and standards for marriage and sexuality. Striking down the religious exemption would prohibit BYU, and other religious universities, from expressing their religious beliefs through honor codes (personal codes of conduct for the school). Moreover, its removal would force them to adopt standards set forth by the government, even if doing so contradicts their doctrine and closely held beliefs.

In responding to *Hunter v. Department of Education*, the courts must decide how to balance two compelling state interests: protecting students against LGBTQ+ discrimination while attending religious universities, and the constitutional right for those institutions to exercise freedom of religion. Striking down the Title IX Religious Exemption would force religious universities to either abandon their sincere religious beliefs or forgo federal funds that allow students to attend their school. Students with financial disadvantages, then, could not attend the university of their choice, compelled instead to attend where they could apply for federal aid without question.

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\(^5\) *Id.* at 3.


The Title IX Religious Exemption allows religious universities to provide a religious education—one that requires students to follow a high moral code and provides a unique religious environment. Furthermore, students who seek a non-religious education may choose to attend a wide variety of state schools, private institutions, or even less strict religious universities. The Title IX Religious Exemption is crucial for maintaining diversity in higher education atmospheres, specifically religious diversity. Students can choose where they attend school and how they might pursue their values as they receive an education.

Legal precedent establishes and grants autonomy to religious universities to carry out internal operations and religious educational oversight. Although secular organizations are subject to comply with Title IX, religious institutions are granted specific independence in choosing their employees and determining admissions policies. The Title IX Religious Exemption provides this same autonomy to religious universities in deciding the makeup of their student body and the moral expectations placed on them. Navigating a balance between the Establishment Clause and Free Exercise Clause is nuanced and sensitive. The Title IX Religious Exemption is crucial for the survival of religious universities and their ability to provide the type of religious education that their beliefs demand. Failing to uphold religious exemptions under Title IX would impede the free exercise of religion, force religious universities to become indistinguishable from non-religious universities, and rob students of crucial religious higher education.

This paper first outlines the history and evolution of Title IX, defines its use, and identifies certain exemptions by referencing eight cases where Title IX applies. In the following section, I provide a brief overview of both an initial purpose and current application of Title IX and the effects of its absence. Next is a review of precedents set through cases wherein religious exemptions are called into question; standards set by these cases prove to either establish or deny

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8 See also Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (2020).
religious exemption by the Supreme Court. The article then explores some limitations of the application of Title IX and the constitutional statutes that support it and discusses both the potential detriments of its misuse and the involvement of the government to prevent misuse in certain circumstances. In the final section, I briefly summarize the significance and constitutionality of Title IX and encourage greater consideration of the impact of this issue: the effect on access to the free exercise of religion if we fail to defend and uphold Title IX.

II. BACKGROUND

A. History of Title IX

In determining the constitutionality of the Title IX Religious Exemption, it is helpful to review the history of Title IX—specifically, why Title IX was created and how it has been applied and modified over time. Before the enactment of Title IX in 1972, women experienced substantial discrimination in education. In the landmark case of United States v. Virginia, the Supreme Court recognized that “our Nation has had a long and unfortunate history of sex discrimination.”9 Some schools prohibited women from attending without exception, while others restricted their access through quotas that determined the number of women who should be accepted to a university.10 In 1970, only 8 percent of women age 19 or older had graduated college and discrimination went beyond college admissions alone: women

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 9 tice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf (“[I]n the forty years since its enactment, Title IX has improved access to educational opportunities for millions of students, helping to ensure that no educational opportunity is denied to women on the basis of sex and that women are granted “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” U.S. v. Virginia, 518 U.S. 515, 532 (1996)).

10 United States Department of Justice, Equal Access to Education: Forty Years of Title IX, The History of Title IX, 2 (June 23, 2012), https://www.jus -
 10 tice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.
had restricted access to particular majors or courses of study, including medicine; they were offered fewer academic opportunities and scholarships and were required to adhere to harsher rules than male students; women who attended college despite these limitations experienced further discrimination in the workforce and academia, as women faculty were rare and male professors were granted tenure over their female counterparts. The overt discrimination against women in higher education was addressed by the passing of Title IX by Congress on June 23rd, 1972—a federal statute that prohibits discrimination based on sex in “educational programs or activities” that receive federal funds, and is enforced by the Office for Civil Rights under the Department of Education.

B. Religious Exemption

During the creation of this statute, Congress provided an exemption to allow religious universities to be exempt from Title IX in circumstances that burden sincere religious beliefs. To prohibit non-religious universities from using the exemption to discriminate, the statute includes two requirements that universities must meet to qualify for the religious exemption—a university must (1) be controlled by a specific religious organization, and (2) prove that adhering to Title IX would burden the religious beliefs held by the university. The stipulation that a university must be organized or defined by a specific religion means that a university cannot simply

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11 Women in America: Indicators of Social and Economic Well-Being, White House Council on Women and Girls, March 2011, p. 19 (changes between Title IX’s enactment and 2009 show that “approximately 87 percent of women had at least a high school education and approximately 28 percent had at least a college degree, up from 59 percent with a high school education and 8 percent with a college degree in 1970.”).


14 34 C.F.R. Part 106: Title IX regulations, Subpart B - Coverage § 106.11 Application & § 106.12 Educational institutions controlled by religious organizations.
be affiliated with any religion or merely subscribe to a set of beliefs; rather, universities must prove religious affiliation directly through a specific religion. For example, a Christian college that does not affiliate with a specific church but simply wants to uphold the principles of the Bible, would not qualify for the exemption. The second qualification requires a university to prove that complying with Title IX would unduly burden their religious beliefs. In other words, a university is not automatically exempt from all the demands of Title IX. Universities are only exempt from those parts of the law that would be contrary to their religious beliefs.

C. Protections Under Title IX

Since the creation of this statute, various cases clarify what Title IX does and does not protect. The case *United States v. Virginia* involved the Virginia Military Institute (VMI), which was an all-male public university. Petitioners argued that male-only admissions violated the Fourteenth Amendment of the Constitution and sought protection under the Equal Protection Clause. Defendants claimed the state could create the “Virginia Women’s Institute for Leadership” (VWIL) to be an analogous institution to the VMI as an all-girls school. The court ruled that the VMI was unconstitutional in excluding women at their university: the school failed to prove “exceedingly persuasive justification” for excluding women and that the gender-biased admissions policy furthered educational diversity or other compelling interests. The proposed VWIL was not equivalent to the VMI as it would not provide women with analogous military training and opportunity. Ultimately, sex discrimination is

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15 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a) (Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization.).


17 *Id.* at 517.

18 *Id.* at 534.
subject to heightened scrutiny and the actions of VMI failed under the U.S. Constitution.

The Supreme Court later expanded Title IX to include further protections for women as they interpreted the statute—protections for sexual harassment and increased equality in sports activities. The case *Cannon v. University of Chicago* determined that the government could hold schools accountable for sex discrimination. The female plaintiff, in this case, was denied admission to a private medical school that was receiving federal funding. Before this case, Title IX did not recognize the right of an individual to bring suit for damages under the statute. This case determined that there was a private cause of action and created a valuable tool for students as they were now allowed to sue their universities for damages based on discrimination.

Title IX also protects students against sex-based harassment. *Davis v. Monroe County Board of Education* involved plaintiff Aurelia Davis, who sued the Monroe County Board of Education for being complacent in her child’s suffering of sexual harassment. The court stated that the school board acted with “deliberate indifference” and ignored complaints made on behalf of the harassment. The Court decided that the complacency of the school toward harassment and failure to act prohibited Davis’ daughter from accessing the educational equality provided under Title IX. Further, this case determined that Title IX includes a private right to education and individuals can sue for private damages. In 2010, the case *J.L. v. Mohawk*


20. *Biediger v. Quinnipiac University*, 928 F.Supp.2d 414, 473 (D. Conn. 2013) (Judge Underhill concluded that the university had “failed to demonstrate a significant change in the quantity and/or quality of athletic participation opportunities provided to its female students.”).


24. *Id.* at 651.
Central School District extended the protections against sex-based harassment to those who do not conform to gender stereotypes.\(^{25}\) Subsequent to the matter, the school was required to implement anti-harassment training and monitoring.\(^{26}\)

Finally, the protections of Title IX extended to women’s sports. In *Biediger v. Quinnipiac University*, Quinnipiac University eliminated several varsity sports teams, including the women’s varsity volleyball team; in its place, the school introduced women’s competitive cheerleading as a new varsity sports team, rather than maintaining the volleyball team.\(^{27}\) The so-called “equality” sought by the school was found, instead, to “systematically and artificially [increase] women’s teams’ rosters and [decrease] men’s teams’ rosters to achieve the appearance of Title IX compliance.”\(^{28}\) The court held that cheerleading did not count as a sport under Title IX and that the school could not count those female cheerleaders as athletes under Title IX.\(^{29}\) This decision required the school to provide more positions on athletic teams for women.

Perhaps one of the most noteworthy modifications made to Title IX took place in 2021 by the Department of Education through the Office for Civil Rights.\(^{30}\) Under the Joe Biden administration, the Department expanded the protections of “sex” as outlined in the Title IX statute to include both sexual *identity* and sexual *orientation*.\(^{31}\) This change was made in light of the ruling of *Bostock v. Clayton County*, which similarly expanded the definition of sex in


\(^{26}\) *Id.*


\(^{28}\) Biediger v. Quinnipiac Univ., No. 10-3302, 5 (2d Cir. 2012); *see also* Biediger v. Quinnipiac Univ., 616 F. Supp. 2d 277 (D. Conn. 2009); *see also* Biediger v. Quinnipiac Univ., 3:09-cv-00621-SRU (2d Cir. 2012).

\(^{29}\) *Id.* at 10. *See also* Biediger v. Quinnipiac Univ., 728 F. Supp. 2d, at 92.


\(^{31}\) *Id.*
Title VII of the Constitution, as it “prohibits employment discrimination based on race, color, religion, sex, and national origin.”32

D. Exceptions Under Title IX

U.S. Supreme Court rulings established the ministerial exception which gives religious institutions a high level of autonomy. This exception prohibits employees who perform religious functions from taking suit against religious institutions.33 The ministerial exception was upheld by the Supreme Court in the ruling of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC.*34 Although the Supreme Court did not adopt a rigid formula for the ministerial exception, they did determine that religious institutions, including religious schools, have complete control over who they hire and fire, free from government intervention.35

The ministerial exception was strengthened by *Our Lady of Guadalupe School v. Morrissey-Berru.* In that case, a history teacher who taught only secular subjects, and who had little religious training or coursework, was fired by the religious school that employed her.36 She filed suit against the school, claiming discrimination on the grounds that she was primarily a secular teacher, rather than a representative of their religion.37 The Supreme Court held that they could not determine who is or is not considered a “minister” to a religious organization.38 Although she was not teaching religious material, the religious institution still considered the teacher a

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35 *Id.*
38 *Id.*
“minister” or representative of their religion. She was, therefore, subject to the exemption held by the school and could be fired at the school’s discretion.

E. Title IX & Higher Education

The history of religion in higher education is also relevant in determining the constitutionality of the religious exemption under Title IX. Higher education was widely championed by predominantly religious organizations in the United States. Some of the oldest universities in the U.S. are religious schools or identified as such in their infancy—the first of which included Harvard (1636, congregational), William and Mary (1693, Anglican), Yale (1701, congregational), Princeton (1746, Presbyterian), Columbia (1754, Anglican), and Brown (1764, Baptist).\(^{39}\) Religious freedom and religious education were inherently part of the pursuit of education since the founding of our country, and moral and religious views were interwoven in higher education until the privatization of religion at the beginning of the 1900s.\(^{40}\) Diversity increases in higher education as more students attend college and there are more options for both religious and secular schools—private or public. The Supreme Court has been tasked with drawing lines between protecting religious freedom and avoiding excessive government entanglement in religion and education.

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40 Id.
III. The Purpose of Title IX

Title IX was created to provide equal opportunities in higher education for women. Because of historically widespread discrimination against women, substantially fewer women were permitted to attend college than men were. Although the Title IX statute does function to prohibit universities from perpetuating discriminatory policies, the primary creation of the statute was to combat widespread discrimination based on sex in higher education.

Prior harm and certainly future injury to protected groups were further curtailed by the initial and intentional protections against such outcomes established through Title IX. Harm or injury, for the purpose and consideration used in this paper, are implied as comprehensive terms for any “wrong or detriment done by one individual (or group of individuals) to the body, rights, reputation, and physical or mental well-being, etc.” of another individual (or group of individuals). Surely, the allowance of two such protected classes, and their subsequent rights (on the basis of sex or religion, in this case), to be pitted against each other, is an interference with the

41 U.S. DEPT. OF JUSTICE, Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations, Purpose, ¶ 1, https://www.justice.gov/crt/title-ix (last visited Jan. 8, 2022) (“Congress enacted Title IX with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices in education programs, and to provide individual citizens effective protection against those practices.” See Cannon v. University of Chicago, 441 U.S. 677, 704 (1979)).

42 U.S. DEPT. OF JUSTICE, Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations, Legislative History, ¶ 2, https://www.justice.gov/crt/title-ix (last visited Jan. 8, 2022) (“As the women[’s] civil rights movement gained momentum in the late 1960’s and early 1970’s, sex bias and discrimination in schools emerged as a major public policy concern. Women, who were entering the workforce in record numbers, faced a persistent earnings gap compared to their male counterparts. As a consequence of the equality in the workforce debate, Americans also began to focus attention generally on inequities that inhibited the progress of women and girls in education.”).

legally protected interests of an individual. Harm or injury to the rights of individuals is considered a crime according to criminal case law. It follows that injury through negligence to protect religious freedoms and rights is unlawful—both via Title IX and under the First and Fourteenth Amendments.

IV. THE MINISTERIAL EXCEPTION

The ministerial exception, established by the Supreme Court, allows religious institutions to have autonomy over the internal affairs of the church including hiring and firing of their employees, or anyone they consider to be a “minister”. Multiple cases strengthen this autonomy granted to religious institutions. For example, the ruling of Corporation of Presiding Bishopric v. Amos gave churches autonomy over any hiring or firing that may appear completely secular.44 The plaintiff, in this case, worked for a church-owned gym for several years but was fired when he did not comply with the religious expectations of the institution. His church required that he (like all their employees) pay a religious tithe to the church, which he did not pay. His job was primarily secular since he maintained the gym facility owned by the church. The Supreme Court determined that the discriminatory firing by the religious institution of the employee with an almost entirely secular job was not only constitutional, but it was also not a violation of the Establishment Clause.45

This case affirmed that the government cannot invalidate decisions made by a religious institution regarding who will administer in the faith and represent that institution. Religions are allowed complete autonomy in deciding the standards for employees, who they hire and fire, and who they consider a minister. These determinations are at the discretion of the religion, and without government interference, which was endorsed in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, by Justice Thomas:

45 Id.
The question of whether an employee is a minister is itself religious, and the answer will vary widely. Judicial attempts to construct a civil definition of “minister” through a bright-line test or multi-factor analysis, risk disadvantage those religious groups whose beliefs, practices, and membership are outside of the “mainstream” or unpalatable to some.46

_Hosanna-Tabor_ served to strengthen the autonomy given to churches in _Corporation of Presiding Bishopric v. Amos_. A teacher at a religious school was fired after having taken significant time away from work for health concerns.47 It appeared that she was fired for her health problems and not for religious reasons; the Supreme Court decided that although her job was secular, her position as a teacher at the religious school was deemed a ministerial position by the religious school and would be recognized as such.48 Beyond what was established in _Corp. of Presiding Bishopric_, Chief Justice Roberts clarified that the ministerial exception applies to hiring and firing based on religious standards versus those that are not. In the case of _Hosanna-Tabor_, he stated, “The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter “strictly ecclesiastical”—is the church’s alone.”49 This case further substantiates the strength of autonomy granted to religious institutions.

Based on these precedents, religious institutions may terminate an employee for any reason, religious or not, without government intervention. In the case of _Hosanna-Tabor_, even if the plaintiff was terminated for her health problems, and not for religious reasons,

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47 Id. at 3.
48 Id. at 19.
49 _Hosanna-Tabor_, No. 10–553, slip op. at 19–21 (Jan. 11, 2012) (today the Court holds only that the ministerial exception bars an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her (internal quotation marks omitted)); _see also_ Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952).
any hiring or firing of “ministers” falls under the ministerial exception. Although hiring and firing “ministers” is different from rejecting and accepting students, the autonomy established by the courts through the ministerial exception is significant. The complete control of “ministers” by religious organizations leads us to believe that the makeup of a student body and standards of conduct would be also in the control of the religious university. A minister is a position that is more closely connected with a religious institution than a student is; however, religious universities claim that their student body is also an extension and representation of them as a religion.

A minister influences members of the faith and is tasked with teaching, befriending, and encouraging all to live per the faith. The individuals in a student body may be more influential on each other than a teacher or minister. Ministers are tasked with preparing the students to move forward into society with the belief in the principles of the religion. It is often the moral standards and religious convictions of the students that encourage other students to increase their own belief or continue in that faith, and not the teachers. The ratio of teachers or religious leaders to students does not permit students to meet one on one with these leaders frequently. A student may only be able to meet with a religious leader or teacher once a month. Thus, the regular religious influence that a student may experience through education is often derived primarily from their peers.

The students that create a student body may be considered ministers. Often, peer relationships have a strong influence on both students and teachers within the faith, whether their peers are members of the faith or not. The moral and religious standards for students created and upheld by a university impact the religious convictions of its students and the furthering of beliefs and values that the religion seeks to encourage. Viewing students as ministers, or representatives of a religious institution, gives religious universities autonomy to decide who will be admitted, the makeup of the student body, standards for students, and potential dismissal of students. Furthermore, the autonomy over the makeup and standards of the student body should be free from government intervention if they qualify to use religious exemption under Title IX. If the religious university is from a specific church and can prove that following Title
IX is contrary to their religious beliefs, they are allowed to use the religious exemption. The autonomy given to religious institutions, established by the ministerial exception, links religious employment decisions with religious university decisions. If a university believes an honor code with specific standards is essential in providing what they consider to be a religious education, that is for the religion to decide, free from government interference.

Again, it is the religious institutions themselves that decide who they consider a minister. Several religions and, by extension, their religious institutions consider students to be impactful ministers as they share their faith through friendship, by participating in weekly services, and even as counselors to one another as they navigate university courses together. In the same way that a religious university can hire and fire teachers, it can also accept, deny, or expel students at its discretion. It is important to note a distinction, however, between the autonomy of a religious institution over who they employ as ministers or accept as students, and that their exemption from some limitations is still subject to other limitations under the statute. Because limitations to, or qualifications for, religious exemption or autonomy must exist at some intersection, the language in Title IX requires the institution to prove that compliance with Title IX would be contrary to their religious beliefs. Religious universities may exercise their prerogative over the religious education they provide or expectations of their students; a university qualified for a religious exemption, however, is not permitted to simply forgo all Title IX requirements in their policies and decisions.

For example, a religious institution offering specific classes only to men or only to women, need only prove that abiding by Title IX would go against their religious beliefs. If the classes were based on sincere religious beliefs where students were taught specific religious principles viewed as unique to their sex, such actions would qualify for a religious exemption under Title IX. Similarly, if a religious university that qualifies for the Title IX exemption were to maintain an abundance of men’s sports teams but neglected to have any women’s teams, they would need to prove that creating equal teams for men and women violates their religious beliefs. In the case that a school has no sincere religious reasons for giving more sports
opportunities to men than women, such action would not qualify under the Title IX Religious Exemption. These examples are hypotheticals of how the Supreme Court could limit the extent to which Title IX Religious Exemption extends. Although religious universities should be granted a high level of autonomy as established by the ministerial exception, they must still be subject to the requirements outlined by the religious exemption.

Importantly, different universities have different levels of religious affiliation. There may be limits placed on the religious exemption via Title IX by the courts which might include a heightened level of religious involvement. For example, some universities may be affiliated with a religion, but teachers are not required to be members of the religion, and students are not required to take courses on religious material or follow any moral code. Other universities may act as a more literal extension of religion with religious requirements for teachers and students, tuition costs subsidized by religious tithes, and religious courses or requirements for all students who attend. Although the connection and commitment of religious universities related to various religions differ, the extent to which an institution is involved in or affiliated with religion may play a role in determining which schools may qualify for the exemption and which ones do not.

V. Diversity in Higher Education

Access to public, private, and religious education promotes a variety of options for those who pursue education at any level. The option for students to choose where they attend school, by default, encourages diversity in how and what a student chooses to study. Arguably, a university education is sought after and used to further develop one’s belief systems and world views; it follows that the ability of a student to contribute to society is shaped by their decision to not only attend any university available to them but to choose where and what that education might be. Theological studies point to religious education being central to the development of students and societies, both secular and sacred. To limit students’ options to a higher education system that is strictly private or only public (non-religious) would not only offend the First Amendment of the Constitution, but it would
also effectively incite a rebellion against the very tenet upon which our country was founded: religious freedom. Religious freedom in higher education must persist as an essential government interest.

If the government were to further restrict religious universities and prohibit students from pursuing their sincere views on the sanctity of marriage, students’ ability to attend a school with the religious education they desire would be severely limited. The Title IX exemption is crucial in allowing religious universities to provide the niche type of education that students continue to seek. The government does not decide what religious education should entail; the educational program and the extent of religious affiliation or involvement are determined by the religious institution. This provides students with a variety of both religious and secular emphases at a school of their choosing. Schools can be secular in their entirety, have religious roots, have religious affiliations, or be completely connected with a specific religion.

Religious educational institutions decide for themselves whether and to what degree they are exempt from Title IX. “In the nearly 50 years since the enactment of Title IX, the Office for Civil Rights has never denied a claim to religious exemption...[t]herefore, a religious institution may presently decide what is a burden to their religious beliefs.” However, the limitations to these burdens have not been defined. For example, there is a difference between requiring all admitted students to abide by a code of conduct and discriminating based on sexual orientation only upon application for admission, which an applicant should—and likely would—be aware of. Similarly, there is a difference between discrimination based on how someone identifies and discriminating against someone who is breaking a code of conduct that all students must follow. Whether or not a religious school may refuse a student admission based on the religious beliefs of the school being contrary to the applicants’ (such as when a student identifies as LGBTQ+) has not been established as a rule.

Those who disagree with the views or values of a university—or may even find their policies to be offensive—can apply to or attend a different religious school or a variety of other state or private schools. School choice allows students to choose a university that best fits their priorities and religious alignment in higher education. To limit religious universities’ approach to higher education through Title IX would hinder students’ ability to find and flourish in an educational environment they seek. The religious exemption afforded in Title IX allows all students, both religious and non-religious, to choose a school that will help them develop in the ways they desire. The absence of the Title IX Religious Exemption only hurts students who wish to attend religious schools.

In Obergefell v. Hodges, the Supreme Court implied that traditional views on marriage still maintain a place in our society and that “reasonable” and “sincere” people may hold these beliefs. A religious university run by a religion with traditional views on marriage and qualify for the Title IX Religious Exemption. Because of this, the institution may be exempt from complying with Title IX, if it is contrary to their sincere religious beliefs. In providing a religious education they may have a code of conduct or code of ethics that includes restrictions on marriage that coincide with their sincere beliefs on traditional marriage.

As an institution may be directly controlled by and affiliated with a religion, their code of conduct may be central to the type of education and environment they provide. Because students seek a spiritual and religious education, they may be willing to abide by the policies a university requires students to maintain (such as specific moral or physical standards), or even tolerate the policies they disagree with. Under Title IX, religious-exempted schools should be allowed to keep a code of conduct that maintains a specific and limited moral standard (a policy dealing with the sanctity of marriage or

51 Obergefell, 576 U.S. ___ (2015) (the Supreme Court held that “state bans on same-sex marriage and on recognizing same sex marriages duly performed in other jurisdictions are unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment.”).

52 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a)
sexuality, for example). Because students may attend public, private, or religious universities, it is up to students to decide if they want to attend a university with these views and moral expectations.

VI. FEDERAL FUNDING

Funding related to Title IX remains a key element in determining the constitutionality of the Title IX Religious Exemption. A university will not receive federal funds if they do not comply with the requirements of Title IX. Religious schools, like private universities, are allowed to keep policies that public schools cannot. Religious universities are allowed specific exemptions that do not preclude them from accepting federal funding. Public schools and private and religious schools differ in their tax exemption status, requirements, and federal funding available to them.

The recently filed case of Hunter v. Department of Education is a class-action lawsuit attempting to prevent religious universities from receiving federal funding because of the religious exemption under Title IX. More than thirty LGBTQ+ students argue that the religious universities they attended kept discriminatory LGBTQ+ policies related to religious bias and because of those policies, the complainants were negatively impacted. The students claim complacency of the Department of Education toward “tax-payer funded discrimination,” which they assert is a violation of their due process and equal protection rights. Further, the plaintiffs contend that the Title IX Religious Exemption maintained by these schools is unconstitutional. In response to the argument presented in this case and the proposed outcome to stop religious universities from receiving

55 Id.
56 Id.
federal funds, the precedent established in *Espinoza v. Montana* is applicable.\footnote{Espinoza v. Montana, 591 U. S. ___ (2020). Public elementary and secondary schools are also subject to the sex discrimination prohibitions of the Equal Protection Clause of the U.S. Constitution and the requirements of the Equal Educational Opportunities Act of 1974.}

*Espinoza v. Montana* asks and answers the following pertinent question: has a violation of the Free Exercise Clause and the Equal Protection Clause occurred if a state maintains a law that prohibits a general scholarship for education to be used at a religious school? The case argued that a general government scholarship offered to children or families to help pay for school was discriminatory if it excluded religious schools.\footnote{Espinoza, 591 U.S. at 12 (2020).} The crux of the case centered on families who were required to choose between being eligible for the scholarship or having their children attend the religious school they had chosen. Several families were denied the scholarship because their children continued to attend religious schools. Montana argued that due to their “no aid” provision that restricted them from providing any aid to religion, no breach of the Free Exercise Clause had occurred.\footnote{Id. at 7.} The Supreme Court stated, “...Montana’s interest in creating a greater separation of church and State than the Federal Constitution requires cannot qualify as ‘compelling’ in the face of the infringement of free exercise here”.\footnote{Espinoza v. Montana, No. 18–1195, slip op. at 18-20 (Jun. 30, 2020) (“Because the Free Exercise Clause barred the application of the no-aid provision here, the Montana Supreme Court had no authority to invalidate the program on the basis of that provision.”).} The Supreme Court held that the policy in question did, in fact, “[discriminate] against religious schools and the families whose children attend or hope to attend them, [and was] in violation of the Free Exercise Clause of the Federal Constitution.”\footnote{Montana, slip op. at 6-22.} Students cannot be discriminated against for their religion or attending a religious school.
Because students are not denied general scholarships due to their religious school or affiliation, they choose which institution they pay those funds or scholarships to. Federal funds that are ultimately received by schools are not paid to the schools themselves. Rather, schools receive funds (that are technically issued by the federal government) through students by way of the Free Application for Federal Student Aid (FAFSA): need-based financial aid and loans offered to students by the federal government to cover the cost of education. Because of this, the government remains unentangled from religion in education, since the funding is awarded directly to the student and not the institution. Students may then exercise their right to attend the school they desire using the funds they have been awarded. Applying the precedent established in Espinoza v. Montana, the government cannot prohibit schools from accepting payment from students using federal funds, nor can it prevent students from having access to FAFSA simply because they choose to attend a religious school (except for schools for clergy). Because of the way federal funds through FAFSA are distributed and used, there is no breach of the Establishment Clause.

In the case of Hunter v. Department of Education, the plaintiffs seek to prevent religious schools that are currently operating under the Title IX Religious Exemption from receiving federal funds. The case of Bob Jones University v. The United States provides such an example of federal funding being restricted from a religious university based on their practices. Bob Jones University maintained a policy that was religiously motivated, which prohibited interracial dating and marriage. The Supreme Court ruled that protecting against racial discrimination was an overriding government interest and that such discrimination triggered strict scrutiny; Bob Jones University


faced a decision: to either do away with their racially discriminatory policy or lose their tax-exempt status. The U.S. Supreme Court ruled (8–1) on May 24, 1983, that nonprofit private universities that prescribe and enforce racially discriminatory admission standards based on religious doctrine do not qualify as tax-exempt organizations under Section 501(c)(3) of the U.S. Internal Revenue Service. The university held its ground—maintaining policies of racial discrimination, though based on religious beliefs—and was responsible for paying back taxes dating to their original notice from the IRS in 1970. The university lost its tax-exempt status and didn’t regain it until 2017. Although this case does not deal with vouchers or scholarships, it is an example of the limitations on the autonomy of a religious university (or their discriminatory policies) and subsequent loss of tax exemption status and federal financial aid.

The case of Bob Jones University v. the United States deals with racial discrimination, which differs in severity from discrimination based on religion or sex. For example, in the case of Craig v. Boren, the court created a level of scrutiny that lies between rational basis and strict scrutiny called intermediate scrutiny: the court struck down an Oklahoma law that allowed 3.2 percent beer to be sold to women 18 and older, but only sold to men 21 and older. Although this law was based on a series of statistics for gender norms in those age groups, the court determined that the general habits of

64 Id. at 581 (“Until 1970, the IRS extended tax-exempt status to Bob Jones University under § 501(c)(3). By the letter of November 30, 1970, ...the IRS formally notified the University of the change in IRS policy and announced its intention to challenge the tax-exempt status of private schools practicing racial discrimination in their admissions policies.”).

65 Id.

66 Id. (“[On] April 16, 1975, the IRS notified the University of the proposed revocation of its tax-exempt status. On January 19, 1976, the IRS officially revoked the University’s tax-exempt status, effective as of December 1, 1970, the day after the University was formally notified of the change in IRS policy.”).

67 In February 2017, BJU president Steve Pettit announced that Bob Jones University had, after more than 30 years, regained its tax-exempt status.

a demographic were not enough to justify gender-based discrimination. In striking the Oklahoma law down, the court outlined that sex discrimination was subject to intermediate scrutiny, not simply a rational basis.

Notably, discrimination based on sex triggers intermediate scrutiny, while discrimination based on race triggers strict scrutiny. The precedent established in *Bob Jones University v. the United States* should not be applied in this instance because the interest of protecting against racial discrimination is held higher than the free exercise of religion; similarly, the free exercise of religion is held in higher interest than religiously motivated sex discrimination. For this reason, a religious school with policies that include religiously motivated discriminations, but do not violate the discriminatory limits of the statute, should not lose its religious exemption or federal funding.

Conversely, Title IX does not apply to schools that do not receive federal funding. A private school or university, for example, that is funded entirely from sources other than the federal government is not obligated to prohibit the same activities that Title IX prohibits. However, if an educational organization receives federal funds, it cannot choose to provide services to some people and not others. “For example, if a religious organization receives public money to run an emergency food distribution program, that organization may not serve only persons of their faith and turn away others; institutions that use federal money may not discriminate against a person

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69 U.S. DEP'T OF JUSTICE, *Title IX Legal Manual: Scope of Coverage*, Federal Financial Assistance, ¶ 1, https://www.justice.gov/crt/title-ix (last visited Jan. 8, 2022) (“Title IX prohibits, with certain exceptions, any entity that receives “federal financial assistance” from discriminating against individuals on the basis of sex in education programs or activities. The clearest example of federal financial assistance is the award or grant of money...It is also important to remember that not only must an entity receive federal financial assistance to be subject to Title IX, but the entity also must receive federal assistance at the time of the alleged discriminatory act(s)...” See Huber v. Howard County, Md., 849 F. Supp. 407, 415 (D. Md. 1994)).
seeking help who is eligible for the service.” In addition, organizations may not require those they serve to profess a certain faith or even to participate in religious activities without qualifying for religious exemption.

As it stands, Congress delegated to each funding agency the authority to implement the prohibition of sex discrimination (in educational programs or activities of recipients of federal financial assistance under Title IX) by issuing regulations that have the force and effect of law. Students who receive federal funds under FAFSA are not currently discriminated against based on sex or gender identity (with few [religious] exceptions). If students are not allowed to choose to attend a religious university using federal funds, they are effectively being discriminated against based on religion. If both the letter and spirit of the law are to be upheld and honored, the government must neither “further nor inhibit” religious agenda. The failure of the government to protect this balance, or government support for cutting off federal funding, instead, implicates governmental action in favor of inhibiting religion.

VII. The Establishment Clause & Free Exercise Clause

The current tension between religious exemptions of Title IX and LGBTQ+ rights demonstrates the careful balance required by the Establishment Clause and Free Exercise Clause of the constitution. Together, with other constitutional protections, the Establishment Clause—which prohibits the government from establishing or


furthering religion, and the Free Exercise Clause—which ensures that religious practice is free from government intervention, afford individuals with protections to both practice religion and secure government neutrality on those religious practices. Title IX Religious Exemption does not offend or impede the Establishment Clause of the Constitution. An example that illustrates how these concepts work together is illustrated by changes in religious freedom in recent years. The stricter “Lemon Test” used by the Supreme Court was replaced with the looser protections for religious liberty in Employment Division v. Smith. Under the Lemon Test, statutes for religious freedom set by the government must meet three standards, including 1) the government action must have a legitimate secular purpose, 2) the effect of the government action must neither advance nor inhibit religion, and 3) the result of the government action must not excessively entangle the government with the affairs of religion.

The subsequent precedent in Employment Division v. Smith, then, would be foundational in deciding whether the Title IX Religious Exemption is constitutional. Employment Division v. Smith determined that generally applicable laws that do not target a specific religious practice or group are not in violation of the Free Exercise Clause of the First Amendment, and therefore constitutional. The court can enforce generally applicable laws that are neutral, regardless of whether a secondary result has limitations to religion. In this case, laws against sex discrimination already exist via Title IX. Title IX is a generally applicable law. Removing the religious exemption, however, or essentially making a new law that says the religious exemption is no longer valid is not a neutral law. It specifically targets religious universities and limits their ability to freely exercise religion. Taking away the exemption would be purposefully trying to limit religious exercise and is not neutral.

73 U.S. CONST. Amend. I, § 1.2 Establishment Clause.
74 U.S. CONST. Amend. I, § 1.4 Free Exercise Clause.
See also https://law.justia.com/constitution/us/amendment-01/03-free-exercise-of-religion.html
The current facts can also be compared to those of *Fulton v. City of Philadelphia*. This case involved the refusal of Catholic Social Services (CSS) to train and certify foster parents who were same-sex couples, which was contrary to a state law that prohibited discrimination based on sexual orientation and gender identity. Because the government has control over foster care and adoption, they must be even more careful about how they limit religion. The Supreme Court ruled that the government could not remove CSS from making contracts with them for adoption services. Their religiously motivated discrimination was not unconstitutional as the law was not applied neutrally in this case and inhibited the free exercise of religion.

VIII. Social Harm

It could be argued by those seeking retribution against religious universities who discriminate based on religious policies that there are social benefits to removing religious barriers in education such as religious exemptions and discrimination. However, the collective negative impact associated with the intervention or disruption of social norms or “controls”—the variables designed for a specific religious nature—would be substantial in a largely religious and community-based environment designed to be beneficial for those who choose it. Removal of the religious tenets of an educational environment would do more harm than good. Social control theory proposes that relationships, commitments, values, norms, and beliefs encourage the conformity of people; thus, if moral codes are internalized and individuals are tied into and have a stake in their wider community, they will voluntarily limit their propensity to commit [divergent] acts, or “harm” others.

In any educational environment, two of the largest objectives of a school that directly benefit the institution and the student are edu-


cational success and attrition (pursuing vs dropping out). Social controls (variables) are employed to achieve these goals and “encourage conformity” in the process. Inherent social harm is caused by students who choose to attend a school but refuse to abide by the policies of that institution or contribute to the commitments and values of the university. If the intervention of these “controls” by individual students who do not want to conform (and could choose not to, by attending school elsewhere) is permitted, the larger student body and university “community” are then compromised.

Studies aimed at addressing such issues show the positive impact of the protection provided for those seeking higher education under current laws. The socioeconomic groups examined in one study included those with opposing tendencies, understanding whether and how equality of access to higher education has changed over time, and the likelihood of different socioeconomic groups (gender, racial, and ethnic) entering various types of postsecondary institutions. The results of one study indicated persistent inequality concerning the socioeconomic background only, but notable improvements in access to postsecondary opportunities for both women and African Americans. This example establishes a core element of the equality, opportunity, and protection available to individuals under Title IX: members of minority groups (based on gender and race here), who have been largely and historically unprotected and underrepresented in education, now have increased access to higher education.

If the objectives of the protections under the Fourteenth Amendment and Title IX are to further protect and provide an opportunity for the marginalized, removing those protections may unravel the progress gained thus far. No evidence suggests that removing the religious exemption under Title IX—or worse, limiting Federal funding for those who would otherwise attend religious universities—would improve access to postsecondary education and opportunities for the very parties affected by its safeguards. Rather, those opportunities would be further limited. By keeping the current and constitutional statutes of Title IX it seems likely that access to higher

education for minority and protected groups would only continue to improve. There is harm done in thinking that to preserve the rights of some, the rights of others must be removed or infringed upon; under the current constitutional statutes there is protection for the rights of sex- and gender-based groups and religious-based exemptions.

IX. CONCLUSION

The Title IX Religious Exemption is crucial for preserving religious freedom, diversity in higher education, and federal funding for education. Case law establishes that autonomy granted to religious institutions is constitutional and those religious universities are free to make their own decisions in promoting and providing religious education. Restricting funding from religious universities that will not adopt policies contrary to their religious beliefs is incompatible with the “benevolent” or constitutional neutrality required and protected by the First Amendment of the constitution. Government involvement in religion and its foremost duty to defend both the Establishment Clause and the Free Exercise Clause is to ensure that those statutes complement and not contradict one another; the religious exemptions maintained by Title IX should continue to be supported with both neutrality and accommodation.

An area for future discovery would include the limitations to the religious exemption via Title IX. Case law has established an understanding and acceptance of differences between action and belief. However, all religious universities that currently accept students who use federal funding will be affected if the Title IX exemption is removed. So, should universities be allowed to seek religious exemption under Title IX in determining who to grant acceptance or denial from their university? Is there a distinction between requiring students to live up to a certain moral standard and denying someone entrance for their sexual orientation or gender identity? If Title IX Religious Exemptions are removed, other religious exemptions

might be consequently struck down as well. The Supreme Court’s decision on religious exemption bleeds into other areas of law when two government interests remain at odds. The future of the free exercise of religion will be irreparably altered if exemptions for religious institutions and universities cease to exist.

The Supreme Court has refrained from outlining rules in determining constitutional acts, and instead, is ruling on specific cases and facts on an individual basis. However, the determination of *Hunter v. Department of Education* may negatively affect the future of religious exemptions, sex discrimination, and religious instruction and diversity in higher education. More importantly, greater consideration of the long-term impact of such cases must be made before setting what is arguably a harmful precedent. The constitutionality of Title IX must not be the only issue in question; rather, we must consider the future of the free exercise of religion if we fail to defend it now.
A Balancing Act: Overcoming Incommensurability in Rights Adjudication

Samantha Knutson Jex

Introduction

If you asked your boss, neighbor, father-in-law, or the clerk at the grocery store which constitutional right is the most important, you would receive a vast array of answers. Some people would say that the right to free speech is more important than the right to privacy. Others would maintain that the right to bear arms is more important than the right to marry who you choose. The conclusion you would likely reach from this exercise would be that different fundamental rights matter more to different people. Because ranking fundamental rights is a subjective process, the concept of rights adjudication at the Supreme Court level can be disconcerting. Rights adjudication—the legal process of resolving a dispute regarding rights—in the United States' highest court influences who has rights as well as which rights will be upheld in various situations. The holdings of these cases have the potential to limit or expand the reach of fundamental

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2 Wex Definitions Team, Adjudication, Legal Information Institute (May 2020), https://www.law.cornell.edu/wex/adjudication#:~:text=A%20judication%20refers%20to%20the%20legal%20process%20of%20resolving,of%20the%20case%20have%20matured%20enough%20to%20.
rights Americans hold dear, whatever they may be, making the process of rights adjudication worth evaluating.

The Supreme Court’s current tiered system for rights adjudication suggests that the Court respects rights. This respect is demonstrated by their commitment to protect rights from unnecessary infringement by the government. The tiered system also suggests that the Court believes that not all rights are created equally since various rights are given different levels of scrutiny. In the past, the Supreme Court has applied these tiers of scrutiny to reject affirmative action programs that benefit groups that have not personally experienced discrimination, laws that target certain classes of people because of animus, and policies that exclude women from male-only institutions on the basis of stereotypes about men and women’s capabilities. These applications have prioritized rights over government agendas, emphasizing the importance of rights in our American federal system. While the existing tiers of scrutiny provide a strong framework for the Court to use as they adjudicate cases involving fundamental rights, they are not sufficient to be applied in cases involving conflicting fundamental rights—rights that the Court uses the highest level of scrutiny to protect because they are of primary importance in America.

In cases such as Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission and Cox Broadcasting Corp. v Cohn, both parties feel that their fundamental rights have been violated. The Court typically applies the highest level of scrutiny in cases involving fundamental rights because these rights are of primary importance to the American sense of liberty, but even the highest level of scrutiny is insufficient to deal with cases that involve conflicting fundamental rights for reasons that will be expounded in this paper. This paper
discusses the current systems in place for rights adjudication in the United States and internationally. I will examine the insufficiencies of both systems and the consequences of such insufficiencies to support my claim that a modified system should be applied in rights adjudication cases to ensure that all fundamental rights are given the deference they deserve. The modified system that I propose is called the “incommensurability test.”

**BACKGROUND**

**I. FUNDAMENTAL RIGHTS**

Fundamental rights are those seen as central to “the American scheme of ordered liberty.” In this paper, rights will refer to “claim[s] recognized and delimited by law for the purpose of securing [them].” The idea that we have inherent rights was powerfully articulated in the Declaration of Independence, which states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness.” That idea was reemphasized with the enumeration of rights in the Bill of Rights which was officially adopted in 1791.

In *Barron v. Baltimore*, Justice Marshall declared that the Bill of Rights only applied to the federal government. It remained that way until 1897 when the Supreme Court began applying the Bill of Rights to state actions via the Fourteenth Amendment through a process called incorporation. Today, most of the Bill of Rights has been incorporated to apply to the states. It is also through the Fourteenth Amendment that other rights have come to be seen as fundamental

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10 Declaration of Independence para. 2 (U.S. 1776).
11 Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).
rights. These include the right to privacy, the right to marry, the right to vote, and the right to travel.

It should be noted that if a right is deemed fundamental by the Supreme Court through the process of incorporation, it is not guaranteed to remain a fundamental right. In *Lochner v. New York*, decided in 1905, the Supreme Court found that the right to contract is a fundamental right protected by the due process clause of the Fourteenth Amendment. In justifying this decision, the Supreme Court focused on the importance of economic contracts in the context of individual liberty. This idea was overturned in *West Coast Hotel v. Parrish* in 1937. Here the Court declared that there is not a fundamental right to contract, saying, “The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.” Because incorporated rights are not included in the text of the Constitution and instead derive from contemporarily informed interpretations of the Constitution, incorporated fundamental rights may later be viewed as non-fundamental.

II. WHEN MIGHT A FUNDAMENTAL RIGHT BE PITTED AGAINST ANOTHER?

If litigants feel that a constitutional right has been violated, they turn to the Courts to seek redress. On occasion, both parties involved in a Court case feel that a fundamental right has been violated. Some examples include:

17 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
18 Id.
A. Masterpiece Cakeshop v. Colorado Civil Rights Commission

In 2012, Jack Phillips, owner of Masterpiece Cakeshop, chose not to make a cake for a same-sex couple’s wedding, citing religious reasons. The couple filed a charge pursuant to the Colorado Anti-Discrimination Act (CADA), which forbids discrimination based on sexual orientation. Supporting the same-sex couple’s case, the Supreme Court ruled that the right to marry is a fundamental right in *Loving v. Virginia*.\(^{19}\) In *Obergefell v. Hodges*, the Supreme Court held that that fundamental right includes the right to marry someone of the same gender.\(^{20}\) While denying someone a wedding cake is not directly denying their right to get married, it can be understood as discrimination based on a fundamental right. The treatment of such discrimination reflects how the Court views the underlying fundamental right. On the other side of the case was Jack Phillips. He viewed his cakes as acts of expression and, as such, exercises of his free speech. Additionally, he did not feel comfortable complying with their request for a cake because of his sincerely held religious convictions. He claimed that CADA attempted to inhibit his rights to free speech and to practice his religion, both of which are fundamental rights guaranteed by the first amendment. Thus, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the rights of freedom of speech and religion are pitted against the prevention of sex discrimination in the public sphere based on the fundamental right to marry.\(^{21}\)

B. Cox Broadcasting Corp. v. Cohn

*Cox Broadcasting Corp. v. Cohn* addresses the right to privacy versus the right to freedom of speech and the press.\(^{22}\) Martin Cohn’s daughter was raped and killed by a group of youth. During the

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22 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
criminal proceedings, a reporter covering the trial found the name of the rape victim on the indictments that were public record, though the name had not previously been announced. That day, the reporter broadcasted the name over a television station owned by Cox Broadcasting Corp. Cohn filed a case against Cox Broadcasting, claiming that his right to privacy had been invaded by the release of his daughter’s name over the television channel. The right to privacy has been recognized as a fundamental right since *Griswold v. Connecticut.* Appellants claimed that they had the right to broadcast the information under the First and Fourteenth Amendments. Hence, this case pits the right to privacy against the rights to freedom of speech and the press.

For cases like *Cox Broadcasting* and *Masterpiece Cakeshop,* the preeminent argument against rights adjudication is that rights are incommensurable, or that there is no common standard by which they can be judged. As Justice Kennedy stated, attempting to compare rights is like “judging whether a particular line is longer than a particular rock is heavy.” One can attempt to determine the weight of a line or the length of a rock, but the results of the attempt would be unsatisfactory at best. Similarly, one can attempt to compare the right to privacy and the right to free speech, but there is no common denominator that can be used to simplify the comparison. Fundamental rights are individual and protect very different aspects of American life, making it impossible to determine which is of greater worth or which right should trump all. Additionally, comparing rights creates situations in which one person’s fundamental rights are minimized because another person’s fundamental rights are being exercised which is antithetical to the very idea of individual rights. Thus, when certain cases necessitate that the Court adjudicate between incommensurable fundamental rights, the Court is essentially being asked to do the impossible.

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III. CURRENT SYSTEM FOR ADJUDICATING RIGHTS IN THE UNITED STATES

Currently, the United States has a three-tiered structure for adjudicating rights: the rational basis test, the intermediate scrutiny test, and the strict scrutiny test. The rational basis test is the lowest tier of scrutiny. The idea encapsulated by rational basis was applied in Munn v. Illinois, though some attribute the foundation of the test to be Footnote 4 from United States v. Carolene Products Co. The test is used in economic cases, as well as cases that do not warrant intermediate or strict scrutiny. The rational basis test requires that a legitimate government interest is met by a means that is rationally related. The intermediate scrutiny test, developed in Craig v. Boren, is used for quasi-suspect equal protection clause classes like gender and discrimination against nonmarital children. To satisfy intermediate scrutiny, the government must have an important interest that is met by a means that is substantially related to the end. The highest tier is strict scrutiny, a test that was first articulated as we understand it today in Sherbert v. Verner. Strict scrutiny requires that a compelling governmental interest be met by a means that is narrowly tailored and the least restrictive way of seeking the compelling interest. Strict scrutiny is used in cases that fall under the due process clause and suspect equal protection clause classes such as race and national origin. Because fundamental rights are so important, a governmental regulation that infringes a fundamental right must meet strict scrutiny.

Strict scrutiny has been used in cases such as Korematsu v. United States, Regents of the University of California v. Bakke,
Grutter v. Bollinger,\textsuperscript{31} Gratz v. Bollinger,\textsuperscript{32} and City of Richmond v. J.A. Croson Co.\textsuperscript{33} Strict scrutiny cases show the high bar that the highest tier sets for the government in cases involving immutable characteristics and fundamental rights. Few governmental interests have been deemed compelling, and even fewer have been met by narrowly tailored means. For example, in Gratz and Grutter, the Court articulated that promoting diverse educational environments in higher education is a compelling interest. The admissions system examined in Grutter was held to be narrowly tailored because it used race as a factor in holistic, individualized assessment for university admission.\textsuperscript{34} However, the Court ruled that the admissions system examined in Gratz violated the equal protection clause because it used race as a determining factor in university admissions.\textsuperscript{35} These cases demonstrate that even when a compelling interest has been identified, the rule or act designed to meet the compelling interest might not justify the compelling governmental interest. Passing strict scrutiny is uncommon.

IV. CURRENT SYSTEM FOR ADJUDICATING RIGHTS IN OTHER COUNTRIES

The prevailing alternative to strict scrutiny is the proportionality test. Though this test has no standing in the United States, some form of the proportionality test is used in the constitutional courts of Europe, Canada, and some Latin American courts, as well as in South Korea, Taiwan, Hong Kong, Malaysia, South Africa, Israel, and Australia.\textsuperscript{36} Because the test is used so widely, it is fitting to examine—and potentially learn from—this international rights

\textsuperscript{36} Jamal Greene, Rights as Trumps, 132 Harv. L. Rev. 28, 30-38 (2018) (importance of rights and frameworks used to determine them).
adjudication approach. Proportionality has similar elements to the United States’ strict scrutiny test, but there are key differences. The proportionality test originated in German administrative law and was first articulated in *R Daly v. Secretary of State for the Home Department.* The test can be broken into four questions: Is the government’s purpose in taking the case legitimate? does the means used to achieve the legitimate end make some contribution to that purpose? is the law in question necessary to achieve the stated interest and is it the least restrictive means of doing so? and is the law proportional in the strictest sense and do the benefits associated with the law outweigh the burden imposed on the fundamental right? We look at each question in comparison with strict scrutiny.

The first two questions resemble the language our Supreme Court uses when invoking the rational basis test, the test used for cases involving nonfundamental rights in the United States. Whereas strict scrutiny asks for a compelling purpose, the first question of proportionality seeks only a legitimate governmental purpose, making the qualifying threshold easier to cross. Like the first prong of proportionality, the second question creates a fairly lax standard as most ends can be construed to be reasonably related to a legitimate governmental end. The third question examines the necessity of the law and whether the law is the least restrictive way of reaching the legitimate end. This question closely resembles the narrowly tailored prong of strict scrutiny, indicating that both tests are interested in protecting fundamental rights from unnecessary government encroachment. Taken together, the first three parts to the proportionality test utilize a different approach than strict scrutiny but do not offer anything additional to the United States’ existing tests. The last step of the proportionality test is what sets proportionality apart from strict scrutiny. To measure proportionality in the strictest sense, judges assess whether there is “significant disproportionality between the marginal benefit to the government and the marginal cost to the rights bearer.”

37 Regina v. Secretary of State for the Home Department, Ex Parte Daly, UKHL 26 (2001) (appeal taken from HL).

similar cost-benefit analysis in cases involving fourth amendment violations and the exclusionary rule, but the courts have yet to apply similar analyses in other realms.

Because the idea of proportionality is not commonly used or understood in the United States, it may be helpful to see what proportionality looks like in practice. In *R. Daly v. Secretary of State*, a prisoner—Daly—challenged the lawfulness of a policy that allowed prison staff to conduct searches of the living quarters of the prisoners without them present. During such a search of Daly’s room, prison officers examined privileged legal correspondence between Daly and his attorney, a violation of his common law right to confidentiality. The Secretary of State argued that searches of the prisoner’s quarters without the prisoners there were necessary to maintain security and prevent intimidation of the guards by the prisoners. The House of Lords ruled in favor of Daly, concluding, “The infringement of prisoners’ rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified.” When balanced, the right of R. Daly to confidential correspondence with his attorney weighed heavier than the prison’s objectives for passing the intrusive policy. This balancing has not been applied in strict scrutiny cases, setting the proportionality test apart from the United States’ current system.

**Proof of Claim**

While both the proportionality and the strict scrutiny tests have their merits, neither of the tests are sufficient to handle cases with incommensurable rights. I examine both tests to show why they are insufficient in cases with fundamental rights on both sides to support my claim that an additional test for rights adjudication is necessary.

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40 *Id.*
V. INSUFFICIENCIES OF STRICT SCRUTINY

Strict scrutiny is a hard test to pass. As Justice Souter put it in his dissent to *Alameda Books v. City of Los Angeles*: “Strict scrutiny leaves few survivors.”41 It needs to be this way because it limits the number of situations in which a fundamental right can be infringed. Knowing the steepness of the test can inform the legislation that is passed. Strict scrutiny seeks to protect minorities in meaningful ways and emphasizes the importance of fundamental rights. It declares that there are few compelling reasons for the government to infringe on fundamental rights. However, strict scrutiny is insufficient for cases involving incommensurable rights because (a) it is intrinsically hard on the government, (b) it is one-sided and inflexible, and (c) it remains subjective in implementation.

A. Hard on the Government

Strict scrutiny assumes that the government’s regulation that infringes upon a fundamental right is unconstitutional. The government bears the burden of proving that it has a compelling interest and that its law is narrowly tailored to meet that interest. Chief Justice Roberts once said, “It is a rare case when a law would survive strict scrutiny” against a fundamental right such as those found in the First Amendment.42 In most cases, this is good. Fundamental rights should take precedence over governmental regulations whenever possible. However, when the government’s statute is in place to protect a fundamental right, the high wall to hurdle becomes unnecessarily high.

Consider the Colorado Anti-Discrimination Act (CADA) in question in the *Masterpiece Cakeshop* case. This law declares that “it is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny [service] to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status,

national origin, or ancestry.”\(^\text{43}\) Colorado seeking to protect protected classes from discrimination is a compelling purpose. CADA has been cited in cases regarding sexual orientation discrimination\(^\text{44}\) and race-related discrimination.\(^\text{45}\) Clearly, the law in place has done a lot to protect the fundamental rights of minority groups. Because strict scrutiny is such a high standard, acts such as the Colorado Anti-Discrimination Act might not survive its test because they are not narrowly tailored enough, no matter how much good they have done and how important the rights they seek to protect are. If the goal is to protect fundamental rights, overturning laws that protect fundamental rights is counterintutive. Because the burden of proof falls so heavily on the government, important laws that help protect fundamental rights or prevent discrimination may be deemed unconstitutional, regardless of the good they do. Consequently, in cases involving conflicting fundamental rights, the nongovernmental party has an immediate advantage.

**B. One-Sided & Inflexible**

Strict scrutiny is easily applied to cases like *Grutter v. Bollinger*\(^\text{46}\) and *Gratz v. Bollinger*.\(^\text{47}\) In *Grutter*, a white student was denied admission to the University of Michigan Law School. She sued, claiming that the school’s use of affirmative action in its admissions policy violated her Equal Protection rights under the Fourteenth Amendment. Here we have a civilian versus an institution. Institutions do not have fundamental rights so it is a fundamental right versus private policy. The university’s admission policy had to pass strict scrutiny and it did.

\(^{43}\) CO Rev Stat § 24-34-601 (2016).


In cases such as *Cox Broadcasting v. Cohn*, it is more complicated. The right to privacy—privacy being a fundamental right since *Griswold v. Connecticut*—is weighed against the right to free speech and freedom of the press. Georgia’s law is the law in question, so the Court can apply strict scrutiny to see if the Georgia law concerning privacy is constitutional. However, due to the nature of strict scrutiny, it cannot be applied in reverse to then determine how compelling the right to free speech and freedom of the press would be. In cases involving two fundamental rights, one side will always be backed up by a governmental provision that should be constitutionally sound, and it is likely that the other is backed by the Constitution itself. The inflexibility of strict scrutiny is intentional and sufficient for cases involving one fundamental right or protected class, but it falls short in cases involving incommensurable rights. A better test for cases with multiple fundamental rights at play would successfully weigh both sides rather than just critiquing the validity of the governmental law.

**C. Subjective**

Strict scrutiny is clearly defined with its two prongs. Nonetheless, even choosing which level of scrutiny to apply is subject to deliberation. For example, *Sherbert v. Verner* and *Wisconsin v. Yoder* were cases involving free exercise of religion claims. In both cases, the Court applied strict scrutiny and ruled in favor of the individuals who felt their fundamental rights had been violated, effectively declaring that the citizens’ rights were more important than the governmental interests in these cases. However, in *Employment Division v. Smith*, the Supreme Court argued that exemptions to every state law affecting religion “would open the prospect of constitutionally required exemptions from civic obligations of almost every

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conceivable kind.” In the 6-3 decision, half of the Justices chose to move away from using strict scrutiny in free exercise of religion cases. Justice O’Connor concurred in the judgment but not the reasoning, arguing that strict scrutiny should continue to be applied in free exercise clause cases. Justice Blackmun wrote a dissenting opinion which disagreed with the reasoning on the same grounds as Justice O’Connor. In this case, we see a clear division among the Justices as to which level of scrutiny to apply. The Justices had the same case details and frameworks to choose from and they chose differently. Because legal matters are not equations with clear and definitive answers, we might expect such an outcome. Ultimately, the decisions made about what level of scrutiny to apply will be made subjectively.

Deciding which laws are narrowly tailored or which interests are compelling is also subjective. In Korematsu v. United States, the majority concluded that the government’s interest in protecting national security in a time of war was compelling and stated that the government was justified in demanding that “all citizens of Japanese ancestry be segregated from the West Coast temporarily.” Using strict scrutiny, the Supreme Court held that the Civilian Exclusion Order No. 34 was constitutional. In a dissent, Justice Murphy declared, “this exclusion of ‘all persons of Japanese ancestry, …’ from the Pacific Coast area on a plea of military necessity … ought not to be approved. Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.” He claimed that the military necessity and concern about espionage and sabotage the majority cited was not reasonably related to the forced evacuation. In his opinion, the Act in question should not have passed strict scrutiny. Later Justices agreed with Murphy and

56 Id.
Korematsu was eventually overturned, demonstrating that what is deemed “compelling” and “least restrictive” is subjective and will change with different Justices, especially different Justices at different times.57

Thus, deciding which level of scrutiny to apply, which interests are compelling, and which laws are narrowly tailored is arbitrary and up to the discretion of the Justices. Subjectivity is not problematic when constituents align with the ideology of the Justices. However, this is not always the case in our polarized society. Having Justices with different ideologies is acceptable when the American people believe that Supreme Court Justices are neutral arbitrators of the law, but tests such as strict scrutiny require a Justice to be at least somewhat subjective, and subjectivity opens the door to ideology. Even though Justices may opt to use their subjectivity to make neutral decisions, reducing the number of instances where subjectivity is necessitated can reassure citizens that the Supreme Court is more neutral than ideological.

VI. INSUFFICIENCIES OF PROPORTIONALITY

The rest of the democratic world’s approach to rights adjudication—the proportionality test—has the advantage of being flexible, the ability to weigh the interests of both sides, and the capability to be accommodative to each case. However, like strict scrutiny, the proportionality test is insufficient in fundamental rights adjudication. Three major weaknesses to the proportionality test in incommensurable cases are (a) it does not require a recognition of the importance of the right, (b) it is not the Court’s role to balance, and (c) it is highly subjective.

A. No Recognition of Importance of the Right

The first two questions asked when applying the proportionality test constitute a low bar for the government to pass. The government can argue that its purpose is legitimate for almost any law that it

passes. It is likewise not hard to say that the measures designed to meet the legitimate objective are rationally connected to that objective. Thus, cases involving rights that would qualify for the rational basis test and cases involving rights that would qualify for the strict scrutiny test in the United States would receive the exact same treatment under proportionality. The fairly lax standards set forth in the first two questions do not necessarily mean that all rights for which the government has a legitimate interest are automatically equalized. The importance of the right may be considered when the Court balances the benefits to the government versus the costs to the rights bearer. However, the outcome of this balancing act does not reveal the importance of the right: it reveals the importance of the right in relation to the government’s interests. Rather than having the importance of the right determine the lens through which the Court approaches the case, the importance of the right is a mere consideration in the fourth step of proportionality.

The U.S. Department of State’s webpage states, “The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago.”58 If fundamental human rights are foundational in the United States, it follows that those rights should be foundational in rights adjudication cases. A test that does not acknowledge the importance of or defer to fundamental rights until the end—if at all—is unsuited for rights adjudication in the United States. This makes the proportionality test especially insufficient in cases where multiple fundamental rights are being considered.

B. Not Court’s Role to Balance

The fourth step of the proportionality test is determining proportionality in the strictest sense which requires balancing rights versus government interests. The backbone for all Supreme Court decisions is the Constitution of the United States. Justices are to make decisions that align with the Constitution, not the choices that they feel

are correct. Fundamental rights are clearly articulated in the Constitution; it is, therefore, the Supreme Court’s job as protectors and upholders of the Constitution to protect and uphold fundamental rights and other constitutional provisions. There is nothing in the Supreme Court’s job description that says they are to say what constitutional provisions carry more weight than another.

In Chief Justice Robert’s concurrence in June Medical Services v. Russo, 59 he discusses that the court’s opinion in that case “could invite a grand ‘balancing test in which unweighted factors mysteriously are weighed.’”60 Under such a balancing test, “equality of treatment is … impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.”61 In June Medical Services, the Court attempted to balance the potentiality of human life and the health of a woman against the woman’s liberty, according to Roberts.62 He stated:

There is no plausible sense in which anyone, let alone the Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were … Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an ‘unanalyzed exercise of judicial will’ in the guise of a ‘neutral utilitarian calculus.’63

The sitting Chief Justice recognizes that seeking to balance in situations such as these would require the Court to perform a task that no human can do and no judge should do. Balancing in such a matter would require the Supreme Court to act as legislators which our three separate branches of government with checks and balances

60 Michael Marrs v. Motorola Incorporated, et al, No. 08-2451 (7th Cir. 2009).
seeks to prevent. These arguments presented by Chief Justice Roberts demonstrate that the balancing required by proportionality is inherently problematic for our American federal system.

C. Highly Subjective

The judicial branch is the only branch of government not elected by the people. That makes them a step removed from American citizens. They do not need to impress anyone so they can move up the career ladder because they are already at the top. Additionally, Supreme Court Justices have life-tenure. They do not need to worry about being re-elected because their term does not end until they want it to, and time has shown that they do not need to fear impeachment. Thus, the Supreme Court has a lot of independence. The American people are comfortable with this because they view the Court as impartial administrators of the law. Justices are supposed to be bound by the law, not creators of it. However, as discussed earlier, the current system in place for adjudicating fundamental rights is still subject to a justice’s interpretation, and a justice’s interpretation is partially informed by their policy goals.

Proportionality has similar drawbacks to those I discussed in connection with strict scrutiny, but the drawbacks with proportionality are intensified. The cost-benefits analysis required by proportionality has no apparent structure. It is up to the administrators of the test to determine how to approach the analysis, what lens to frame the analysis with, and what the ultimate outcome will be. Consider how landmark cases such as *Obergefell v. Hodges*,\(^64\) *Loving v. Virginia*,\(^65\) and *Brown v. Board of Education*\(^66\) could have been decided under proportionality. The potential outcomes are endless. Perhaps the Court could have decided in *Obergefell* that the cost of not allowing gay couples to legally marry was proportional with the benefit that the government derived from preserving the traditional family

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advocated in the Bible or at the founding of the nation.\textsuperscript{67} The justices who decided \textit{Brown} could have ridden the Jim Crow tide prevalent in the 1950s and declared that the cost of segregated schools for African Americans was proportional to the benefits gained by the government by maintaining separate but equal.\textsuperscript{68} A balancing test would give our unelected Supreme Court justices undue power to turn their policy preferences into law due to the subjective manner of proportionality. This constitutes a major weakness of the proportionality test.

\section*{VII. \textit{Masterpiece Cakeshop LTD. v. Colorado Civil Rights Commission}}

Perhaps the easiest way to see the insufficiencies of strict scrutiny and the proportionality test would be to apply the tests to \textit{Masterpiece Cakeshop v. Colorado}. It is important to note that the Court did not apply either test in this case. Justice Kennedy delivered the majority opinion, stating, “Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.”\textsuperscript{69} The Supreme Court acknowledged the rights on both sides, acknowledged that the “case presents difficult questions as to the proper reconciliation of at least two principles.”\textsuperscript{70} However, they also acknowledged that the Colorado Civil Rights Commission had clear animus towards Jack Philips’ sincerely held religious beliefs and the case was a bad vehicle to make such a decision between rights. Because of the Commission’s animus, they remanded the case to the lower court and

\begin{itemize}
  \item \textsuperscript{67} Obergefell v. Hodges, 576 U.S. ___ (2015).
  \item \textsuperscript{68} Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
  \item \textsuperscript{69} Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. ___ (2018).
  \item \textsuperscript{70} \textit{Id.}
\end{itemize}
did not adjudicate between the rights.\textsuperscript{71} We look at what might have happened if they did.

\textit{A. Masterpiece Cakeshop & Strict Scrutiny}

Justice Gorsuch, joined by Justice Alito, wrote a concurrence for \textit{Masterpiece Cakeshop}. He writes that since \textit{Employment Division v. Smith}, neutral and generally applicable laws will usually survive a constitutional free exercise challenge.\textsuperscript{72} However, “when the government fails to act neutrally toward the free exercise of religion …. The government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.”\textsuperscript{73} In their opinion, the Commission’s “judgmental dismissal of a sincerely held religious belief” did not satisfy strict scrutiny.\textsuperscript{74} Gorsuch claimed that if we should protect speech that we disagree with, we should also protect religious beliefs that we disagree with. In sum, Gorsuch argues that the Commission failed to show a compelling reason for its failure to give Jack Phillip’s case neutral consideration and thus does not meet the compelling interest requirement of strict scrutiny.\textsuperscript{75} The fact that Justices Gorsuch and Alito were the only justices to advocate for strict scrutiny to be applied shows the subjectivity involved in when to apply which tier of scrutiny. While strict scrutiny was ultimately not applied in this case, I apply it now.

It can be argued that the Colorado law was not narrowly tailored. Jack Phillips lost at the state court of last resort and Court of Appeals levels.\textsuperscript{76} The Colorado Civil Rights Commission ordered Phillips to cease and desist discriminatory practices, conduct comprehensive

\begin{enumerate}
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Employment Division v. Smith}, 494 U.S. 872 (1990).
\item \textsuperscript{73} \textit{Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission}, 584 U.S. ___ (2018).
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\end{enumerate}
staff training on the public accommodations section of CADA, and change any company policies to comply with this order. It also mandated that Phillips prepare quarterly compliance reports for a period of two years documenting the number of patrons denied services and why. The cease-and-desist order basically denies Jack Phillips his ability to choose what kinds of cakes to make. It places him between a rock and a hard place: on the one hand, he could obey the Commission’s order to cease and desist and thereby compromise his sincere religious beliefs. On the other hand, he could choose to disobey and thereby be ineligible to keep his bakery open and participate in the market. This is clearly not narrowly tailored.

The Colorado Civil Rights Commission has a compelling interest in preventing discrimination and ensuring that people of protected classes should have the same opportunities as everyone else in places of business. The Commission could have chosen a narrowly tailored means such as requiring Jack Phillips to direct same-sex couples to other bakers who will complete their cake request. That way, Phillips’ cakeshop gets to remain open and gets to keep practicing his sincerely held religious beliefs and the same-sex couple can get a wedding cake. In some ways, Phillips’ shop might lose customers, but that could be a price he was willing to pay. Alternatively, the Commission could withdraw the cease-and-desist order but still require that Phillips’ business complete the reports and the training. That would not infringe on Jack Phillips’ free exercise rights but would also give him an opportunity to review his beliefs and how they might affect marginalized groups.

If we applied the strict scrutiny test to Masterpiece Cakeshop, we might reach the conclusion that the Colorado Anti-Discrimination Act does not satisfy strict scrutiny because its requirements were an impermissible encroachment of Phillips’ fundamental rights. The Colorado Civil Rights Commission would then have to rework the act to make it comply with strict scrutiny which might result in the act’s losing power to protect the compelling interests involving the prevention of discrimination and the fundamental right to marry who one chooses, demonstrating that strict scrutiny may be unnecessarily hard on the government in rights adjudication cases. Jack
Phillips would win against the government-backed same-sex couple, as would be expected in strict scrutiny cases.

B. Masterpiece Cakeshop & the Proportionality Test

The United States Supreme Court has never applied the proportionality test in cases, but, if it had, it would look similar to the following. We would first look at the legitimacy of the government’s purpose in taking the case. Colorado clearly has a legitimate interest in protecting protected classes from discrimination and ensuring that their fundamental rights are upheld. This requirement would be met. Concerning the suitability of the means used to reach this legitimate end, Colorado’s Anti-Discrimination Act would likely pass. If their interest is to prevent discrimination, an act requiring discriminatory businesses to cease-and-desist discriminatory practices and change discriminatory policies is rationally related to that interest. We would then consider the necessity of the law in question and whether it is the least restrictive means to achieve the legitimate end. In order for same-sex couples’ rights to be protected, they need a law that offers that protection in the courts. CADA fulfills this role and offers a place for same-sex couples to find remediation. In this sense, the law can be seen as necessary. Concerning least restrictive, we would have similar findings as presented in the narrowly tailored discussion presented under strict scrutiny. Though CADA may fall short of the requirements to pass the third question because it is not narrowly tailored, we proceed to the fourth step to observe how it might play out.

The final consideration is whether the case is proportional in the strictest sense. We would weigh the benefits of the challenged measure against the cost in terms of infringement of protected rights. The proportionality test states that only if the benefits exceed the burden it imposes does the challenged measure survive. The benefits of the Colorado Anti-Discrimination Act include protection of protected classes, a means for redress, and a more inclusive, open market. The costs in this case, however, include stifling Jack Phillips’s ability to exercise his sincere religious beliefs and his right to freedom of speech. The decision could reasonably go either way
at this point and the Court would necessarily be subjective in the decision. If the Court decided that the costs outweigh the benefits, CADA would not be able to stand and would have to be modified. If the Court decided that the benefits outweighed the costs, CADA would stand and the baker would have no legal right to deny the cake, in spite of his sincerely held religious beliefs. He would either be required to compromise his beliefs or cease operating a public business in Colorado.

Strict scrutiny has a fairly predictable outcome and would likely lead to the modification or revocation of the Colorado Anti-Discrimination Act which would be seen as a loss for marginalized groups in the state. The proportionality test does not have a predictable outcome. Justices would be forced to balance incommensurable rights. Their decision would be reached on the grounds of who hurts the most, not who is backed more completely by the Constitution. This approach to rights adjudication could harm the legitimacy of the Court which would severely inhibit the Supreme Court’s capacity to be good since they lack power to enforce their decisions.

VIII. REVISED TEST: INCOMMENSURABILITY TEST

The leading models for rights adjudication in the United States and elsewhere have weaknesses that cannot address the primary issue of incommensurability when a fundamental right faces a fundamental right, though both tests have promising aspects. Cases like *Masterpiece Cakeshop* and *Cox Broadcasting* do not arise very often, but it is inevitable that they will arise again, especially if the Court uses the Fourteenth Amendment to declare more rights fundamental. Near the end of the majority opinion in *Masterpiece Cakeshop*, Justice Kennedy wrote, “The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and

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78 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
without subjecting gay persons to indignities when they seek goods and services in an open market.”79 In preparation for further elaboration in the courts, I propose a test the Court can apply in incommensurability cases such as Masterpiece.80

I call the test the incommensurability test. This test considers four questions: (a) is there a fundamental right on both sides? (b) is the law in question necessary to protect the fundamental right? (c) could the law be applied in a way that does not infringe fundamental rights? (d) what harm would come from allowing the infringement of the right? We consider the purpose and function of each of these questions.

A. Is There a Fundamental Right on Both Sides?

This initial question serves as a threshold question. If only one fundamental right is in question, strict scrutiny should still stand. Only if both sides have a constitutionally protected fundamental right would a case qualify for the incommensurability test. Recognizing the importance of the rights that have been violated on both sides provides a frame through which the Court can approach the case. For example, in Masterpiece, the Court would recognize the fundamental right to free exercise of religion and the right to marry who one chooses and the protected class’s right not to be discriminated against, qualifying the case for the incommensurability test. This acknowledgement of rights would set the stage for the pursuant deliberation and decision.

B. Is the Law in Question Necessary to Protect the Fundamental Right?

A law of some sort will almost always be involved in incommensurability cases. Two citizens might get into an argument, and both sides may feel that their rights are violated. However, the citizens of

80 Id.
themselves have no ability to enforce the protection of their rights. For enforcement, litigants must appeal to an existing statute, executive order, or precedent. In *Masterpiece*, the same-sex couple could not force Jack Phillips to make a cake because they felt they had been discriminated against. Instead, they “filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.”

Because citizens do not have authority in and of themselves to protect their rights, there will always be a law involved in incommensurability Court cases.

This aspect of the incommensurability test determines whether the fundamental right could be protected in the absence of the law. In *Masterpiece*, the same-sex couple had somewhere to turn because of the Colorado Anti-Discrimination Act and it is not clear that they could have turned anywhere else for redress. It can thus be said that the Act is necessary to prevent discrimination based on the fundamental right. If a law is important in the defense of fundamental rights, it can be assumed that the government’s interest is compelling and the incommensurability test will proceed. If the law is not essential to the preservation of fundamental rights, the law should be placed under the scrutiny it would receive under strict scrutiny to determine if the law’s infringement of a fundamental right is constitutional.

Handling the government’s interest in this way takes pressure off of the government and recognizes the importance of the rights on both sides of the case. It does not assume that the government is guilty, nor does it assign the burden of proof to the government. The case then becomes about the rights rather than proving the government had a compelling interest.

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C. Could the Law Be Applied in a Way That Does Not Infringe Fundamental Rights?

At this point, the Court has determined that both sides of the case have fundamental rights and the government statute in question is legitimate. This next step is similar to the narrowly tailored or the least restrictive means prong that is used in both strict scrutiny and the proportionality test. However, rather than determining whether the law should be struck down or upheld, the Court determines if it could be applied differently. This helps ensure that the law in place to protect fundamental rights can remain in place to protect those rights in the future. If the law can be applied differently, the Court would order those changes in the application of the law be made. If the law cannot be applied differently, the incommensurability test will proceed.

In *Masterpiece*, the Court might look at the Colorado Anti-Discrimination Act and what it prescribes for violations of the Act. Pursuant to CADA, the Colorado Civil Rights Commission declared that Jack Phillips must cease and desist the discriminatory action, conduct training with his staff, provide reports about customers that had been turned away, and change store policies to make them compliant with CADA. Some of these actions could reasonably have been taken by the Commission without infringing on Phillips’ fundamental rights. For example, the Commission could have declared that Jack Phillips must conduct training with his staff and provide reports of who had been turned away. The reports could legitimize that Phillips had turned away the couple because of sincerely held religious beliefs. The reports could also show that Phillips turns away a lot of people for a lot of reasons and the Commission could then have reason to assume that Phillips is discriminatory in his practices. Additionally, the Commission could require that Phillips direct the customers to other bakers who would be willing to bake a cake. If this were the case, Jack Phillips would not lose the right to live his sincerely held beliefs and the couple could still find a cake. The Commission could monitor the baking establishment to ensure that discriminatory practices are not common or malicious. No fundamental rights would be violated and the law would not have to change.
D. What Harm Would Come from Allowing the Infringement?

This last step draws from the last step of the proportionality test. It is not anticipated that most cases would reach question four. However, there may arise cases in which the first three steps are insufficient for the Court to reach a verdict. If the Court decides that both sides have a fundamental right and the law is necessary and cannot be applied in a way that does not infringe on the other side’s fundamental right, the Court must ask itself what harm would come from allowing infringement. The question considers the marginal cost to the rights-bearer without considering the marginal benefits to the government. If Masterpiece made it to step four, the Court would consider whether it would cause more harm to have the same-sex couple go elsewhere to find a wedding cake or whether it would cause more harm to prevent Phillips from living his sincerely held religious beliefs.

While judging which infringement is more harmful will require some subjectivity, a helpful starting point is an examination of the source of the fundamental right. In this last step of the incommensurability test, rights that are included in the Bill of Rights would likely trump rights incorporated through the Fourteenth Amendment. This is not because the first ten amendments are more important than the Fourteenth Amendment is but because rights codified in the actual text of the Constitution are more permanent than those written in the case law of jurisprudence. Consider the right to contract which was declared fundamental by the Supreme Court in *Lochner v. New York*.82 Because the right to contract is not included explicitly in the text of the Constitution, the Supreme Court easily changed its precedent in *West Coast Hotel v. Parrish*, stating “the Constitution does not speak of freedom of contract.”83 The Supreme Court deferring to the text of the Constitution supports the idea that written amendments would trump incorporated amendments. While there may be situations in which the Court takes this question into consideration

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and decide not to let it influence the decision, this question is a good starting point.

Additionally, when the Court is applying the incommensurability test, they should be very careful to distinguish between what they are saying and what they are not saying when they conduct the last step of the test. In *Masterpiece Cakeshop*, if the Court applied the incommensurability test and decided that the cost to the same-sex couple was greater than the cost to Phillips, the Court would need to articulate clearly that they are not saying that one right is more important than another, only that the cost of one in this case is greater than another. The fourth step of the incommensurability test should be applied on a case by case basis to preserve the integrity of the right without creating a hierarchy of fundamental rights where none exists.

**IX. BENEFITS OF INCOMMENSURABILITY TEST**

The incommensurability test is designed to circumvent the insufficiencies of the strict scrutiny test and the proportionality test. From the outset, it identifies the importance of the rights in question. The test takes the burden of proof off of the government to give both fundamental rights fair consideration. It considers whether the law and application of the law are narrowly tailored. Looking to enforce the existing law in a more just way allows for more flexibility than either upholding the law or striking it down. The first three steps can be handled in a fairly objective manner. Since most cases should be resolved before the fourth step, the incommensurability test should rarely require balancing. When balancing is necessitated, the Justices balance the costs rather than the importance of the right. By approaching it in this way, they are able to avoid the problems that accompany incommensurability cases.

Ultimately, the incommensurability test is not perfect because no rights adjudication system is. Instead, it is a step in the right direction. The ideas presented here can be further developed and finetuned. Perhaps the greatest benefit that the incommensurability test offers is its potential for future applicability. The test could be extended to private cases like those between a silenced voice on
social media and the owner of the platform. The incommensurability test would be suitable in cases like this because it is flexible enough to deal with the rights and interests on both sides. This paper has focused on fundamental rights, but the conversation started and the test proposed here could easily be extended to a conversation about protected classes. The incommensurability test could be applied to future cases that are similar to *Bob Jones v. United States* which involved the protected class of race against religious freedom.

**Conclusion**

The current system in place in the United States to evaluate cases involving fundamental rights is sufficient only when one side of litigation feels as if a fundamental right has been violated; when the case involves incommensurable rights, strict scrutiny falls short. The proportionality test, the system for adjudicating rights abroad, is likewise insufficient. In *Craig v. Boren*, the Supreme Court faced an issue regarding gender discrimination. They decided that rational basis nor strict scrutiny provided the right amount of scrutiny for gender, so they created the intermediate scrutiny test. Just as the Supreme Court created a new test in 1976 to deal with insufficiencies in their existing system, it is again time in the American judicial system for a new test to be implemented to deal with insufficiencies in today’s rights adjudication system. In cases where fundamental rights are violated on both sides, a modified system is needed. The incommensurability test is proposed as a viable modified system to deal with cases like *Masterpiece Cakeshop* and *Cox Broadcasting*. It might not be the perfect solution, but the insufficiencies addressed in this paper should serve as a call to action for the Court to address the insufficiency in their rights adjudication framework as they did when they created intermediate scrutiny. Recognizing the shortcomings and the possible avenues to overcome those shortcomings like the incommensurability test is a step in the right direction to preserve the sanctity of rights in the United States today.

Making the Case for Paid Parental Leave in the United States

Jane Johnson¹ and Sarah Calvert²

I. Introduction

In a comprehensive list of different countries’ paid parental leave mandates around the world, the United States stands out with zero weeks of federally mandated paid leave. The United States is one of only a handful of places on Earth and one of only three developed countries where countrywide paid parental leave laws are non-existent.³ Women have been advocating for a change for decades, and some even use social media to bring awareness to the lack of a paid leave policy. Posts and Tweets using the hashtags #PaidLeaveCan’t-Wait and #SavePaidLeave are surfacing across the country, sharing experiences from new mothers and uncovering alarming statistics. One example of such experiences includes women who were forced to quit their jobs after being both physically and mentally unable

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to return to work when their disability coverage ran out. Another example includes women who were forced to continue working after just a three-week period of unpaid leave because they could not afford to pay their bills.

One post pointed out that in 28 states, it is illegal to separate a puppy from its mother before the puppy is 8 weeks old. Over half of the states in the United States have mandates protecting dogs from leaving their mothers before 8 weeks, but these same states force most working women to be separated from their infants anywhere from 2–6 weeks following birth. Most daycare facilities will not even admit infants until they are 6–8 weeks old.

Both these unsatisfied working women and their infants could greatly benefit from paid parental leave. Studies show that the length a mother spends with her infant during the first year of life directly influences the child’s future success in school and work. These outcomes are related to the duration of a child’s access to exclusive breastfeeding and the child’s early brain development. Additionally, the earlier a mother returns to work following childbirth, the more likely she is to develop symptoms of postpartum depression or intensify already existing symptoms. Thus, mothers’ mental health would also positively benefit from receiving maternity leave.

5 Ibid.
Parental leave should cover both paid maternity leave and paid paternity leave. Although fathers don’t experience the same physical challenges that mothers do following childbirth, allowing them to stay home for a period of time gives them opportunities to participate in the infant’s early life, help the mother recover from childbirth, and adjust to their family’s new addition.

Our empirical research shows that paid federal maternity and paternity leave mandates in developed countries positively affect levels of postpartum depression and decrease discrimination in the workplace; therefore, the United States should adopt a federal mandate requiring up to 12 weeks of paid maternity leave and 14 days of paid paternity leave. We will first examine existing legislation in the United States pertaining to family leave and show their deficiencies, then look at individual states who have already implemented a family leave policy. Next, we will examine studies showing the benefits of paid maternity leave for both mother and child and then conduct an international survey showcasing the paid parental leave mandates that exist in different countries around the world. Finally, we will examine the current proposed plan for paid parental leave in the United States.

II. BACKGROUND

A. Defining Terms

Maternity leave is defined as the period of employment-protected time a new mother takes off work following the birth of her child to care for the infant. Similarly, paternity leave refers to the employment-protected time off work a father has after the birth of his child.\textsuperscript{10} In the United States, the duration of and salary granted during this postpartum period of leave is determined by the policies of the mother’s and father’s place of employment. Outside of the United States, parental leave is defined by each countries’ mandates and typically remains independent of individual company policies.

Workplace discrimination is defined as prejudicial treatment in the workplace based on a person’s gender, age, or disabilities. In some cases, pregnancy can be considered a short-term disability if it hinders or prevents a woman from fulfilling her responsibilities at work. Workplace discrimination may affect hiring, promotions, job assignments, and benefits. Finally, postpartum depression is defined as depression experienced in a mother following the birth of her child. Not every woman experiences postpartum depression; it is a genetic disorder typically caused by many factors following childbirth. Symptoms of postpartum depression include insomnia, intense irritability, and inability to connect with one’s newborn infant.

B. Existing Legislation

Despite the lack of a federal mandate for paid parental leave, the United States has a small number of acts that protect new parents and provide some benefits. However, these existing acts are flawed and often incapable of providing sustainable postpartum rights for parents, something only a federal mandate could do. Here we will examine the Pregnancy Discrimination Act (PDA), Family and Medical Leave Act (FMLA) and Federal Employee Paid Leave Act (FEPLA), as well as the benefits, or lack of benefits, that they provide.

1. The Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act of 1978 forbids discrimination based on pregnancy during any part of and in any aspect of employment, including hiring, firing, pay, job assignments, layoff, and health insurance benefits. This act states that if a woman is unable to perform her job due to a medical condition related to pregnancy,
employers must treat her like a temporarily disabled employee.\textsuperscript{13} For example, employers must provide lighter duty or alternative assignments or grant temporary disability unpaid leave if a pregnant woman can no longer fulfill the normal responsibilities for her position.\textsuperscript{14} This act applies to all employers who have 15 or more employees. Additionally, because workplace discrimination based on pregnancy can begin before a woman actually becomes pregnant, the PDA makes it clear that no woman should be discriminated against due to pregnancy or changes caused by becoming pregnant. For example, employers might show prejudice during the hiring stage against women who anticipate requiring leave in the future for childbearing and childcare. The PDA does not allow for this sort of behavior.\textsuperscript{15}

Despite the clear statements forbidding discrimination based on pregnancy made in the Pregnancy Discrimination Act, discrimination against women in the workplace still exists. The last two decades have seen a growth of pregnancy discrimination charges.\textsuperscript{16} Employers in the United States who must either pay for an employee’s paid maternity leave salary or simply cover her shifts while she is on unpaid leave may be less likely to hire a woman nearing childbirth.

Additionally, because there is no federal mandate dictating the duration and salary of maternity leave, companies are at liberty to create their own maternity leave policies. A lawsuit from 2020 shows the repercussions of allowing companies in the United States to create their own parental leave policies. Deloitte, a multinational professional services network, uses its website to boast the company’s

\begin{thebibliography}{99}
\bibitem{16} Ibid.
\end{thebibliography}
generous parental leave policy, which includes up to 16 weeks of paid leave for eligible professionals. Following the birth of her child, Saxon Knight decided to take advantage of the company’s policy and took a 16 week leave. However, Knight was unaware that any individual who actually takes the 16 week leave as offered by Deloitte loses the right to return to her prior position or any position in the company. Knight lodged complaints with the company’s integrity helpline and employee relations department, but her job was terminated just weeks after she took her leave. She filed a lawsuit against the company in September 2020, and the decision of the case is still pending, as of February 2022.17

2. The 1993 Family Medical Leave Act

The 1993 Family Medical Leave Act entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family members and medical reasons. In order to be eligible for FMLA, employees must 1) work for a covered employer, 2) work for their employer for at least 12 months within the past seven years and at least 1,250 hours in the 12 month period prior to taking leave and 3) work at a location with fifty or more employees located in a 75 mile range.18 This act also ensures the continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to twelve work weeks of leave in a 12-month period following the infant’s birth to care for the newborn child. The 12 workweeks of leave similarly covers employees who have adopted a child.19 This act seems to provide an exceptional amount of time off, though unpaid, for parents following a child’s birth. However, this act does not cover nearly enough Americans to meet everyone’s needs. Since this law has so many eligibility restrictions, only 59 percent of workers are eligible for the 12 workweek leave. Additionally, according to

a report released by the U.S. Bureau of Labor Statistics, only 17 percent of all employed American workers have access to paid parental leave.\textsuperscript{20} Up to 23 percent of working mothers return to work within 10 days after giving birth, primarily due to their inability to pay living expenses without income.\textsuperscript{21}

3. Federal Employee Paid Leave Act

Beginning in October 2020, the Federal Employee Paid Leave Act (FEPLA) made paid parental leave available to certain categories of Federal civilian employees. This act provides up to twelve weeks of paid parental leave within the first twelve months following childbirth to eligible workers.\textsuperscript{22} Paid parental leave under FEPLA replaces the unpaid leave guaranteed under FMLA, and a federal employee must meet eligibility requirements in order to qualify.\textsuperscript{23} However, not every branch of federal civilian employees is covered by FEPLA. The largest category of ineligible workers for the paid twelve workweek leave is the U.S. Postal Service, which has nearly 600,000 employees. In addition to the Postal Service, the Federal


Aviation Administration and Transportation Security Administration employees are not covered under FEPLA.24

4. State Family Leave Policies

To date, eleven states and the District of Columbia have currently passed laws related to paid family medical leave, including California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin.25 These laws differ in each state in multiple ways, including eligibility requirements, the amount of leave granted, and the percentage of an individual’s paycheck that is granted during the medical leave time period.

Some states require individuals to work at their place of employment for a certain amount of time before they can qualify for paid family leave provided by the state. For example, New York’s Paid Family Leave Benefits Law (PFL), which passed in 2016, requires full-time employees to work regularly for twenty or more hours per week for twenty-six consecutive weeks before they can qualify. Part-time employee requirements who “work a regular schedule of less than 20 hours per week are eligible after working 175 days, which do not need to be consecutive.”26

In addition to variations in eligibility requirements, states with family leave laws also have different guidelines for funding their programs. For example, New York’s PFL pulls funding through payroll deductions taken from an employee’s income after tax. According to the program’s website, “In 2022, the employee contribution


is 0.511% of an employee’s gross wages each pay period. The maximum annual contribution is $423.71.”

Massachusetts uses a similar method for its Paid Family and Medical Leave (PFML) program. In this program, “the contribution rate is re-evaluated annually. For 2022, the PMFL is a tax of no greater than 0.68% of… eligible wages” paid by an individual and, possibly, that individual’s employer. The repercussions of these differing state laws are addressed later in this paper.

III. PROOF OF CLAIM

A. Benefits of Paid Maternal Leave

In 2019, the United Nations Children’s Fund (UNICEF) published an evidence brief advocating for the International Labour Organization Convention 2000’s recommendation of eighteen weeks of paid maternity leave for mothers of infants. As support for their recommendation, UNICEF outlined a variety of ways paid maternal leave can benefit mothers and children, including the effects listed below.

1. Improved Mental Health

According to a study conducted by The Harvard Review of Psychiatry, women who take at least twelve weeks of paid leave following the birth of a child are less likely to be diagnosed with a major depressive disorder. This study also found that paid maternity leave is associated with many positive effects on the mental and physical health of mothers and children, including a decrease in intimate partner violence towards women, postpartum depression, infant


mortality, and mother and infant rehospitalization.\textsuperscript{30} Women without the option of at least a twelve-week period of leave are burdened with the responsibilities of caring for an infant and dealing with financial and work-related concerns.

Another study conducted by the Department of Public Health at Benedictine University provides evidence of improved mental health in mothers following at least twelve weeks of maternity leave. This study looked at symptoms of postpartum depression reported by mothers who returned to work shortly after giving birth. The data illustrates that among women who took twelve weeks or less of maternity leave, each additional week of leave led to decreased odds of experiencing symptoms of postpartum depression.\textsuperscript{31} Mothers who return to work shortly after giving birth must immediately balance work and home responsibilities, but mothers who remain at home for longer periods of time find the transition back into the workforce to be much easier.

2. Long-term Influences on Child Development

Policies facilitating more time spent between mothers and their children in the first year of the child’s life can lead to the child’s increased ability to perform well in school succeed in the future. One study followed a group of children until they were 33, looking at factors such as high school completion, college attendance, and wages. The study found that the amount of time the mother spent at home caring for their newborn child within the first year of the child’s life had a strong negative correlation with the child’s subsequent high

\begin{itemize}
  \item \textsuperscript{31} Katelin R. Kornfeind, \textit{Exploring the link between maternity leave and postpartum depression}, 28 \textsc{Women’s Health Issues}. 323, 321–326.
\end{itemize}
school dropout rates and a strong positive correlation with his future earnings.\textsuperscript{32}

Another systematic review and meta-analysis of the effects of postpartum depression on child development found that a mother’s postpartum depression was detrimental to the cognitive development of her child, and these effects were evident as early as eighteen months. Poorer outcomes in language development, IQ, and Piaget’s object concept tasks, which test a child’s cognitive understanding of object permanence,\textsuperscript{33} were shown to persist until up to five years in some children, especially in boys.\textsuperscript{34}

These studies show the important, lasting effects of longer maternity leave on children. Although actions taken during a child’s infancy are not always concerned with the child’s long-term development, the data from these studies suggests that when a mother spends more time with her child during the first year of its life, there are lasting, positive consequences. Arguably, investing in paid maternity leave is an investment in a child’s future and the contributions that child will make to the United States.

3. Breastfeeding & Mother Empowerment

Studies suggest that there is a positive relationship between maternity leave and duration of exclusive breastfeeding.\textsuperscript{35} Breastfeeding has countless benefits for both mother and child. For the child, breastfeeding can improve the development of the immune system,

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\textsuperscript{33} Donna E. Stewart et al., \textit{Postpartum depression: Literature review of risk factors and interventions}, TORONTO: UNIVERSITY HEALTH NETWORK WOMEN’S HEALTH PROGRAM FOR TORONTO PUBLIC HEALTH. 221, 1–289 (2003).

\textsuperscript{34} Maureen Sayres Van Niel et al., \textit{The impact of paid maternity leave on the mental and physical health of mothers and children: a review of the literature and policy implications}, 28 HARVARD REVIEW OF PSYCHIATRY. 113, 113–126 (2020).

digestive system, and brain, and for the mother, breastfeeding can reduce breast and ovarian cancer. The World Health Organization recommends exclusively breastfeeding up to the sixth month of the baby’s life, and maternity leave is one of the easiest ways for a mother to extend the duration of time she breastfeeds her child. The longer a mother stays at home with her infant, the longer she can exclusively breastfeed, which leads to many health benefits for the child. Such benefits include modifying the function of the infant’s digestive and immune systems, as well as preventing diabetes and obesity. Breastfeeding has also been proven to protect infants against infection and allow them to respond better to vaccines. Studies show the most commonly reported reason for mothers to stop breastfeeding is not the lack of milk supply but the need to return back to work and other work-related pressures.

Additionally, socioeconomic standing should arguably not stand in the way of a mother’s ability to exclusively breastfeed her infant. One study done to determine whether or not socioeconomic status plays a role in a woman’s duration of maternity leave shows that

36 Ibid.
39 Ibid.
40 Lars A. Hanson, Breastfeeding provides passive and likely long-lasting active immunity, 81 ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY. 529, 523–535 (1998).
41 Seaneen Sloan et al., Breast is best? Reasons why mothers decide to breastfeed or bottlefeed their babies and factors influencing the duration of breastfeeding, 12 CHILD CARE IN PRACTICE. 283, 283–297.
black women, women in less privileged positions, and women with less education have a shorter duration of breastfeeding.⁴²

4. Parental leave and the economy

Some people in the United States may oppose paid parental leave because of the large amount of money needed to support working parents and make paid leave possible. However, studies have shown that paid parental leave can have a positive effect on the economy. For example, one study found that “women who take paid leave are more likely to return to their jobs during the year following birth, promoting job stability and negating replacement and retraining costs for employers.”⁴³ Research conducted on the impact of paid maternity leave on the economy has shown that maternity leave supports women’s economic empowerment from increased wages and experience, tenure, employment, and labor force participation.⁴⁴ Another study found that maternity leave can “pave mothers’ way back to… [and] strengthen their ties to [the workforce],” allowing women to contribute to a higher proportion of a household income.⁴⁵ For some families, paid parental leave may prevent a drop in income that can eventually lead to poverty.⁴⁶


⁴⁵ Haya Stier and Hadas Mandel, Inequality in the family: The institutional aspects of women’s earning contribution, 38 Social Science Research. 596, 594-608 (2009).

B. Benefits of Paid Paternity Leave

Similarly to paid maternity leave, allowing fathers to take paid paternity leave following childbirth reaps several benefits. Worldwide, just 22 percent of countries provide at least four weeks of parental leave to both mothers and fathers. However, allowing a father the opportunity to participate in the earliest moments of his child’s life also has several benefits. According to the United States Department of Labor, longer paternity leaves are associated with increased father engagement and bonding, and increased engagement leads to improved health and development outcomes for children. Many fathers struggle with work-life balance—providing them an opportunity to stay at home and be with their families helps alleviate this conflict and give them peace of mind. Additionally, providing the father with paid leave in turn benefits the mother; she can recover quicker and have more help at home. The two parents can work together in adjusting to a bigger family.

C. International Survey

The United States is one of only three developed countries worldwide that does not mandate paid maternity leave and is the only high-income country that lacks paid maternity leave mandates. Around the world, paid parental leave ranges anywhere from less than 12 weeks to over 52 weeks. By examining different countries’ parental leave mandates, we can observe the rising worldwide trends related to maternity and paternity leave and better understand the need for such mandates in the United States.

47 Ibid.
49 Ibid.
1. New Zealand

An island country in the southwestern Pacific Ocean, New Zealand has long been known for its excellence in education, civil liberties, government transparency, and economic freedom. In recent years, New Zealand has also become associated with generous parental leave mandates. Since 2020, employees who have worked for a company for at least an average of 10 hours a week for 12 months or more prior to the expected date of the child are entitled to 52 weeks of unpaid parental leave and 26 weeks of government funded parental leave payments if they are the primary caregiver of the child. In order to prove eligibility for parental leave, New Zealand residents must complete a survey and provide evidence that they work for a New Zealand employer, pay income tax to New Zealand, and that their employment relationship is subject to New Zealand employment law.

2. Italy

Italy provides up to 5 months of paid maternity leave with an allowance equal to 80 percent of pay. No minimum contribution is required to be eligible for maternity leave except when the mother works for an agricultural, domestic, or independent company. Paternity leave is also available, allowing fathers to take seven days of leave within the mother’s period of leave plus one optional day of unpaid leave. The compensation during this period is equivalent to 100 percent of pay. Additionally, if the mother is unable to care for the child due to death, serious illness, or abandonment, the father is entitled to the maternity leave period.

52 Ibid.
3. China

In 2012, maternity leave in China extended from 90 days to 98 days in response to recommendations from the International Labor Organization, the increase of women in the workforce, and the precedent set by other developed countries. However, this period of time is negotiable depending on the province of an individual’s workplace. For example, Henan and Hainan provinces both offer up to seven months of maternity leave, while Beijing and Shaanxi provinces provide up to one year depending on the employer. All 31 provinces in China also provide 7–30 days of paternity leave, the average number being 20 days. Similar to maternity leave, this time period is also negotiable, and families must work with employers to secure the desired amount of leave. In terms of paid leave, China’s *Special Rules* states, “for those enterprises already participating in the maternity insurance system, the salary of female employees during maternity leave shall be paid by the maternity insurance fund; for those enterprises not participating in the maternity insurance system, the salary of women during maternity leave shall be paid by the employer.”

**D. Current Proposed Federal Plan**

Evidently, as shown by the statistics referenced previously in this paper, existing legislation within the United States such as the FMLA are limited because they fail to provide a sufficient number of working Americans with even unpaid parental leave. Recently, President Biden proposed legislation with the potential to change how parental leave is handled on a federal level.

In April 2021, President Joe Biden released details about his proposed American Families Plan. This plan aims to provide free preschool to all three-and four-year-olds, grant two years of free community college to all Americans, and focus on “making college


55 Ibid.
more affordable” for prospective students in low and middle income brackets. Most pertinent to the issue of maternity leave, however, is the plan’s extensive proposal to “create a national comprehensive paid family and medical leave plan” that aims to secure partial wages for workers who need to take time off to care for a new child or a loved one who has fallen ill. The program proposes providing workers with up to 80% of their regular wages (or up to $4,000) a month for a twelve-week period. President Biden estimates that this paid family and medical leave plan will cost $245 billion dollars over the next ten years.

However, at the end of 2021, the negotiations for President Biden’s plan ended. Although the bill passed the House, Senator Joe Machin from West Virginia refused to support the plan, halting its path through the Senate. Machin provided several reasons for not supporting the bill, namely because he believes the bill will substantially increase national debt. The future of this bill is unclear, but supportive senators vowed to revise the bill and continue to vote until it is passed.

E. Proposal for Federal Mandate

After considering the multiple health benefits for mother and child, the trends around the world regarding paid parental leave, and the lack of a sound United States federal mandate for working parents following the birth of their children, it is clear that countless people would benefit from new legislation promoting paid maternity and paternity leave.


57 Ibid.

As we previously illustrated, inconsistencies in state family leave policies, or the lack of policies in some states altogether, can create confusion and obstacles for families moving to different states. These inconsistencies can also cause problems for employers with employees in multiple states. A federally mandated paid parental leave law would help eliminate such inconsistencies and allow citizens in every state the right to care for their children following childbirth.

Therefore, we propose instituting a national mandate requiring twelve weeks of paid maternity leave, as recommended by several of the previously mentioned studies referencing periods of postpartum depression. We support President Biden’s proposed allowance allocation which provides up to 80 percent of wages per month, determined by an individual’s income. Equally important is the opportunity for fathers to care for both the infant and the mother following birth. Therefore, following the fashion of countries around the world, including Italy and China, we propose a paid paternity leave duration of fourteen days that can be taken at any time within the year following the child’s birth. Allowance allocation will be identical to the maternity leave system, which provides 80 percent of wages during paternity leave.

In the case of same-sex couples, one partner would be designated as the primary caregiver and enjoy the paid maternity leave rights, and the other partner would be designated as the secondary caregiver and enjoy the paid paternity leave rights. The designation of primary and secondary caregiver would be determined by each couple and their circumstances.

We recognize that every parents’ circumstances are unique and complex. In addition to same-sex couples, some parents may be unmarried or have multiple jobs. Our paper is not meant to address every possible living situation and account for each unique situation. It is, however, meant to reiterate the importance and need for such a law that will account for these individual needs and ensure that all parents across the country have equal opportunities for paid parental leave.

This proposal is for the minimum amount of time enforced by the federal government for paid maternity and paternity leave. Each individual state has the ability to increase from the minimum twelve
weeks and fourteen days, but any increased wage allowance must be funded using means separate from federal funding. Additionally, privately owned companies may have the ability to create their own family leave plans. However, if those plans exceed the time duration set by the federal mandate, payment for this excess leave must be funded by the company.

Funding for this national mandate will follow the precedent set by states such as New York and Massachusetts, pulling funding through payroll deductions taken from an employee’s income after tax. The contribution rate is to be re-evaluated annually.

By implementing this proposed parental leave federal mandate, we believe working men and women in the United States will feel more supported as they start families and take care of their children before coming back to work. Our proposal is just a starting point and can certainly be built upon or revised to help ease the burden of parents and allow them to participate in their child’s early years. Twelve weeks of paid maternity leave and fourteen days of paid paternity leave pales in comparison to policies around the world, but is a suitable starting point that will still allow the United States to join the rest of the world in terms of parental leave.

IV. CONCLUSION

The United States needs to adopt a paid parental leave mandate. Due to the precedent set by countries around the world, instituting such a mandate does not need to be a radical or politically charged decision. Women, men, and children in the United States will benefit from paid maternity and paternity leave, and only a federal mandate will ensure that working parents in all states enjoy the rights of parental leave. The existing legislation provided by some states in the United States is a start, but this legislation does not even begin to cover the majority of working parents. Candidates for paid parental leave should also not be required to jump through hoops or meet exhaustive requirements—parents in the United States all deserve to be involved in the first few weeks of their children’s lives.

As more and more women become enraged about the United States’ lack of paid parental leave and share their dissatisfaction
about this country’s parental leave rights, it is essential that the federal government hear the voices of these women and make a change. The United States prides itself on being a world leader in many areas, and our leaders should adopt that same attitude towards paid parental leave. Our recommended twelve-week paid maternity leave and fourteen-day paid paternity leave is just a starting point to further expand parental rights in the United States. These suggestions, if adopted, should be continually evaluated by government leaders, legislators, and experts to ensure new mothers can receive adequate support. Lawmakers should feel the urgency of this issue and act quickly to give citizens of the United States the paid parental leave policy they deserve.
MEDICAL ACCREDITATION FOR FOREIGN-EDUCATED REFUGEES: AN UNDUE BURDEN

Katherine Jolley¹ and Alex Hansen²

I. INTRODUCTION

Layla Sulaiman and her family were forced to flee their home in Iraq in 2007, where Layla had practiced as a primary care obstetrician-gynecologist for seventeen years. After applying for refugee status, the United Nations assigned Layla and her family to resettle in the United States. When she arrived in Pennsylvania, Layla was devastated to discover that her medical license was invalid. Had she been relocated to Australia like her sister, she could have been placed on an accelerated track for foreign doctors. Similarly, Canada offers foreign doctors semi-restricted practice while obtaining their full license. Instead, Layla was forced to start from scratch by volunteering at her child’s elementary school. For Layla to practice in the United States, she would have to apply for residency (training that brand-new medical school graduates complete), likely move from her initial host city to complete the residency and pass extensive testing.³ Layla’s situation is not unique.

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Refugees face significant adversities when they resettle in their host countries. Some difficulties include language barriers, mental and physical trauma, and complicated health situations, in addition to the challenge of moving across the globe. While institutions and organizations are set up to ensure their successful resettlement and employment, refugees are disappointed to discover that licensure and certification for foreign-educated medical professionals are stringent and difficult to navigate. Many foreign-educated refugees come to the United States and are pushed towards low-skill level jobs, like driving a taxi or manual construction, despite years of experience in their specialized fields.

In the year 2020 alone, there were 82.4 million forcibly displaced people around the world, one-quarter of which were refugees. In light of the current worldwide refugee crisis, as heightened by the COVID-19 pandemic, the economic turmoil in Venezuela, and political upheaval in Afghanistan, our attention is called to the plight of thousands of refugees who are entering or will soon enter the United States. Approximately 12,000 refugees were resettled in the United States in 2020, with a large increase initially anticipated for 2021. Due to an “unforeseen emergency refugee situation,” President Biden curtailed the presidential designation to 15,000 but has plans to increase them in 2022.

This paper illustrates that the current process for accreditation of foreign medical professionals in the United States places an undue

burden on foreign-educated refugees. Beginning with a brief background on the definition of a refugee, the paper discusses the barriers refugees face after entry into the United States and the provisions of the Refugee Act of 1980 that protect their right to employment and proper healthcare. Next, the paper will compare the current accreditation system for domestic medical professionals to that of foreign medical professionals. Finally, the paper argues that the current accreditation system places an undue burden on refugees by referencing modifications made to accreditation processes during the COVID-19 pandemic and suggests comparable modifications for the future.

II. BACKGROUND

A. Defining a Refugee

Immigrant healthcare providers often meet the definition of a refugee. According to the 1951 Refugee Convention held by the United Nations, to which the United States is a party, a refugee is defined internationally as someone “unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” 9 Domestically, the Immigration and Nationality Act defines a refugee as:

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such a person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or

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political opinion” or “in such special circumstances as the President after appropriate consultation may specify.\(^{10}\)

**B. Means of Refugee Relief**

The Refugee Act of 1980 provides the U.S. government a means of caring for and ensuring the success of refugees when they arrive in the country. As established by the Refugee Act of 1980, the number of refugees that are admitted into the United States is released in an official Presidential Determination on Refugee Admissions on an annual basis.\(^{11}\) Refugee allocations under President Trump were historically low, declining from 45,000 in fiscal year 2018 to 18,000 in fiscal year 2020, as compared with the 110,000 allotments from President Obama in fiscal year 2017.\(^{12}\) President Biden set the admissions cap to 62,500 for the fiscal year 2021 and intends to increase the admissions to 125,000 in the fiscal year 2022.\(^{13}\)

In consideration of the United States’ decision to accept refugees, they are guaranteed certain rights upon arrival through the Refugee Act of 1980. Their rights include resettlement assistance, the right to stay and work in the United States, the right to reunite with overseas family members, the right to travel, and the right to health care. The Refugee Act of 1980 set forth “a permanent and systematic way procedure for admission to this country of refugees.” The law mandates creation of project grants and contracts

\((1)\) to assist refugees in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, daycare, professional refresher training, and other recertification services;

\(^{10}\) Immigration and Nationality Act § 101(a), 8 U.S.C. § 1101(a)(42)


\(^{12}\) Bruno, *supra* note 7.

(2) to provide training in English where necessary (regardless of whether the refugees are employed or receiving cash or other assistance); and

(3) to provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services.\textsuperscript{14}

Currently, this system includes funding to cover refugees’ food, rent, furnishings, and clothing for their first 90 days in the United States. There are other programs under the Office of Refugee Resettlement in the Department of Health and Human Services to provide longer-term cash and medical assistance, such as Match Grant. These programs seek to provide economic self-sufficiency by providing job training, job referrals, and budget planning, as well as access to English language training and help with social and cultural adjustments.\textsuperscript{15}

Additionally, the Refugee Act of 1980 details the healthcare provided for new arrivals. Refugees are assured that the Secretary, in consultation with the Coordinator, shall—

(A) assure that an adequate number of trained staff are available at the location at which the refugees enter the United States to assure that all necessary medical records are available and in proper order;

(B) provide for the identification of refugees who have been determined to have medical conditions affecting the public health and requiring treatment;

(C) assure that State or local health officials at the resettlement destination within the United States of each refugee are promptly notified of the refugee’s arrival and provided with all applicable medical records; and

\textsuperscript{14} Refugee Act of 1980, 8 U.S.C. §§ 1157-1159

(D) provide for such monitoring of refugees identified under subparagraph (B) as will ensure that they receive appropriate and timely treatment.\textsuperscript{16}

Refugee health care is overseen by the Division of Refugee Health.\textsuperscript{17} Refugees are eligible for federally funded Refugee Cash Assistance and Refugee Medical Assistance for their first eight months in the United States, as well as Temporary Assistance for Needy Families (TANF) and Medicaid coverage, as expanded under the Affordable Health Care Act.\textsuperscript{18} After the eight-month period, they are held to the same qualification standards as other state residents. Delays in state coverage registration and activation intensify the frustration as refugees navigate a fairly complex medical coverage system on their own.\textsuperscript{19} Even after acquiring state insurance, refugees must pay copayments and costs not covered by Medicaid.\textsuperscript{20}

\textbf{C. Undue Burden}

The undue burden test has frequently been used as a means to measure the validity of legislation when weighed against the hardship it imposes. In 1944, Irene Morgan was arrested on a segregated Greyhound bus for refusing to give up her seat while en route to Maryland from Virginia.\textsuperscript{21} She was arrested and convicted of violating the Virginia state segregation ordinance. Morgan appealed the decision and her case was taken on by the National Association for the Advancement of Colored People (NAACP) in \textit{Morgan v. Virginia (1946)}.

\begin{itemize}
  \item \textsuperscript{16} Refugee Act of 1980, 8 U.S.C. §§ 1157-1159
  \item \textsuperscript{17} \textit{About Refugee Health}, \textit{Office of Refugee Resettlement}, January 14, 2021.
  \item \textsuperscript{18} Patient Protection and Affordable Care Act, Pub. L. 111-148 § 124 Stat. 119 (2010).
  \item \textsuperscript{19} Ann M. Philbrick et al., \textit{Make refugee health care great [again]}, 107 \textit{American Journal of Public Health} 656–658 (2017).
  \item \textsuperscript{21} \textit{Morgan v. Commonwealth of Virginia}, 328 U.S. 373-394 (1946).
\end{itemize}
The NAACP argued that state segregation laws impede interstate commerce by creating an “undue burden,” violating the Commerce Clause. The Supreme Court agreed and created the “undue burden test” in their decision. The undue burden test was originally penned by Associate Justice Stanley Forman Reed, who stated:

> There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose.22

The undue burden test provides a means to ensure that the state legislature does not impede or restrict an individual’s fundamental rights. The undue burden test was also notably used in Planned Parenthood v. Casey (1992).23 The Pennsylvania state legislature amended its abortion control law to require informed consent, a twenty-four hour waiting period, and the consent of a parent if the patient was a minor or the consent of the husband if the patient was married. The Supreme Court crafted the undue burden standard to measure the validity of state abortion restrictions by defining an undue burden as a “substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability.”24 Justice John Paul Stevens wrote a partial agreement, partial dissent and expanded the definition of an undue burden by adding that “[a] burden may be ‘undue’ either because [it] is too severe or because it lacks a legitimate, rational justification.”25 The Supreme Court ruled the government could pursue its interest in protecting the health of a pregnant person and maintained all provisions of the Pennsylvania ordinance, except requiring the consent of the husband. Thoughtful application of the undue burden test ensures that states can protects their interests while maintaining

22 Id at 377
24 Id at 878
25 Id at 924
that legislation should not severely obstruct fundamental, and as will be discussed later in the paper, guaranteed rights.

**D. Due Process Clause (1791)**

The Due Process Clause is found in both the Fifth Amendment in the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution. Within the Fifth Amendment, it states that no one shall be, “deprived of life, liberty or property without due process of law.” The Fourteenth Amendment uses the same wording; however, it incorporates the legal obligation of all states to ensure these same protections. A serious concern to many is the impact of the Due Process Clause on non-citizens within the United States. Under the Fourteenth Amendment, the Equal Protection Clause was established in 1868 after the effects of the Civil War. Protections were extended to all natural-born or naturalized citizens, however, there were no clarifications on undocumented immigrants, refugees, or other asylum-seeking individuals. Further case law has expanded upon these questions. For example, in *Yick Wo v. Hopkins* (1886), Justice Matthew opined, “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens… These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.” In a more recent example, a Texas statute was questioned in *Plyler v. Doe* (1982), wherein illegal immigrants and their children were barred from obtaining a free public education. Justice Brennan stated, “Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”

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26 U.S. CONST. amend. V § 1.
27 U.S. CONST. amend. XIV § 1.
29 *Id.* at 356
31 *Id.* at 202
Additional rulings and clarifications have brought to light the realization of protections for individuals who are non-citizens or non-naturalized. These protections, established under both the Due Process and Equal Protection Clauses, grant refugees the right to once again, not be “deprived of life, liberty, or property without due process of law.”


In January 2017, then President of the United States of America, Donald Trump, signed an Executive Order that suspended entry for ninety days of foreign nationals who belonged to seven countries that were presumed to present higher risks of terrorism. His campaign promise of a “total and complete shutdown of Muslims entering the United States,” was quickly fulfilled after the President’s inauguration. Immediate challenges to the Order came soon after in March of 2017 when President Trump changed his previous list of seven countries to six. On the same day the second Executive Order expired, President Trump issued a new Proclamation that included the restriction of travel to the United States from citizens of eight countries. The Ninth Circuit Court struck down the Proclamation and the Supreme Court was granted review. In a five-four decision, the Court upheld the Proclamation. They ruled that it did not violate the President’s statutory authority or the Establishment Clause. The Court found that the Proclamation did not practice discrimination

against a specific religion since it included individuals from both Muslim and non-Muslim countries.

Arguments quickly arose regarding the power of the president and the future use of the Due Process Clause. President Trump responded by citing his actions to Section 212(f) of the Immigration and Nationality Act\textsuperscript{38}, which gives “the president the power to deny entry to any aliens or class of aliens whose entry would be detrimental to the United States.”\textsuperscript{39} Persisting arguments stated that the President’s use of Section 212(f) was “inconsistent with the complex statutory scheme Congress had elaborated over the years to screen potential immigrants, including for national security risks.”\textsuperscript{40} As protected powers granted to the President continue to be challenged within the courts, issues within immigration will continue to evolve.

III. PROOF OF CLAIM

A. Refugee Resettlement and Employment in the United States

As guided by research of topics introduced in the background of this paper, we will now support our claim that the current medical accreditation process of foreign-educated medical professionals places an undue burden on refugees. As set forth by the Refugee Act of 1980, the United States is obligated to

- Respond to urgent needs of persons subject to persecution in their homelands, including where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special

\textsuperscript{38} Immigration and Nationality Act § 212, 8 U.S.C. §1182(f).

\textsuperscript{39} Rodriguez, supra note 35.

\textsuperscript{40} Rodriguez, supra note 35.
There are several programs in place to support refugees in their right to work in the United States. However, the current system provides the bare minimum as opposed to promoting growth in careers of refugees. It appears that most of the efforts to resettle refugees are aimed towards “the very poorest and least experienced immigrants,” with refugees frequently being placed in low-income housing and having to rely on food stamps through the Supplemental Nutrition Assistance (SNAP) program. Many high-skilled refugees are pushed towards low-skill work. A shift in programs that prepare refugees to find employment in the United States would more fully utilize their already-developed human capital, and better comply with the aims of the Refugee Act of 1980.

Historically, refugees have been strong contributors to the U.S. labor force. In 2020, foreign-born men held a 76.6 percent participation rate as opposed to native-born men at 65.9 percent. Foreign-born women are slightly lower at 53.2 percent than native-born women at 56.8 percent. Refugees are immediately eligible for hiring upon arrival to the United States. However, most refugees begin working at jobs much lower than their skillset. MPI research found that there are approximately two million college-educated

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42 Voluntary Agencies Matching Grant Program, Office of Refugee Resettlement, October 15, 2021.
44 Coburn, Sharan, supra note 43
45 B.L.S News Release USDL-21-0905 (May 18, 2021)
46 B.L.S News Release supra note 45
immigrants who are underemployed.\textsuperscript{48} In the study, immigrants are defined as persons who had no U.S. citizenship at birth, which includes refugees. One study found that “skilled immigrants with very low English proficiency are five times more likely to be underemployed than their fully proficient counterparts.”\textsuperscript{49} No One Left Behind surveyed Afghan refugees who had recently arrived as part of the Special Immigrant Visa program and found that 97 percent of them had graduated high school, 32 percent had a bachelor’s degree, and 9 percent had an advanced degree.\textsuperscript{50} However, 28 percent of those eligible to work were unemployed and 22 percent were underemployed.\textsuperscript{51} Many end up working for Lyft or Uber, or temporary manual labor, like landscaping or manufacturing.\textsuperscript{52} The underutilization of the skillset of foreign professionals is stark and contradicts the assurance from the Refugee Act of 1980 that refugees will be provided with “professional refresher training, and other recertification services.”\textsuperscript{53}

\textbf{B. Refugee Healthcare}

Refugees face barriers to receiving proper health care, including cultural and religious challenges. The healthcare system in the United States is often difficult for refugees (as well as native-born citizens) to navigate and understand. Many refugees come from countries where

\begin{itemize}
  \item Jeanne Batalova, Michael Fix, \textit{Tapping the Talents of Highly Skilled Immigrants in the United States: Takeaways from Experts Summit}, \textsc{Migration Policy Institute}, August 2018.

  \item Jeanne Batalova, Michael Fix, \textit{supra} note 48


  \item Coburn, \textit{supra} note 50

  \item Coburn, \textit{supra} note 50

\end{itemize}
spiritual healers are considered just as legitimate as a doctor, if not complementary. A refugee’s transition to treatment based solely on medication and physical therapy can be hard to navigate and even more difficult to trust. Furthermore, refugees often face significant physical hardships before their arrival to the United States, including exposure to infectious diseases like tuberculosis, parasites, and hepatitis B. They may also have significant dental and nutritional concerns, or even physical injuries as a result of torture and sexual violence. Refugees could also have experienced post-traumatic stress disorder, depression, and anxiety. Treatment for mental health is especially difficult considering varying cultural perceptions of mental health across the world.\textsuperscript{54}

Most significantly, language creates a barrier for refugees and their access to healthcare. While physicians should, in theory, provide a certified translator for each doctor visit, individual clinics are often unclear about who should pay for the services. Refugees speak a variety of languages, including dialects that are not common in the United States. Many clinics end up getting by with unprofessional interpreters, such as semi-proficient volunteers or family members. Refugees settled in larger cities have a higher likelihood of being treated at a large clinic with access to more extensive translation services as opposed to refugees being treated in rural communities.\textsuperscript{55} This results in a lack of privacy for sensitive information of refugee patients. The right to privacy is not explicitly stated in the Constitution, but has been established in several notable cases, including \textit{Roe v. Wade}.\textsuperscript{56} The quality of translation services is often questionable as well, considering that lay translators are not trained in medical terminology. Refugees and domestic doctors find difficulty in


\textsuperscript{55} Michael Timo Hoggard, \textit{Barriers to Health Care Access for Refugees in Cache County, Utah}, \textit{Undergraduate Honors Capstone Projects}, (535) 2016. https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1547&context=honors

\textsuperscript{56} Roe v. Wade, 410 U.S. 113 (1973).
communicating with each other; lack of communication and foreign medical systems leave refugees distrustful of the system as a whole. Adjustments in the accreditation process that allow foreign-educated doctors to obtain licensure more easily may largely eliminate the linguistic barriers and infringement of privacy rights.

C. Accreditation Process in the Medical Field

Upon completion of medical school, students must pass the United States Medical Licensing Examination to receive their license to practice in a specific state. After their time in residency, physicians can become board eligible and take a specialty certification exam. Upon successful completion of the exam, physicians are now considered members of the American Board of Medical Specialties (ABMS). Continuing certification is then required for all certified physicians. The Federation Credentials Verification Service (FCVS) was created by the Federation of State Medical Boards in 1996 to provide a standard process for state medical boards-as well as private, governmental, and commercial entities-to obtain a verified source for a physician’s credentials. After receiving such credentials, individuals can openly begin their practice of medicine.

It is interesting to examine examples of how one who is already practicing medicine can retain their certification. For example, physicians in North Carolina are required to renew their medical licenses each year by their birthday. They must pay a $250 fee and complete sixty hours of continuing medical education (CME) every three years. Failure to renew your medical license results in an inactive

57 Ramin Asgary, supra note 54
status. Inactivity legally restricts you from practicing medicine.\textsuperscript{60} These practices of license renewal are similar across many states in the nation. Renewal of accreditation is a simple and common process for all practicing physicians within the United States. This differs from the lengthy process of reaccreditation that many refugees face when trying to become a licensed physician in the United States. “Clinicians who have obtained their medical degree or residency training outside of the United States or Canada,” are labeled International Medical Graduates (IMGs).\textsuperscript{61} Interestingly enough, “Of the 12,142 IMG applicants to residency in the 2018 National Resident Matching Program (NRMP), 7,067 were non-U.S. citizen IMGs.”\textsuperscript{62}

This attests to the fact that a majority of IMGs who are seeking to be reinstated into the healthcare field within the United States are refugees. The first step for refugees to become licensed doctors in the United States begins with applying for certification with the Educational Commission for Foreign Medical Graduates (ECFMG).\textsuperscript{63} To then obtain an ECFMG certification, an individual must prove their attendance of an accredited medical school, provide other key documents, and then pass steps one and two of the United States Medical Licensing Examinations (USMLE). Once an individual passes these exams and has their documents approved, they then receive the ECFMG certification. The next step is to apply and complete a residency program, even if the individual has already completed one in their home country. Then, one must pass USMLE Exam step three and apply to the state medical board for their license. The process it takes for an individual to prove their skills is careful, as it should

\textsuperscript{60} Physician License Renewal, NORTH CAROLINA MEDICAL BOARD, https://www.ncmedboard.org/licensure/renewals/physicians.


\textsuperscript{62} Kureshi, Namak, Sahhar, Mishori, supra note 61.

be. However, the process becomes compromised when certain barriers cannot be overcome. For example, “only 56.5% of IMGs participating in the U.S. Match in 2018 were successful in obtaining a first-year residency position (versus 94.3% success rate for U.S. graduates).”64 Since the process of becoming reaccredited is already lengthy, it is even more challenging when refugees are denied with higher frequency than an average U.S. Medical School graduate. Clearly, the accreditation process needs to be examined and revised in order to allow further opportunities for refugees to use their skills and specialties gained outside of the United States.

D. Foreign Medical Professionals in the COVID-19 Pandemic

The COVID-19 pandemic produced a unique opportunity for modification of licensure policies for foreign medical professionals. The unprecedented stress on the healthcare system led to a massive labor shortage of healthcare professionals. The stress was so great that individual states began modifying licensing policies to allow more medical professionals to practice. Several states, including Idaho and Florida, allowed physicians in good standing with licenses from other states to practice in their states. On January 28, 2021, the U.S. Department of Health and Human Services added the fifth amendment to the Declaration under the Public Readiness and Emergency Preparedness Act (PREP Act) that authorized “any healthcare provider who is licensed or certified in a state to prescribe, dispense, and/or administer COVID-19 vaccines in any other state or U.S. territory.”65

Other states allowed foreign medical professionals to practice in their state, with New York allowing Canadian doctors to practice and New Jersey creating a foreign licensed doctor program. The governor of New Jersey signed Executive Order 112 on February 3, 2020 “authorizing the practice in New Jersey of foreign doctors in

64 Kureshi, Namak, Sahhar, Mishori, supra note 61.
good standing in other jurisdictions.” To qualify for the Temporary Emergency Foreign Physician Licensure Program in New Jersey, medical professionals must:

1) Reside in the United States;

2) Be a United States citizen, legal permanent resident, or otherwise legally present and authorized to work in the United States;

3) Hold a medical license in good standing in a country other than the United States;

4) Have practiced clinical medicine under that license for at least five (5) years during their career;

5) Have practiced clinical medicine under that license at some point during the last five years; and

6) Limit their practice under their temporary emergency license to providing in-person clinical medical services in a facility licensed by the New Jersey Department of Health, including but not limited to field hospitals and long-term care facilities, or another location designated as an emergency health care center by the Commissioner of Health.

Licenses granted were valid until the end of the Public Health Emergency declared by Governor Murphy. The International Rescue Committee (IRC) estimated that at the time the Executive Order was signed, there were approximately 165,000 underutilized healthcare refugee and immigration workers that received their healthcare


education outside the United States. The process required for the Temporary Emergency Foreign Physician Licensure Program is significantly more manageable than the non-emergency application process for physicians licensed in other countries. A notable change was no longer requiring foreign medical professionals to complete a residency, which typically requires relocation. Rather, the temporary license only required them to have practiced within the past five years and for at least five years. Unfortunately, logistical challenges and closure of verification services due to the pandemic resulted in only 35 of the 1,100 applicants receiving a license. Despite poor implementation of the Temporary Emergency Foreign Physician Licensure Program, the modifications to the licensure requirement demonstrated the possibility of simplifying the licensure requirements. Remarkably, refugees who did not receive their emergency license were still willing to volunteer and contribute their medical expertise at little to no cost to those benefiting from their service.

The welfare of both refugees and the U.S. medical system could be expanded if licensure requirements for non-emergency foreign physicians were adjusted. The benefit to society of having more access to healthcare surely outweighs the need to heavily retrain already capable foreign doctors.

E. The Undue Burden Standard Applied to Foreign Medical Personnel Licensure

The ease of licensure facilitated during the COVID-19 health emergency stands in stark contrast to the current process for accreditation of foreign medical professionals, especially since refugees are


guaranteed “assist[ance] in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services.”

As it currently exists, the accreditation process for foreign medical professionals stands in the way of foreign doctors practicing in the United States. As defined by Justice Stevens, a “burden may be ‘undue’... because [it] is too severe.” The government has an interest in ensuring that doctors are sufficiently qualified to practice safely in the United States, but the current licensure requirements are severe, especially when compared to the requirements for doctors that received their training in the United States and recent modifications for emergency licensure. Thus, the difficulty of acquiring a license as a foreign medical professional was highlighted by the significant modifications made by various state governments that lightened licensure requirements during the public health crisis. In this situation, foreign medical personnel faced a similar standard as recently retired medical personnel who were also granted temporary emergency licenses.

Furthermore, the residency requirement is not cohesive with the resettlement policy for newly arriving refugees. The residency one is accepted into is not guaranteed to be close to where one lives. The setup in itself is problematic as refugees are placed in various host cities around the country without consideration for their professional skill set. Refugees would have to move to an unfamiliar location just months after becoming settled in their initial host city. To comply with the “assistance,” “professional refresher training, and other recertification services,” as mandated by the Refugee Act of 1980, the Refugee Resettlement process should be amended to ensure refugees with previous professional medical experience are placed in a city that allows them to complete their residency without having to relocate or modify the residency requirement in consideration of past experience.


Justice Stevens also said that something could be an undue burden if it “lacks a legitimate, rational justification.” An analysis of foreign medical professionals currently practicing in the United States showed no significant difference in mortality rates of patients treated by foreign educated medical professionals and medical professionals educated in the United States. Graduates of international medical schools make up approximately one-quarter of U.S. practicing physicians. Many individuals, especially Americans, feel distrust towards the level of medical training that individuals receive in countries other than their own. As our health and safety is at risk when we interact with medical professionals, these concerns are rational. However, many individuals will be enlightened as they examine different data behind this claim. John J. Norcini, the president and CEO of the Foundation for Advancement of International Medical Education and Research (FAIMER), conducted an elaborate study in 2010 comparing results over a lengthy period of time of patients who were cared for by international versus American medical school graduates. A total of 6,113 physicians were included in the study with 1,497 of such physicians being international graduates. The study focused on the care of patients who had congestive heart failure or acute myocardial infarction. During the study 244,153 patients were hospitalized. 22 percent of these patients were cared for by international medical graduates. The most pressing statistic was the mortality rate among total patients. Non-U.S.-citizen international graduates were associated with a nine percent decrease relative to U.S. graduates. Holding the scales of measurement to be constant, this study proved the capability of many non-U.S.-citizen international graduates. Thus, the current licensure requirements also lack “legitimate rational justification.” While cultural and communicative skills could be a reasonable concern in employability, they are not an indicator of practical medical skills or knowledge.

73 Id at 920

The cultural and communicative barriers could be overcome by ensuring that the “professional refresher training” is adequately provided. One example of a cultural shift that is necessary and easily resolved is moving from a “doctor-centered” practice to a “patient-centered” practice. Health systems in Eastern Europe or Asia tend to be “doctor-centered,” meaning that doctors rarely seek patient input in their treatment. The United States’ healthcare system is “patient-centered,” with doctors typically interacting directly with patients and educating them about treatment choices. By refocusing efforts on improving refugee employability instead of excluding them from the labor market of their chosen career via stringent licensure, the aims of the Refugee Act of 1980 will be realized, and refugee doctors will no longer be subject to an undue burden of excessive licensure requirements.

F. Recent Usage of the Due Process Clause (1791) to Protect Marginalized Groups

Under the Equal Protection Clause (1868) of the 14th Amendment, “nor shall any state... deny to any person within its jurisdiction the equal protection of the laws.” The Due Process Clause contained within the Fifth Amendment of the Constitution requires the United States government to practice equal protection, while the Equal Protection Clause requires state governments to do the same. Therefore, protection is granted under both federal and state jurisdiction for all “persons born or naturalized in the United States.” As was stated in the background section, refugees are not included in this wording. However, precedent establishes that they are to be included as protected groups. It is interesting to examine the case of Trump v. Hawaii (2018), as potential challenges to both the Equal Protection and Establishment Clauses.

75 Jeanne Batalova, Michael Fix, Tapping the Talents of Highly Skilled Immigrants in the United States, Migration Policy Institute (August 2018).
76 U.S. Const. amend. XIV § 1.
77 Id.
Although the travel ban was never directly stated as a “Muslim ban,” the common belief was that of racial and religious animosity towards this group. In the case of United States v. Windsor (2013), precedent and protection for marginalized groups was established under Justice Anthony Kennedy, who stated, “The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.” This judicial ruling reiterates the protections established under the Due Process and Equal Protection clauses. However, the evidence of the claim in Trump v. Hawaii (2018) was ultimately predicated on the concern that “the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.” In concern with the religious prejudice in question in the decision, the Court ruled that, “many majority-Muslim countries were not subject to restrictions and that some non-majority-Muslim countries were subject to the restrictions… and was based on a sufficient national security justification.”

In recent decades, tensions surrounding refugees and border control have created a pressing issue in the United States. Precedent has established that equal protection must be given to citizens, naturalized individuals, or refugees within the United States of America. The Constitution therefore allows these individuals the right of life, liberty, and the pursuit of happiness. Both United States v. Windsor (2013) and Trump v. Hawaii (2018) deal with the role of government in cases of refugees or marginalized groups and their rights. Although no violation was made against the Equal Protection or Establishment Clauses in the case of Trump v. Hawaii (2018), it is interesting to consider the statements made by the dissenting opinion from both Justices Sonia Sotomayor and Ruth Bader Ginsburg.

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80 Id. at 3, (Kennedy, J., opinion).
82 Id. at 32, (Roberts, J., opinion).
Justice Sotomayor “criticized the majority for turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.”\textsuperscript{83} As was established in \textit{U.S. v. Windsor} (2013), congressional desires to harm a politically unpopular group cannot justify disparate treatment of this group. As cases and proclamations create a rise in animosity and hard feelings towards specific minority groups, it is crucial that legislation aligns with precedent set in both the Due Process and Equal Protection Clauses and cases such as \textit{United States v. Windsor} (2013). Many refugees belong to these groups and rely on the protections established under the precedents set. For refugees to prosper and have equal access to opportunities in their work, their communities, and their social well-being and health, it is essential to examine ways in which the government can fully protect their rights and opportunities. As we examine the specific benefits of reforms in the accreditation process in the healthcare industry for refugees, we see clear improvements among these refugees’ financial, social, and physical situations. Poverty rates will fall, healthcare opportunities for minority groups will expand, and social inclusion will rise as refugees are better represented and seen as active, important members of communities. Overall, these individuals will be valued, and their skills and training will be utilized to not only better themselves, but better the communities they live in.

\textbf{IV. Conclusion}

Clearly, the utilization of foreign-trained medical professional refugees is diminished within the United States due to the undue burden they face in the arduous accreditation process. Thousands of individuals like Layla Sulaiman are limited in their ability to work in the United States using their professional skillset. We view the medical accreditation process to be ineffective in providing equal opportunities on many levels. To begin, refugees face greater difficulty in being accepted into new residency programs upon arrival in comparison to U.S. citizens. If they are inclined to participate in

\textsuperscript{83} \textit{Id.} at 1, (Sotomayor, J., Ginsburg R. dissenting).
another residency program, one may question why it is even more challenging for them to be accepted. Likewise, in the case of the emergency call in New Jersey for more medical professionals during the COVID-19 pandemic, extensive and disorganized forms of licensure and accreditation resulted in a lack of essential healthcare to society. Additionally, international medical graduates have proven their medical training and skills in many instances to be similar if not better than many U.S. medical graduates. Thus, it is evident that the accreditation process is both severe and lacks legitimate rational justification, constituting an undue burden. We reiterate that precedent surrounding the Due Process Clause guarantees refugees equal protection under the law.

The attention of legislators around the United States should therefore be directed towards mitigating this undue burden that foreign-educated refugees face. Policy changes should be enacted in a holistic sense, however one proposal is to adjust the current residency requirements. They are both lengthy in nature and an additional difficult adjustment for refugees to undertake as they must move to another new city. An improved system of accreditation for foreign medical refugees in the United States provides key benefits to society as a whole. Healthcare for other refugees will improve as those from similar backgrounds and cultures can more effectively communicate and treat refugees in need. Economic prosperity will be a realistic future for refugees as medical professionals are generally compensated far above wages of those living in poverty. Increasing medical professionals will provide greater accessibility to healthcare for all members of society.
ESPORTS AND TITLE IX: ADDRESSING SCHOLARSHIP DISTRIBUTION ACROSS GENDER LINES IN COLLEGIATE ESPORTS PROGRAMS

Adam Martin

I. INTRODUCTION

Over the past decade, college campuses have experienced a significant rise in varsity esports teams including, but not limited to, games such as Fortnite, Rocket League, League of Legends, Overwatch, FIFA, and Madden NFL. Colleges utilize esports programs not only to attract potential students and promote a diversity of interest on campuses, but also to capitalize on a recent and drastic increase in viewership rivaling that of traditional sports. For example, in 2019, 100 million viewers tuned into the League of Legends World Championship finals. In comparison, the World Series, NBA Finals, and Super Bowl garnered 14.1 million, 15.1 million, and 100.7 million viewers across all platforms, respectively.

In contrast to more traditional sports, however, esports are unique in that they present no physical barriers barring men and women from competing both alongside and against one another. Since its implementation in 1972, Title IX has protected people in the United States from discrimination on the basis of sex within any education program or activity receiving federal financial assistance. Naturally, the Education Amendment applies to collegiate athletic programs as well, binding traditional collegiate sporting institutions

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to devote approximately equal funding and resources between male and female departments. Not only does the law require institutions to provide equal opportunity to participate in sports for men and women, but it also mandates that scholarships be awarded proportionally to participation.

In a recent sample of esports recruiting data from 27 public American universities, male gamers received 90.4% of roster spots and 88.5% of available scholarship funds. Approximately 41% of total gamers in the United States, however, are female. Universities should sanction esporting teams with varsity status and thus adhere to Title IX protections surrounding the allocation of athletic scholarships to ensure that female athletes receive an equal amount of fiscal support as do their male counterparts. Addressing the issues barring female student-athletes from receiving proportionate scholastic aid would not only benefit colleges profiting from esporting viewership, but also further the educational opportunities of almost half of the esporting population.

II. BACKGROUND

A. Collegiate Esports

In 1972, Stanford University held what is widely accepted as the first known video game competition for the game *Spacewar*. Since then, the appeal of electronic sports has expanded among demographics around the world. In 1991, the game *Street Fighter* popularized a player-versus-player competitive format (until that point, players competed with each other by way of high scores obtained during

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individual playing sessions). In the following years, large video game producers such as Nintendo began to hold worldwide competitions for their games. Now, both amateur and professional e-athletes can participate in a myriad of competitions held either online or in person. The most popular games currently include League of Legends and Fortnite. The industry has grown to the degree that global revenues hit $1.1 billion in 2019, representing a 27% growth from 2018. North America accounted for more than a third of all revenue incurred. As esports have gained traction, universities around the world have begun to see increasing engagement among their students as an opportunity to capitalize on student talent. In 2014, Robert Morrison University in Chicago became the first college to announce a varsity esports program. In 2017, the collegiate esports division of Blizzard Entertainment—known for games such as World of Warcraft, Overwatch, and StarCraft—announced its intentions to hold tournaments for college-level esports teams in which they could win up to $1 million in prizes.

Currently, there are over 175 colleges and universities that offer varsity esports programs registered with the National Association of Collegiate Esports, otherwise known as NACE (College Gazette, 2021). One of the appeals of esports over traditional athletics to universities


is the inexpensive nature of the sport itself. For example, compared to football—which requires a stadium, extensive staff, and exorbitant expenses—esports’ highest expenses usually comprise only of equipment and travel. Though historically esports haven’t generated much revenue, recent changes have almost assuredly secured the rising industry’s profitability. In 2018, the Big Ten Conference and Riot Games decided on a two-year deal to support the Fox Corporation’s Big Ten Network’s League of Legends league. TV deals, such as this one, along with merchandising and ticket revenues, represent significant streams of revenue for esports at extremely low cost when compared to other athletic programs. As esports expand, more colleges and universities are going beyond sponsoring clubs to varsity teams and offering courses to teach students how to work in the field. Many such courses focus on business management, team development, broadcasting, and marketing. In fall of 2019, The Ohio State University took its esports program a step further and began offering a bachelor of science degree in esports (Schwartz et al., 2019). As the video game industry increases market engagement significantly year by year, so grows the incentive of colleges and universities to lay groundwork for successful programs on campus.

**B. Athletic and Esports Scholarships**

With the growth of collegiate esports programs rises the amount of scholarship funds granted to players. When Robert Morrison University (RMU) announced its varsity esports program, it also began offering scholarships to top players. Currently, over 115 colleges and universities offer scholarships for esports. Many utilize their scholarship opportunities to attract and recruit skilled high school students directly from tournaments. Esports scholarships offered currently range in type and value. For example, Miami University in Ohio—the first Division 1 university to offer esports scholarships—initiated their esports program by offering $4,000 in scholarship funds to the 20

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students that comprise the varsity team. In 2018, New York University (NYU) began offering full-tuition esports scholarships. While esports scholarships granted by the colleges and universities themselves have increased, other non-profit organizations have sponsored students as well, some with the goal of increasing diversity in esports. Cxmmunity, one such non-profit, partnered with Microsoft and Verizon to host relatively high-budget esports tournaments at historically Black colleges and universities and grants scholarships to the players.

C. The Esports Gender Gap and Title IX

Among other obstacles that women and girls experience in esports environments—as it pertains to both participation and employment—gender-based harassment from other players poses a significant roadblock to prolonged female engagement in esports. Despite the obstacles, approximately 41% of total gamers in the United States are female. However, an alarming, recent sample of esports recruiting data from 27 public American universities showed that male gamers received 90.4% of roster spots and 88.5% of available scholarship funds (Seiner, 2021). The impacts of missing out on such scholarship opportunities and the accompanying academic benefits include fewer female role models in esports, thus perpetuating the cycle for potential female gamers. Accompanying the disparity in scholarship distribution is the gender pay gap among professionals. Jordan Sundstein (better known by his screen name, “N0tail”) is currently the highest earning man in professional esports—his career earnings amounting to approximately $7 million. By comparison,

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Sasha “Scarlett” Hostyn, the highest earning woman, has accrued just over $300,000\textsuperscript{10}.

Since 1972, the U.S. Department of Education’s Office for Civil Rights (OCR) has enforced the Title IX of the Education Amendments of 1972. Title IX uses case-by-case evaluation criteria to determine whether an athletic activity is considered a sport. Its three-pronged approach determines whether or not the activity has a governing body, program structure and administration, as well as team preparation and competition. Title IX also:

...protects people from discrimination based on sex in education programs or activities that receive federal financial assistance. Title IX states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance (DE, 2021).

In essence, Title IX mandates that men and women be offered equitable opportunities to participate in sports at the collegiate level. An important distinction is that Title IX does not require institutions to offer identical sports but instead an equal opportunity to participate\textsuperscript{11}.

Initiatives like Cxmmunity’s (mentioned above) show the private sector’s desire for diversity in scholarships for esports that is ignored due to lack of Title IX regulations. Interestingly, both RMU’s and NYU’s aforementioned scholarship offerings are merit, not athletic, scholarships, allowing the universities to avoid such federal gender protections and oversight.

Since its implementation in 1972, Title IX protects people in the United States from discrimination on the basis of sex under any education program or activity receiving federal financial assistance. Currently, women do not receive scholarship funds from universities


\textsuperscript{11} National Collegiate Athletics Association, Q. How Is Title IX Applied to Athletics?, NCAA Official Site (2021) https://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions
with esports programs proportionate to their overall participation in esports. The Department of Education’s Office of Civil rights, which oversees Title IX implementation, currently does not have a concrete definition for “sport.” Instead, they evaluate any given activity as a “sport” under Title IX on a case-by-case basis using the following three criteria: whether or not the activity has a governing body, program structure and administration, as well as team preparation and competition. The only question surrounding esports qualifying pertains to whether or not it has a governing body. If a governing body for the esports domain were identified, Title IX protections would be legally guaranteed since esporting programs clearly fulfill the latter two criteria. The National Association of Collegiate Esports (NACE) effectively serves the role of a governing body for collegiate esports programs, and should qualify them for Title IX application surrounding scholarship distribution on the basis of sex.

III. PROOF OF CLAIM

A. Biediger v. Quinnipiac University

On April 16, 2009, five Quinnipiac University women’s varsity volleyball players and their coach filed a lawsuit against Quinnipiac University in response to the announced decision to cut its women’s volleyball team. Represented by the ACLU, the plaintiff asserted that by canceling this program, the University was in direct violation of Title IX of the Education Amendments of 1972 and its regulations, meaning that after the elimination of stated women’s sports programs and rosters, women would be denied the equal participation in sports and scholarships guaranteed by the law. Quinnipiac University claimed that by replacing the volleyball program with a competitive cheer team, the equal varsity sport and scholarship statutes of Title IX were met. After a trial spanning from June 21 to June 25, 2010, a judge concluded that the University’s competitive cheerleading team did not qualify as a varsity sport under the

Title IX (Education Amendments Act of 1972, 2018)
legislation of Title IX and its members could not be counted as athletic participants under the statute\textsuperscript{13}. The Judge stated, "Competitive cheer may, sometime in the future, qualify as a sport under Title IX; today, however, the activity is still too underdeveloped and disorganized to be treated as offering genuine varsity athletic participation opportunities for students."\textsuperscript{14} In the process of the investigation and trial, additional violations of Title IX were discovered at Quinnipiac University and the court determined that the elimination of the women’s volleyball program would exacerbate the already existing problem. Furthermore, the court required the University to form a compliance plan to Title IX regulations within 60 days as well as ensure that any cancellation of women’s programs be accompanied with changes that would keep the University in compliance with the stated regulations.

Biediger v. Quinnipiac University exemplifies a challenge to the unequal distribution of athletic scholarships on the basis of sex. The court ruling in favor of the Quinnipiac University Volleyball team is a ruling in favor of women’s representation in all collegiate sports under Title IX. The designation of esports as a “gamer” activity is definitely part of the issue when it comes to female participation from the debut. Second, the Judge’s ruling on the legitimacy of cheerleading as a varsity sport is particularly pertinent to our claim. The ruling and reasoning of the Judge in this case regarding the definition of a varsity sport according to Title IX provides the legal basis for establishing e-sports as a varsity sport. For an activity at a school to be considered a varsity sport, certain requirements must be met.

\textit{B. Definitions of Collegiate Athlete and Varsity Collegiate Sport, According to Title IX}

Paramount to the classification of esports as athletics is Title IX’s classification of a collegiate athlete. Title IX currently defines intercollegiate athletes as those:

\begin{itemize}
\item\textsuperscript{13} Biediger v. Quinnipiac Univ., No. 10-3302 (2d Cir. 2012)
\item\textsuperscript{14} \textit{Id.} \end{itemize}
(a) Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport’s season; and (b) who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport’s season; and (c) who are listed on the eligibility or squad lists maintained for each sport, or (d) who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.\textsuperscript{15}

In order for Title IX to apply to scholarship distribution, the participating program must be categorized as “sport” by the United States Department of Education’s Office of Civil Rights (OCR). “The Biediger v. Quinnipiac University case established deference to the OCR’s intercollegiate athletic activity guidelines defining sport, as outlined” within the OCR’s 2008 Dear Colleague letter entitled \textit{Guidance for Athletic Activities Counted for Title IX Compliance}.\textsuperscript{16}


\begin{quote}
[T]o the extent that a recipient [of federal funding] awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. [Additionally,] separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex…\textsuperscript{17}
\end{quote}

As is shown above, the equitable distribution of scholarships to both men and women is tantamount to a school receiving federal funding.


\textsuperscript{16} \textit{Id.}

\textsuperscript{17} Education Amendments of 1972, 20 U.S.C. §1681 et seq.
In the policy guidance, the OCR explains that the department does not currently function with a formal definition for what constitutes a collegiate “sport”—it instead evaluates the given activity’s governing body, program structure and administration, as well as its team preparation and competition to determine its intercollegiate or interscholastic athletic status.\(^\text{18}\) Currently, the National Collegiate Athletic Association (NCAA) serves as the governing body for most varsity sports. However, the NCAA does not accept esports as an athletic activity under their supervision. According to the NCAA, “a sport shall be defined as an institutional activity, sponsored at the varsity or club level, involving physical exertion for the purpose of competition against teams or individuals within an intercollegiate competition structure.”\(^\text{19}\) Despite the NCAA’s reluctance to grant esports athletic status, 175 universities currently offer officially recognized varsity esports programs, many of which function under the universities’ athletic departments.\(^\text{20}\) Participating students in such programs can receive partial or full-ride athletic scholarships from the schools.\(^\text{21}\) While the NCAA does not wish to function as an OCR-approved governing body for collegiate esports programs, there are organizations that could and do effectively fill this position.

**C. The National Association of Collegiate Esports as a Governing Body**

The National Associate of Collegiate Esports (NACE) is a nonprofit organization composed of and on behalf of its member institutions.

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\(^\text{18}\) US Department of Education *supra* note 15


Its members work together to develop the structures and tools needed for the advancement of collegiate esports in the varsity space. At the time of NACE’s formation, only seven colleges and universities offered varsity esports programs. The first collegiate esports summit was held in Kansas City, Missouri, on July 28, 2016. As of June 2019, over 94% of all U.S. varsity esports programs are members of NACE, with more schools exploring the possibility of esports within their curriculum.22 NACE is now the largest national association of varsity esports programs at colleges and universities across the nation. The organization works together to lay the groundwork in areas such as eligibility, graduation, competition, and scholarships. NACE serves more than 170 member schools and 5,000 student-athletes, distributes over $16 million in esports scholarships and aid each year, holds an annual national convention, and runs its own secure discord server (voice-over software) for coaches, athletic directors, and more. NACE could effectively serve as a governing body over esports, allowing the final stage in Title IX’s classification of a “sport” to be satisfied.

In fact, it was also the lack of equity between men and women in esports that caused the NCAA to refrain from getting involved in the esports space. As a result of concerns over the male dominance of esports and the extreme violence of some titles, the NCAA’s Board of Governors decided to avoid getting involved in esports on an organizational level in 2019.23 Additionally, governing bodies devoted to esports could expand, including NACE, which was founded in 2016. Theresa Gaffney, head esports coach at Messiah University, contends that paying NACE fees for its governance helps legitimize collegiate esports in the eyes of inexperienced or skeptical university administrators—one study of NACE’s institutional members found that 40% of the esports teams are administered by athletic departments and 40% are administered by student affairs or some other

22 National Academy of Collegiate Esports, About, NACE (Sep. 10, 2021) https://nacesports.org/about/

student services department. “There’s validation in saying, ‘hey, my program will be a member of NACE,” Gaffney said. There are also a few other governing bodies in the collegiate esports space, including the Electronic Gaming Federation, the American Collegiate Esports League, and the Riot-Games-owned RSAA. These other organization bodies, however, could still count as governing bodies for the purposes of Title IX. There is nothing in the language of Title IX that would prohibit a sport having multiple governing bodies as opposed to one.

Some universities have opted not to be members of a national governing body in order to enter independently organized collegiate leagues that are based around individual game titles. For example, some of the largest esports programs such as Akron (2019 spring Collegiate Rocket League Champions), University of California Irvine (2018 College League of Legends Champion), and University of Utah (runner-up in the inaugural 2019 ESPN Collegiate Esports Championship) are not members of NACE. This is due to the fact that game publishers own the intellectual property rights to the games being played, and more and more prefer to organize these tournaments themselves.

D. The Issue of Female Participation

While women certainly deserve an equal share of esports scholarship under Title IX, opponents might bring up the issue of female participation in the first place. In terms of viewership alone, women comprised only 23% of the esports audience in the mid-2010’s. As


of 2019, the proportion rose to 30%. When it comes to the purchasing of video games, women find themselves on equal footing with men; 48% of women play video games, compared with 50% of men. The self-appointed designation of a “gamer,” however, is not as popular—just 9% of video-game-playing women self-identify as “gamers.”

Taking a closer look at how many women around college ages are interested in video games is also insightful. Between the ages of 18-29, 57% of women self-identify that they play video games. Comparatively, 77% of men of the same age group also say they play video games. Of those 77%, 33% of men would call themselves “Gamers,” while still only 9% of women would call themselves such.

Although NACE could effectively serve as a governing body under Title IX stipulations, further evidence reveals that males dominate collegiate esports rosters, with Bauer-Wolf predicting that 90 percent of NACE’s student esports population is male (at the collegiate level, there is limited data on the actual percentage of female “gamers”). The issue of female participation, however, is put into perspective by regarding the gendered history of other collegiate sports. In 1975, Brown University became the first college to “grant

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full varsity level status” to its women’s soccer team.\textsuperscript{30} At that time, female participation in the sport was still very slight\textsuperscript{31}.

For example, in the NCAA’s report on year-by-year sports participation from 1981-1982 – 2017-2018, they reported 22 women’s soccer Division I varsity teams, 10 Division II teams, and 48 Division III teams, for a total of 80 teams of 1,855 athletes in total.\textsuperscript{32} In contrast, men’s varsity soccer teams numbered 521, with a total of 12,957 athletes in total.\textsuperscript{33} In 2017-2018, however, women’s soccer teams numbered 333 Division I teams, 267 Division II teams, and 438 Division III teams.\textsuperscript{34} Overall, there were 1,038 women’s soccer teams, and a total of 27,811 athletes, only second to Track and Field in terms of participation.\textsuperscript{35} By comparison, in 2017-2018, the NCAA reported 832 men’s teams over all three divisions and a total of 25,072 male athletes.\textsuperscript{36} Illustrated below is the change over time between male and female participation in soccer, making it one the most highly-participated sports among women currently.

According to data released by the NCAA in 2020, women’s soccer players made up 28,310 of the 499,217 student-athletes who participated at its institutions last year, overtaking outdoor track and field competitors as the most common female collegiate athletes in

\begin{itemize}
\item \textsuperscript{30} Amy Wimer-Schwarb, \textit{How Women Got a Foot in the Game}, NCAA Champion Magazine, (July, 2019)  
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.}
\end{itemize}
the country with 30,326 last year. As for esports, an increase in female participation at the college level is only a matter of time and commitment on behalf of universities and policymakers to ensure equitable opportunities for women, as they currently make up at least 40% of the esports community as a whole. Similar to women’s participation in soccer, it is reasonable to assume that women’s participation in esports will rise to rival that of men. Because of such projections, adequate protections must be ensured under Title IX.

Some might argue that Title IX’s application to esports teams would demand that other “non-traditional” sports receive similar statuses (e.g., chess, LARP-ing, Quidditch). If these inclusions serve to protect women, however, the principle still stands as long as any one of the aforementioned activities fulfills all four of Title IX’s requirements for a sport.

![NCAA's Varsity Soccer Teams](image)


In principle, we should not sacrifice the possibility of equal opportunity over the altar of semantics when the effects of discrimination are just as prevalent as they were with more traditional sports such as soccer only half a century ago.

**IV. CONCLUSION**

As esports programs continue to expand across the country, legal issues and hurdles are bound to appear, and should be addressed accordingly and in due time. The misrepresentation of women in the realm of esports however, is a particularly pertinent issue that’s time has come, and actions can and should be made in order to ensure the Title IX protection in the realm of esports.

Title IX protects people in the United States from discrimination on the basis of sex under any education program or activity receiving federal financial assistance. Currently, women do not receive scholarship funds from universities with esports programs proportionate to their overall participation in esports. The case of *Biediger v. Quinnipiac University* provides solid precedent suggesting that a
case challenging the under-representation of female student-athletes according to Title IX can be not only argued, but won. To meet the standards of The Department of Education’s Office of Civil Rights, it must be proven that esporting programs have an active and functioning governing body. The National Association of Collegiate Esports (NACE) effectively serves the role of a governing body for collegiate esports programs, qualifying them for Title IX application surrounding scholarship distribution on the basis of sex.

If successfully applied, Title IX regulations would encourage the participation of female participants in collegiate esports programs across the country, a phenomenon that would continue the already exponential growth of the sport as a whole. Recruiting in this field will also shift as a result of Title IX protection as teams will be required to seek diversity in sex when looking for participants and athletes eligible for scholarships. As the field diversifies, so will the games involved, creating a sport more reflective of the world in which it exists, in turn opening the door for other marginalized groups to participate in the ever-growing industry. As the October 2018 Study\textsuperscript{40} by the NCAA shows, the amount of women’s soccer teams and athletes which was far outnumbered by that of men in 1981-82, has overtaken the number of men’s teams by the year 2018. Similar growth should be expected by the amount of female esports athletes in the coming years if the arguments made in this paper are made and enacted on a national level. Esports is on the precipice of massive growth and success in the new digital age. If this is to continue in a legal and just way, equal representation for all should be met and protected by law.

Texas recently passed the most restrictive abortion law in the country known as the Texas Heartbeat Act. This law prohibits abortion the moment when a fetal heartbeat is detected, which means that it could prohibit abortions as early as six weeks into a pregnancy. This law additionally authorizes private citizens to enforce the law by way of bringing civil actions against a person who “performs or induces an abortion” to a person, instead of depending on the state government to enforce this ban. The enactment of this Act resulted in a large proportion of legal scholars to agree that this act is unconstitutional under Roe and Casey. In response to the passage of this Act and its strict restrictions, many abortion providers petitioned the U.S. Supreme Court for emergency injunctive relief rather than allow women to go without access to an abortion procedure.

Despite the unconstitutionality of this act as most legal scholars perceived it, and its substantial burdens that are now imposed on a
woman’s right to an abortion in Texas, the Court denied the petition. The Court’s rationale was that this was a novel issue surrounding the employment of the private populace in enforcement of this new statute with complex issues surrounding what the proper remedy to petitioners are. Due to the novelty and complexity of the case, the petitioners did not meet the burden of proof required for injunctive relief according to the Court. Writing in dissent, Justice Kagan expressed that the Court “barely bothers to explain its conclusion—that a challenge to an unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail.” Continuing, Justice Kagan goes to the root cause of the Court’s haphazard decision, saying “the majority’s decision is emblematic of too much of this Court’s shadow-docket decision making—which every day becomes more unreasonable, inconsistent, and impossible to defend.” In Justice Kagan’s opinion, the Court’s emergency docket decision making, or shadow docket decision making, has set the Court down a slippery slope that makes its decisions more and more defenseless. The question remains, what is the impact of this shadow docket decision making and how can this situation for the Court be remedied?

This article argues that the increased use of the shadow docket damages the legitimacy of the Court and maims the American legal system. Due to these negative impacts, this article proposes a creation of a new specialized court system to mend the American legal system and restore the Court’s legitimacy.

II. Background

The Founders knew that to protect the Constitution and Rights of the people, the power of judicial review should be delineated to an institution that would issue judgments in a deliberative manner, independent of outside influences. Alexander Hamilton argued that the judiciary would be the perfect institution because, unlike the

5 Jackson, slip op at 1-2 (Kagan, J., dissenting).
executive that “holds the sword of the community” or the legislature that “commands the purse [and] prescribes the rules by which the duties and rights of every citizen are to be regulated,” the judiciary has “neither Force nor Will, but merely [judgment].” Consequently, the judiciary would be compelled to depend on other bodies to effectuate its judgments. Therefore, the judiciary was institutionally designed as a body to reach conclusions through rational deliberation to convince the other bodies and people. Being a deliberative body is not the only significant feature of the judiciary, however. An independent judiciary was similarly crucial in a properly functioning republic. Hamilton notes that the independence of the judiciary is “peculiarly essential” in this constitutional republic not only because it is essential to preserve enumerated rights and liberties, but independent from external influences reassures the populace that they are being treated freely and fairly before the law.

Overtime, this independent and deliberative Court has heard cases and made rulings by way of two dockets. The typical fashion in which the Court hears cases is through the merits docket. Under this well-known docket, the Court decides about seventy cases a year in a transparent, structured, and predictable manner. Under the standard procedure of the merits docket, the Court receives two rounds of briefings, followed by oral arguments, which are scheduled in advance, and concludes by providing a lengthy written opinion. Another process by which the Court hears cases is through what is known as the “shadow” docket. The shadow docket, a term originally coined by Professor William Baude in 2015, constitutes “a range of [Court] orders and summary decisions that defy its normal procedural regularity.” The Court uses this docket to manage thousands of other cases by way of orders that either handle litigation matters, such as extending case timelines, or manage requests for


emergency relief. Due to the nature of this docket, the Court oversees these cases with little briefings, no oral arguments, and provides brief, unsigned orders.

While the term shadow docket dates to 2015, this docket is not new. From 1802 to 1839, Congress had a single Justice come to Washington each August for a “rump” session to manage pending procedural issues. Over time, Congress expanded the Court’s authority under this docket to include granting emergency relief as well. The Court granted emergency relief in several instances over the 20th century like when the Court granted a stay on the Rosenberg executions in 1951 and issued an emergency order to stop the Nixon administration’s bombing of Cambodia.

Although the history of the shadow docket is well documented and has played a significant role in the U.S. Supreme Court’s history, the controversy surrounding this docket is a recent development. There are several contributing factors for the sudden public criticism of the Court’s use of the shadow docket. First, the Court is using this docket at a dramatically higher rate than in recent memory. During the Bush and Obama’s administration, they rarely filed the applications for emergency relief, totalling at eight applications. However, during the Trump Administration, applications increased by 350 percent with the Court granting twenty-four applications.

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8 OAG’s Testimony on the Supreme Court’s “Shadow Docket”: Hearing before the H.R. Subcomm. on Cts., Intell. Property, the Internet, 117th Cong. (2021) (Testimony of Loren L. Alikhan, Solicitor General of the D.C.).

9 Ibid.


11 Texas’s Unconstitutional Abortion Ban and The Role of the Shadow Docket: Hearing Before the S. Comm. on Judiciary, 117th Cong. (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).
the Court has suddenly been addressing high-profile issues such as immigration, state electoral processes, state COVID-19 response, and the death penalty. These issues are addressed in a manner that lacks the transparency of the merits docket, causing difficulty in understanding the rationale behind these decisions. This lack of transparency is also a source of concern for the lower courts when applying the shadow docket decisions related to their cases. Third, the granting of emergency relief is becoming increasingly divisive. Of the eight applications filed during the Obama and Bush administrations, only one provoked a public dissent from a Justice. During the Trump Presidency, however, twenty seven of thirty six applications filed provoked at least one dissent from a Justice.12

The U.S. Supreme Court scholars have debated the effects of this new phenomenon of the increased usage of the shadow docket. This paper’s findings show that the dramatically increased use of the shadow docket delegitimizes the U.S. Supreme Court and damages the American judicial system. In order to restore legitimacy and heal the American judicial system, Congress should make a specialized court to oversee applications for emergency relief.

III. PROOF OF CLAIM

A. Poses Risk to the Legitimacy of the Court

The legitimacy of the judiciary was not self-evident at the beginning of the republic; rather, the Court had to earn its legitimacy through independent and impartial actions while maintaining the deliberative nature of the Court. This slow climb to legitimacy is evident in the number of cases that the Supreme Court decided in its beginnings. During the first eighty years of the Court’s existence, it only held that four federal statutes were unconstitutional—and of those, only two had any significance. Occasionally during this period of the Court’s history, there was an open defiance from the executive branch

12 Texas’s Unconstitutional Abortion Ban and The Role of the Shadow Docket: Hearing Before the S. Comm. on Judiciary, 117th Cong. (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).
to accept judicial action as legitimate. For example, in *Worcester v. Georgia*, the Marshall Court settled a controversy between Georgia and the Cherokee tribes. The Court ruled to void Georgia state law in the Cherokee Nation because the intercourse between the Cherokee Nation and the United States belonged “exclusively to the Congress of the United States.”

Rather than apply this ruling, President Andrew Jackson famously said, “Well John Marshall has made his decision: now let him enforce it!”

In addition to the early challenges the Court experienced to legitimize itself against the other federal institutions, it also struggled to gain legitimacy from the populace who were affected by its decisions. No case exemplifies this struggle to gain public legitimacy better than *Brown v. Board of Education*. From this landmark decision, the Warren Court held that the racial segregation in public schools was unconstitutional, which in response, the Southern States publicly refused to adhere to the Court’s holding. In 1956, a large majority of Southern representatives issued what later became known as the Southern Manifesto. These representatives urged all southerners to lawfully resist the Court’s ruling, citing that this was an “abuse of judicial power” and that it was an example of the “Federal judiciary undertaking to legislate....” Fortunately for the Court, by this time, it had established itself as a legitimate institution to the other federal institutions and to the rest of the nation at large. Thus, despite the public criticism of the Court’s decision in *Brown*, the Supreme Court was held as an independent judiciary that had issued this judgment through a deliberative process. Furthermore, the Supreme Court’s legitimacy is evident because despite the Southern states objections, the judgment from *Brown* was enforced.

Following *Brown*, the Court maintained itself as a deliberative institution, independent of external influences, not swayed neither from the public nor other branches of government. With this legitimacy in

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place, the Court was able to make widespread decisions protecting civil rights and liberties for the rest of the 20th century. Entering the 21st century, the Court retained its legitimacy despite deciding highly polarized issues. The high regard for the Court is evident from the public’s response to *Bush v. Gore*. Even though the case was of national importance, which was hotly debated on the merits, and received substantial criticism for the Court’s intervention, the public followed the decision. Associate Justice Stephen Breyer remarked that “They did so peacefully, with no need for troops as in Little Rock, without rocks hurled in the street, without violent massive protest.”

Since the Court relies heavily on the aura of independence from political influences and the demonstration of deliberation in judgment making, the increased use of the shadow docket poses a unique threat to the legitimacy of the Court. The maintenance of normal judicial procedure is critical for the Court’s perception to the public. According to Professor William Baude, “procedural regularity begets substantive legitimacy… A sense that its processes are consistent and transparent makes it easier to accept the results of those processes, win or lose.” The “procedural regularity” of the merits docket provides the public with a sense that even if the Court issues a majority opinion that is contrary to their beliefs, the public respects the Court’s decision because it was made in a deliberative manner. Unfortunately, the shadow docket does away with this procedural regularity. In an emergency stay granted by the Court in favor of the Trump administration, Justice Sonia Sotomayor dissented saying this continued use of the shadow docket “erodes the fair and balanced decision-making process that this Court must strive to protect.”

This perception that “fair and balanced” decision making is not taking place has already begun to threaten the Court’s legitimacy as an independent judiciary. The Supreme Court currently has its highest disapproval rating for at least the past twenty years, with 53% of

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the public disapproving of the Court. The justices of the Court have attempted to salvage the image of the Court as an impartial body as expressed by Justice Amy Barrett, who said, “My goal today is to convince you that this court is not composed of a bunch of partisan hacks” or Justice Clarence Thomas, who shared that justices don’t rule based on “personal preferences.” Despite these attempts, the public, and even Congressional leaders are not convinced. Following his public relations mission, Senator Richard Blumenthal, a former Supreme Court clerk, stated, “I think these last few years have really been very dangerous and potentially devastating to the Supreme Court’s credibility because the public is seeing the court as increasingly political, and the public is right…. The statements by Thomas, Barrett, Breyer, you know, give me a break... they are just inherently non credible.” The degradation of the Court’s legitimacy has not merely resulted in public disapproval but also brought a suggestion to restructure the Court. The Biden Administration has formed a commission to examine the current Court’s structure to find potential changes which range from term limits to an expansion of the Court. If the current path which the Court is trending is not dramatically readjusted, the erosion of its legitimacy could result in highly contentious issues being received like Worcester or Brown rather than Bush.


The Supreme Court’s relationship with the lower courts is critical to the function of the American judicial system. The Supreme Court interprets the law and utilizes judicial review to ensure that state and federal statutes are constitutional. Additionally, under the doctrine of stare decisis, the issued judgments are precedential, binding all lower courts which includes the federal circuit court of appeals, district courts, and future Supreme Courts. On the other hand, the institutional design of the lower courts was to bring “rapid, localized justice” to the rest of the country.\(^{22}\) The lower courts do the bulk of the judicial work with 100 million cases being filed every year in state courts and roughly 400,000 cases being filed in federal trial courts compared to the mere estimated 80 cases that the Supreme Courts hear each term.\(^{23}\) In order for the Supreme Court to ensure that their agents, the lower courts, are applying the law according to their constraints, the Court formulates written opinions with the lower courts in mind. This trend is evident in a study conducted by Pamela Corley among others. They found through utilizing plagiarism technology that the Supreme Court “systematically incorporates language from the lower federal courts into its majority opinions.”\(^ {24}\)

Understanding the interdependency between the higher and lower courts shows that when the Supreme Court issues an important constitutional decision by way of the shadow docket, it fundamentally damages the American Judicial system. The lower courts are dependent on Supreme Court rationale to properly apply precedent to localized cases. Under shadow docket decisions unfortunately, Supreme Court rationale is often not publicly explicit. As the Court has issued increasingly important decisions by way of the


shadow docket, it sent waves of confusion throughout the judicial system. A portion of this confusion is caused by statements made by the Court in relation to the precedential value of these decisions. In *Lunding v. New York Tax Appeals Tribunal*, the Court stated that the shadow docket rulings “do not have the same precedential value ... as does an opinion of this Court after briefing and oral argument on the merits.” 25 The above statement illustrates that the Court preferred to limit the role of the shadow docket on precedence. The Court issued a much different statement, however, in *Tandon v. Newsom*. In this case, coming after a series of emergency rulings striking down COVID-19 restrictions on religious worship in California, Justice Kavanaugh noted that “[t]his is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise... The Ninth Circuit’s failure to grant an injunction pending appeal was erroneous. This Court’s decisions have made [this] clear.” 26 In *Tandon*, the Court issued five emergency rules to strike down pandemic restriction statutes without a single majority opinion. Despite this fact and the statement issued in *Lunding*, the Court expected the Ninth Circuit to apply their rulings as precedent.

This new importance on shadow docket rulings has placed a stress on judges inside the judiciary and actors outside the judicial system. Inside the judiciary, you can see evidence of scrambling among judges. A notable example is that of D.C. district judge Trevor McFadden, who published a paper attempting to categorize the different shadow docket rulings according to what their precedential value should and should not be. William Baude of the University of Chicago has concluded that these shadow docket rulings are not good for lower court judges “[b]ecause the lower-court judges don’t know why the Supreme Court does what it does, they sometimes divide sharply when forced to interpret the court’s non-pronouncements.” 27

These decisions not only affect judges but similarly affect other actors who interact with the judicial system. For litigants, majority court opinions function as guides when shaping what they propose in written argument and oral argument. For other states and federal branches of government, and federal bureaucracies, the Supreme Court’s decisions powerfully influence the way legislation is written and mold the way bureaucracies act. As the Court continues to pursue this policy of shadow docket decisions making, it can be expected to see further damage done to the American Judicial system.

C. Specialized Borrowed-Judge Court

The continued use of the shadow docket to respond to these increasingly important legal questions has both damaged the American legal system and put significant stress on the legitimacy of the Court. The root cause of these issues is that the Court lacks transparency in these controversial decisions, leading to the weakening of its image as an independent judiciary. Solving this issue does not require that the shadow docket must be done away with all together, however. Testifying before the Senate Committee on the judiciary, Professor Stephen Vladeck stated, “the problem is not the shadow docket itself; for as long as we have a Court the jurisdiction of which extends to emergency applications, some action on the shadow docket is inevitable.” Ultimately the issue with the shadow docket is the way the Court has used it over the past decade. In order to remedy this issue, the Supreme Court needs a way to handle complex emergency issues in an efficient, transparent way. Providing the Court a route to handle these issues transparently while saving the shadow docket for procedural minutia could be done effectively through the creation of a specialized court.

Congress has frequently taken this route when having a court of judges focused on handling a particular niche of legal problems

28 Corley, supra. at 42.
29 Texas’s Unconstitutional Abortion Ban and The Role of the Shadow Docket: Hearing Before the S. Comm. on Judiciary, 117th Cong. (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) 32.
seemed like a beneficial/appropriate solution. For example, following *Katz v. United States* and *United States v. United States District Court*, the Court ruled that in order for the United States government to be able to conduct electronic domestic surveillance in congruence with the fourth amendment, warrants needed to be issued. Justice Powell suggested to Congress that for “sensitive cases” a warrant could be procured by going to a “specialized designated court”\textsuperscript{30}. Following this suggestion, Congress established the Foreign Intelligence Surveillance Court (FISC) to conduct such specialized tasks. The FISC has since provided the government both oversight and efficiency when it comes to conducting domestic surveillance on those deemed to be foreign spies, a complicated task if left to the generalized courts. Similarly, following issues removing noncitizens for terrorist activities due to immigration law barring the use of classified information in a case, the Reagan Administration pushed for the creation of a court that had the power to order removal based on classified information. This eventually led to the creation of the Removal Court. Outside of these two particular examples, there are several other specialized courts that Congress has created to handle particular areas of law, from bankruptcy to international trade. Professor Lawrence Baum, an expert in the field of specialized courts, has stated, “specialization sometimes has powerful effects on the work of the courts. Those realities merit greater attention from students of the courts and from policy makers who shape the structure of the judiciary”\textsuperscript{31}.

A specialized appellate court should be established to handle petitions for emergency relief that would normally be addressed to the Supreme Court for relief. Like the FISC’s responsibility to handle specialized cases surrounding the granting of warrants to conduct surveillance on foreign spies within the United States, the Emergency Relief Court would be required to handle petitions of emergency relief resulting from congressional, executive, and state action. Granting emergency relief is a unique burden that is placed on judges. Federal and State judges often have the luxury of time

\textsuperscript{30} Lawrence Baum, Specializing the Courts 82 (2010).

\textsuperscript{31} Baum, Specializing, 230 (2010).
when issuing a judgment. Time gives the judges the chance to be well briefed on the case before them, go through arguments, and then write a thorough opinion. Emergency petitions give no such luxuries. The judges granting relief need to be briefed and decide whether or not to grant the petition while avoiding the appearance of partisanship, an issue that has been plaguing the Supreme Court. These unique problems warrant the creation of the Emergency Relief court to handle these novel issues.

How will this new court be structured? While the specific structure of this court would ultimately be determined through congressional statute, the structure of the FISC provides a blueprint that could be mirrored in the creation of the Emergency Relief Court. The FISC sits in Washington DC and is composed of eleven federal district court judges who are designated by the Chief Justice of the Supreme Court. Each judge serves a maximum of seven years with term expiration dates staggered in order to provide continuity to the court. The judges must be drawn from at least seven of the United States judicial circuits and three must reside within twenty miles of the District of Columbia. Judges then typically sit for one week at a time on a rotating basis. There are at least three reasons as to why this structure is beneficial in the operation of the Emergency Relief court. First, it attempts to be a reflection of judges all across the union. This is important because emergency petitions come from all over the United States concerning issues that are equally as diverse. Having district judges sit on this court who originate from these different places provides the experience required to handle the diverse petitions that will come before the court. Second, it gives the Supreme Court oversight. The ability of the Chief Justice to select the judges sitting on this court gives the Supreme Court the chance to place trusted judges in these important positions and thus give more legitimacy to this court in the eyes of the high court’s sitting justices. Third, this structure would be the most efficient manner to respond to emergency petitions. Similar to the current process established to respond to emergency relief petitions, this court would have one justice decide whether or not to bring the emergency petition before the eyes of the rest of the members of the court. Due to the
limited number of emergency petitions filed and granted each year, this would be the most efficient way to respond to those petitions. 32

This court would follow the same established pattern for granting emergency relief as published by the Supreme Court. Where this court would differentiate from the Supreme Court’s use of the shadow docket is in its transparent procedure. While the Supreme Court will only provide a vaguely, if at all, written opinion when issuing emergency relief, this Emergency Relief Court will be required to provide opinions that are customary of a normal court when issuing judgements. This rule would be instituted in order to avoid brief opinions being drafted by this new court as well. This gives two primary benefits. First, it provides clear direction to the involved parties as to why the court ruled in the manner in the way that it did. Not only does this work to better inform the direct parties involved but it gives guidance to future parties engaged in a similar dispute to understand how the court will rule in a controversy similar to their own. Second, it instills legitimacy to both the court and the decision. As this paper has discussed, courts are meant to be independent bodies that rely on their rationale to have their decisions enforced. This court providing opinions customary of regular case opinions will ensure that this court does not have a legitimacy crisis and that their decisions will faithfully be enforced.

While there are many benefits to the introduction of a new specialized court, there are also critiques. One critique is that the creation of a new court will further drain already strained resources, limiting resources to the other courts. 33 While this is a legitimate concern in a deficit concerned society, the ability of the court to respond to emergency petitions in an efficient manner will address some of that concern by providing financial saving benefits through this specialized court’s efficacy in handling cases. While the court’s efficacy will not completely make up for the financial expenditures, it is important to remember that it is difficult to put a price

32 Baum, Specializing, 15 (2010).
on justice and the legitimacy of one of the United States’ three major branches. While budget concerns are valid, they should not hamper justice being delivered to the proper parties. Another critique is that specialization tends to cause courts to develop policy-oriented missions which subsequently would mean this body is acting more like an administrative agency rather than an independent court.34 While this concern is characteristic of specialized courts like a tax court or bankruptcy court, this Emergency Relief court has the benefit of being specialized in emergency petitions while also being a generalized court in the policy questions it addresses. This prevents the court from developing into a policy-orientated body as there is not a single policy this court will solely handle.

The benefits of establishing a specialized court system to handle emergency applications are numerous. Rather than leave the Court this shadow docket to respond to emergency petitions, this will provide the Supreme Court an opportunity to return the shadow docket to its original purpose, that being mostly procedural minutia. This also ensures that legal questions that require emergency relief get the transparency that the public is asking for. This similarly will solve problems that the increased use of the shadow docket has caused towards the legal system. Rather than confuse lower courts and others involved with the Court, these different units in the legal system will no longer be bound by precedent of the specialized court system. In sum, the creation of a specialized court system will bring normalcy back to the American legal system and restore legitimacy to the Supreme Court.

IV. Conclusion

In conclusion, this controversy surrounding the shadow docket is complex. There are opponents and proponents on every side of the Court’s ruling regardless of the docket from which the case was decided. The dilemma with the shadow docket is that it is not providing evidence of deliberation or impartiality for its decisions regardless of what party benefits from its decision. Failing to stay in line

34 Baum, Specializing the Courts 227 (2010).
with a consistent pattern of decision making through the shadow docket as well as providing little to no rationale behind its decisions is making it increasingly difficult to defend important decisions coming out of this docket. Not only does this system of shadow docket decision making impair the ability of the American legal system to operate efficiently, but it is mangling the legitimacy of the Supreme Court as an institution.

What this paper offers is a way to rehabilitate the legitimacy of the Court and its functionality to the American legal system through the establishment of a specialized court system designed to handle emergency petitions. This new court system will be able to restore the legitimacy of the Court by taking these controversial shadow docket decisions away from the Court and reemphasizing the decisions made through the normal merits docket. This new court system will similarly restore the functionality of the American legal system by isolating emergency petition actions to this new court system and removing any confusion caused by the vague emergency orders issued by the Supreme Court.
ACID RAIN: DETOXIFYING DIVERSITY JURISDICTION’S POISONOUS CYCLE

Baerett R. Nelson and Gavyn Roedel

I. INTRODUCTION

Unless a federal court is enforcing the Constitution, they lack authority to create or abrogate state laws. Therefore, in civil court, if the dispute is over a state law, you will be in state court and vice versa. A dispute’s governing law will be applied, while the “venue” is the court that presides over the issue. Oftentimes, a case or dispute has multiple courts that could exercise “concurrent” jurisdiction; plaintiffs may select any suitable court, usually filing in whichever forum is most convenient or advantageous for them. While state and federal courts always exercise jurisdiction over interpretation of their respective laws, they may also concurrent jurisdiction through diversity jurisdiction.

When federal courts serve as venues under diversity jurisdiction, they lack authority to create state policy or common law; despite

1 “We have all drunk from wells we did not dig, and warmed ourselves by fires we did not build.” (fmr. US Solicitor Gen. and BYU President, Rex E. Lee quoting Deut. 6.11). This author would like to offer sincerest gratitude to those who have most contributed to this paper. In the words of Abraham Lincoln, “Everything I am, or hope to be, I owe to my angel mother.” Likewise, this author owes “everything” his mother, to Barbara Nelson. This author is similarly grateful for countless conversations and counsel on the topics of this paper provided by his father, the Hon. Ryan D. Nelson. Finally, Professor E. Farish Percy of the University of Mississippi School of Law was instrumental in instilling passion and understanding through not only her articles, but her personal critique and guidance of this paper as well. These authors are grateful for her generosity and indebted to her.
federal adjudication, state law still governs. Accordingly, legal outcomes of diversity courts must be substantively the same as in state venues. This creates an “anomalous position” for federal judges who ordinarily must “abstain from state law question[s]” but must predict a state tribunal’s ruling if a case is brought under diversity jurisdiction. This carve-out of states’ absolute authority to preside over their laws was first adopted through the Judiciary Act of 1789 and is now codified in 28 U.S.C. § 1332.

The Court has determined that federal tribunals must maintain state substantive law and federal procedural law in diversity cases. These “procedural” differences between state and federal courts create inherent discrepancies, harmless and unavoidable sans total obliteration of diversity jurisdiction. However, “substantive” discrepancies also plague the judiciary. These contribute to deviation in rulings and the “legal outcome” of a case. The latter cannot be tolerated. In Erie and Guaranty Trust, the Court directed inferior courts to eliminate “substantive” discrepancies. But despite this jurisprudence, diversity courts err far too often – failing to produce diversity outcomes that are authentic to their respective state supreme courts. This damage to state court legitimacy and autonomy calls into question the continued necessity of diversity jurisdiction. The scope of this paper contains neither an endorsement nor a rejection of diversity jurisdiction altogether. Rather, this debate is included to contextualize the current illness of diversity jurisdiction and emphasize how desperately it needs change to remain viable.

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Federal courts produce incongruent rulings by misinterpreting state laws. This incongruence contributes to gamesmanship over venue as parties seek or flee state rulings. Subsequent proceedings bloat federal dockets and overextend courts. Exhausted, diversity courts are more prone to mistakes—especially as they adjudicate outside their federal “wheelhouse.” Thus, the current state of diversity jurisdiction harms the judiciary through 1) forum gamesmanship, 2) excessive pleadings, 3) exhausted courts, and 4) altered legal outcomes.

The four core problems of diversity jurisdiction are cyclical, each one grows the latter. And this toxic cycle continues to worsen. Comprehensive reform is needed; both Congress and the judiciary must act in concert. This paper proposes five solutions to ensure comprehensive reform. The first three solutions come from Congress: 1) Congress must prevent the snap removal loophole in the Forum Defendant Rule. 2) Congress must explicitly provide courts with the permissive power to remand cases where dismissal of claims drops the amount in controversy below threshold. 3) The Legislature must award the judiciary greater latitude in staying, certifying, or repairing proceedings concerning novel or complex issues of state law.

Congressional intervention alone is insufficient to combat inadequacies in diversity jurisdiction. Therefore, federal tribunals must take advantage of these new statutory powers. After doing so, judicial action is required. 1) courts must recognize and apply the Procedural Misjoinder Doctrine. 2) courts should allow and give deference to post-removal damage stipulations when used as clarification.

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4 See Sloviter, id. Referencing incongruent rulings in cases such as Memphis Dev. Found. V Factors ETC., INC 616 F “holding that Elvis Presley’s ‘right of publicity was not inheritable’) Cert. denied 449 US (1980), Factors etc., INC, 652 (2nd Cir. (Deferring to 6th Cir. Prediction of Tenn. Law despite that court’s admission that they were speculating. Cert. denied (1982) and the Tennessee Supreme Court’s rejection of the appellate decision as incorrect in Elvis Presley v Crowell and Tennessee’s legislature enacting a statute to ensure this interpretation.


Elvis Presley Enterprises, Inc., v. City of Memphis, 2182718 (U.S. District Court For The W.D. Tenn. Western Division 2020).
Cumulatively, these prescriptions equip courts with tests and tools to defend themselves, reduce forum shopping, filter the removal process, conserve their resources, and properly predicate legal outcomes.

II. BACKGROUND

A. History and Contemporary

The Constitution established diversity jurisdiction in Article III Sec. 2 with the intention of transforming federal courts into impartial conduits for certain types of cases. Legal scholars debate the full range of rationale behind this provision, but the standard theory is the intention to protect citizens against out-of-state bias. Section 2 addresses the principle of diversity jurisdiction, but it also enables federal question jurisdiction, (the other significant component of subject matter jurisdiction.) This, however, was not codified until 1875, while diversity jurisdiction was created by the very first judicial law Congress passed in 1789. Thus, for nearly a century, diversity jurisdiction was the first, and only extension of federal tribunal adjudication over state law proceedings.

Cautious of unbridled federal power, early legislatures leashed the supervision of state cases. Protective stop gates included the retention of concurrent state authority and requirement of litigant consent. Importantly, these federal forums were required to maintain state governing law, rather than federal statutes (the evolution of this principle is addressed more extensively later in this paper). These measures help avoid nullification of state court validity. Today, Congress has created additional measures as a response to both policy concerns and federalism concerns- these have diminished, but have not eliminated, diversity cases.

Modern policy makers must walk a tightrope between conflicting responsibilities: respecting states’ rights but also intervening when “the State tribunals cannot be supposed to be impartial.” One of the earliest concepts of diversity jurisdiction is found in Federalist No. 80. Here, Madison proposes concurrent jurisdiction between federal and state courts in litigation where “the State tribunals cannot be
supposed to be impartial and unbiased.” Though hotly debated\(^5\) and somewhat apathetically defended\(^7\), a desire to strengthen national identity and incubate interstate commerce\(^8\), as well as ensuring access to “unbiased” forums, ensured diversity jurisdiction’s inclusion in the Constitution.\(^9\)

A broadly accepted rational for diversity jurisdiction is to protect against out-of-state bias. But “…critics also often argue that even if… local bias exists… legal framework for diversity jurisdiction is not adequately tailored to address local bias concerns.” Diversity jurisdiction has been extended to circumstances absent the threat of out-of-state bias. Nevertheless, these two criteria (buttressed by

\(^5\) Alexander Hamilton, *Federalist 80*

\(^6\) With the gradual decline in state sovereignty and sectional identity, arguments that the decay of state bias eliminates the need for diversity jurisdiction have grown and persist today. The complexity of policing its use, its drain of judicial resources, contributions to forum shopping, federalism concerns, and the potential for incongruence in the application of State law, have stoked the fire for proponents of its abolition. At times, Congress, federal court advisory committees, and even Supreme Court justices have advocated for the abrogation or complete abolishment of diversity jurisdiction. *See generally*, The Report of the Federal Courts Study Committee April 2, 1990 (proposing the near-complete undoing of diversity jurisdiction.); *See also*, Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts 8-9 (Mar. & Sept. 1977) (endorsing H.R. 761, 95th Cong., 1st Sess. (1977), which proposed abolition of diversity jurisdiction)

\(^7\) Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harvard Law Review. 483, 484 (1928) “The most astounding thing, however, is not the vigor of the attack but the apathy of the defense.” “As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.” Jonathan Elliot, *Debates on the adoption of the federal constitution in the convention held at Philadelphia in 1787* 48-50 (2nd ed. 1907).


caselaw and supplemental statutes,) gatekeep federal forum access. Requiring complete diversity of citizenship works to filter out cases where out-of-state bias is not an overt concern.

B. Jurisdiction

Federal courts are “of limited jurisdiction[]”\(^{10}\) Policy and constitutional concerns demand that criteria exist to limit the courts’ power and to stem the drain of their resources. 28 U.S.C. §1441 and §1332 detail the two criteria for diversity jurisdiction, demanding that the amount in controversy exceeds $75,000, and that the parties’ state citizenship is completely diverse.\(^{11}\) The absence of either criteria destroys jurisdiction and results in the case being remanded to state court through party motion or sua sponte by the federal court.\(^{12}\) If these conditions are met, the plaintiff, as “Master of the Claim,” may initiate proceedings in federal court. Otherwise, a defendant may also “remove” state court proceedings to federal court. These conflicting rights over litigants’ choice of venue can lead to “venue gamesmanship,” “litigation tourism,” or “forum shopping.”

Forum shopping occurs when plaintiffs or defendants jockey for their preferred forum – Often by manipulating their pleadings.\(^{13}\) Because defendants covet the benefits of federal court, they are incentivized to remove state cases whenever possible. Naturally, plaintiffs work to frustrate defendant tactics and deprive them of jurisdiction.

12 Vanessa Wilkins; Victoria Pouncy; Annette Stapleton; And Shannon Stapleton v. Marissa Stapleton; And John Does 1-25, 617 (U.S. District Court, M.D. Fla., Orlando Division. 1987).
This battle leads to aggressive and even deceitful maneuvering by both parties; the beachhead being the two criteria.

Defendants often pursue removal due to federal courts’ perceived benefits: chiefly, impartial federal judges, better odds at settling, and Federal (rather than state) Rules of Civil Procedure. These differences can shift the scales in a lawsuit, and plaintiffs will often work to thwart a removal if possible. Other perceived benefits stem from variations not between courts, but in attorney demographics and their subsequent familiarities with certain legal procedure:

Plaintiff attorneys represent individuals in 75% of the sample cases. Privately owned corporations comprised an additional 15% of plaintiff attorneys’ cases, with other types of businesses making up most of the remainder. Defense attorneys primarily represent businesses, with insurance companies and publicly owned corporations each equaling 30% of the defense clients. Defense attorneys represent individual citizens in 9.4% of cases and state or local government in 3.2% of cases.¹⁴

Plaintiffs representing individuals may suppose sympathy from state judges and juries, while high-powered corporate defense attorneys frequently deal with the uniform federal courts and assume more favorable attitudes towards their massive clients. These demographics help rationalize why plaintiffs generally prefer state court and defendants may flee to federal jurisdiction when possible. The data reflects these perceptions: “[plaintiff] win rate in original diversity cases is 71%, but in removed diversity cases it is only 34%.”¹⁵

Choice of forum matters. Unfortunately, the importance of venue choice compels many defendants to remove litigation even when a claim fails to meet the jurisdictional criteria. Today, the sheer volume of resources drained by illegitimate diversity proceedings has become a significant problem. Original diversity jurisdiction produces about 36% of all private cases in federal district court dockets,


and even more diversity cases are removed after initial filing in state court.\textsuperscript{16}

III. Key Problems

The first key problem is that of forum shopping. Forum shopping, gamesmanship, or “litigation tourism,” is when litigants fight over a case’s venue. Minor “jockeying” or posturing for preferable courts are part of the practice of law. It is not a travesty for lawyers to gravitate towards an equal, but preferential forum. However, when we see a constant tug of war over forums due to different applications of the same law, this becomes a problem.

To keep forum shopping in check, it is necessary to identify and minimize factors that stimulate it. \textit{Erie} permits procedural differences as non-impactful on the legal outcome – these are tolerable and need not be eliminated. However, substantive differences between state and federal courts do impact the legal outcome. Distinguishing between the two is critical in healing diversity jurisdiction. Once we understand where differences in legal outcomes come from, we can better target them in our prescriptions. Federal civil procedure itself lends benefits to defendants more often than plaintiffs. Plaintiff attorneys more commonly represent individuals, while defense attorneys largely work for larger firms or public and incorporated companies.\textsuperscript{17}

A. Confusion and Abuse of Courts

Litigants engaging in procedural duels have little regard for presiding judges who may get caught in the crossfire. Legal tactics have evolved through an arms race of abuse and when the dust has settled, massive legal fees and exhausted judges remain. Perhaps one of the most complex, and therefore prone to manipulation, general areas of law is the removal. Just as a home field advantage impacts rivalry


\textsuperscript{17} Wilkins v. Stapleton
football games, familiar forums can provide parties with a slight edge in their legal skirmishes. Obviously, a game needs a field, and a court case needs a courtroom, but as much as fans lament poor or inconstant calls by refs, judge discrepancies or “bad calls” lead to much more than lost games or heckling. Attorneys are no dummies: they recognize and pursue the opportunity for incongruent legal outcomes or federal “Erie Guesses” which may favor their clients. This spurs forum shopping and fraudulent or excessive moves and procedural complexity.

Circuit and district splits are vulnerable to abuse by litigants which comes to the expense of judicial resources. By identifying areas of confusion, plaintiffs can increase their odds of remand, while defendants can chart a course straight into federal court. These confusing legal concepts should be clarified to reduce circuit splits.

B. Exhaustion of Judicial Resources

When plaintiffs prefer federal court, they simply file there. Defendants are unlikely to contest federal jurisdiction. Remands in these cases occur almost exclusively sua sponte. Most altercations over diversity jurisdiction follow removal by defendants. Evaluating jurisdiction has proved particularly challenging and subsequent circuit splits have emerged. Confusion and nonconformity over many niche areas of removal law have therefore confounded courts and depleted time on the part of both litigants and judges. Unfortunately, federal courts face daunting caseloads; they do not have time to waste.
Federal dockets are bloated. Even aside from the drain of removal proceedings, the federal judicial system is straining under the weight of massive caseloads and ill-furnished benches. The Founders wisely recognized the importance of evaluating lifetime tenured judges and structured the confirmation process with several failsafe measures. In the past, these floodgates have merely served as barriers against unsuitable candidates. But as the American population has grown and society has become more litigious, these barriers have impeded judicial capabilities. The result is judicial vacancies and a shrunken quantity of judges who must undertake an overwhelming amount of work.


“California’s Eastern District, which covers a large swath of the state that includes Sacramento and Fresno, has had an unfilled judicial vacancy for nearly three years, and it has the same number of judicial positions — six — it had in 1978, according to the Administrative Office of the U.S. Courts… In the late 1990s, the median time for civil cases to go to trial in the district averaged 2 years and four months. From 2009 to 2014, that number jumped by more than a year. The median time to resolve criminal cases nearly doubled to an average of 13 months.” (Also remarking: “The Judicial Conference of the United States, the national policy-making body for the federal courts, has recommended Congress double the number of judicial positions in the district.”)


The federal district of New Jersey is considered one of the nation’s busiest. One third of its judicial seats are vacant and each seated judge has left with a pending caseload “well over three times that national average.” Also quoting Professor Carl Tobias, a federal court scholar and professor at the University of Richmond School of Law stating that New Jersey’s judicial vacancies are “a bad situation and it’s been bad for a long time,” “And you compound it with a year of Covid, and it’s a worst-case scenario.” Craig Carpenito, formerly the State’s top federal prosecutor, criticizes the overload which forces “judges were working around the clock, and that’s not sustainable,” “…You’re walking out late at night and their cars are still there. They’re there on weekends.”
Increased politicization of judicial appointments is one catalyst for the growing suffocation of federal judges.\textsuperscript{20} To some degree the sheer magnitude of their importance has always created political pressure for nominations.\textsuperscript{21} However, the degree of bitterness and contention stirred by contemporary appointees at all levels of the federal judiciary has never been so pronounced. Political pressure now makes appointing federal judges more strenuous\textsuperscript{22} and makes the creation of new courts a virtual political impossibility. Congressmen recognize this, and politicians and pundits across the aisle frequently bemoan how \textit{their} candidates become political footballs. But when the shoe is on the other foot, they are often all too quick to

\textsuperscript{20} In the 1980’s it was not unusual for the confirmation of Justices to be unanimous. Sanda Day O’Connor (99-0) and Anthony Kennedy (97-0) faced little to no political opposition. \textit{See generally,} How Politicized Judicial Nominations Polarize Attitudes Toward the Courts (Jon C. Rogowski and Andrew R. Stone, H.L.R. 2018)

\textsuperscript{21} The confirmation of John Marshall (who simultaneously served as US Secretary of State and the country’s 4\textsuperscript{th} Chief Supreme Court Justice,) was accompanied by significant legal turmoil. Due to his strong commitment to judicial restraint, Federalists and Anti-Federalists sparred over his nomination and entire courts were abolished in the wake of these disputes; compare the relative calm that followed with the rise in candidate scrutiny beginning with President Coolidge’s appointment of Harlan Fiske Stone, the first Supreme Court appointee dragged before the Senate Judiciary Committee before his appointment in 1941. Nowadays even appellate appointees are grilled by members of the senate and votes typically fall strictly on party lines.

\textsuperscript{22} Despite this, President Trump was able to appoint a staggering 245 Federal judges due to support from a Republican Senate and the leadership of Senator Mitch McConnell.
assail the other party’s appointees. Even if all existing vacancies could be filled, Congress has failed to set up sufficient judgeships. The number of Circuit courts has also remained the same since 1891.

To relieve the exhausted judiciary, the Judicial Conference of the United States has suggested reform. But, such legislation, though sorely needed, is likely too politically hot. Debates over both the number and location of new judgeships would be heated and protracted. The politics hindering the federal judicial deserve a complete and independent analysis, the specifics of which are outside the scope of this paper. Suffice it to say, it is critical that the needless drain

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23 Ben Sasse, Sasse on Kavanaugh Hearing: We Can And We Should Do Better Than This, US Senator for Nebraska Ben Sasse (Sept. 4, 2018), https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this. Senator Ben Sasse recognized the absurd levels this politicization had reached, admitting that Republicans were guilty of it as well. “Judge: Since your nomination in July, you’ve been accused of hating women, hating children, hating clean air, wanting dirty water…. declared an existential threat to our nation. Alumni of Yale Law School… wrote a public letter to the school saying quote, ‘People will die if Brett Kavanaugh is confirmed.’… We can and we should do better than this. It’s predictable now that every confirmation hearing is going to be an overblown, politicized circus. (Remarks during the hearing on the nomination of Brett Kavanaugh to be an Associate Justice of the US Supreme Court, 2018)

24 The Judiciary Act of 1891, or the Evarts Act, reorganized the Federal Circuit Courts. This number of courts has remained unchanged.

25 See, Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis (Sept. 2019), arguing the necessity of these expansions by stating that Congress has not approved comprehensive judgeship legislation since 1990, (although they acknowledge that a smaller number of district court judgeships have since been realized.)

26 Testimony before the U.S. House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet, 117 Cong. (2021) (Statement of Kari Kammel). Chief District Judge Kimberly Mueller of the Eastern District of California also recognized this longstanding issue and Congress’ failure to address it: “For 20 years-plus we’ve been in a judicial emergency,” The bottom line of my testimony today is that we cannot fulfill our obligations without congressional action to create new judgeships.”
of courts’ limited time and energy is addressed and prevented. In undertaking this endeavor, it is impossible to pass over the waste caused by frivolous filings, proceedings, cases, confusion, and gamesmanship, which can be solely attributed to removal through diversity jurisdiction.27

Chief Justice Rehnquist and the Federal Courts Study Committee offered guidance to “improve the federal courts capacity to resolve disputes... by relieving them of some functions that involve federal rights or interests only marginally if at all.”28 This Study proposed a complete abolition of diversity jurisdiction to stretch courts’ insufficient resources.29 There is strong support for and against this proposal, as well as alternate solutions.30 The wide acknowledgment of problems within diversity jurisdiction is clear evidence that if diversity jurisdiction is to remain, it desperately needs comprehensive reform.

Federalism issues aside, the policy recognition that diversity jurisdiction is broken is important and must be addressed. After all, “Justice delayed is justice denied” is not merely an adage, but

27 United States Government, Caseload Statistics Data Tables 4.3 and 4.8, United States Courts (Dec. 31, 2021), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. In 2019, diversity cases accounted for over 35% of U.S. District Court civil dockets, removals alone were responsible for about 12% of the entirety of Federal District court litigation.

28 Id. At 13.

29 There was also legislation proposed to abolish diversity jurisdiction and provide State courts federal funding to help with the resulting influx of cases.

30 Federal Courts Access Act of 2018, S. 3249, 115th Cong. (2018). Intended to increase out-of-state litigants access to federal courts “By creating a minimal diversity requirement consistent with the vision of the very first Congress,” but this bill never became law.
a Constitutional right. The exhaustion of judicial resources is a severe problem; diversity cases are responsible for that problem. To prune out needless proceedings, reduce gamesmanship, and clarify complex removal issues is to help resolve this key problem—a problem so grave it solicits calls for the utter abolishment of diversity jurisdiction.

C. Perforation and Misprediction of State Caselaw

As counsel flood the federal courts with diversity cases, they simultaneously deprive states of important cases and kneecap their ability to develop caselaw and provide judges with experience. This is another cyclical problem, as diversity migration strips cases from states. Litigants may advantage of richer and more developed federal jurisprudence. Especially in matters of law with sparse state guidance, lower federal courts will turn to federal appellate predictions of similar issues. These appellate decisions may be incorrect *Erie* guesses but by the time state courts can correct them countless decisions may be swayed and guided by subpar appellate predictions of state law. States must govern themselves and create their own laws; any

31 U.S. Const. amend. § 6. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...” Though this paper focuses on civil litigation, Federal dockets also include criminal cases. The policy concern for civil litigants who receive delayed justice is parallel to the jeopardy Constitutional rights are placed in due to exhaustion of judicial resources. This Constitutional crisis is thus partially created by defects in diversity jurisdiction.

32 *Wilkins v. Stapleton*

Judge Dalton wrote: “The U.S. District Court for the Middle District of Florida is one of the busiest district courts in the country and its limited resources are precious. Time spent screening cases for jurisdictional defects, issuing orders directing repair of deficiencies, then rescreening the amended filings and responses to show cause orders is time that could and should be devoted to the substantive work of the Court.”

33 *Id.* At 2 “Some Federal courts even rely on federal over State precedence at pre-“Erie” levels.”
encroachment on policymaking is a travesty. Under diversity jurisdiction, devastating blows to federalism land all too frequently.

Take *Memphis Dev. Found. V Factors Etc., INC*, for example. Here, the 6th Circuit oversaw how defamation and publicity laws in Tennessee could extend to Elvis Presley’s son. The 6th Circuit ruling set strong precedence which was followed by a number of cases including in *Factors Etc., INC, v Pro Arts, INC*, one year later. Despite the *Factors* Court’s “admission that they were speculating,” they nevertheless stuck to the 6th Circuit’s persuasive prediction of Tennessee law. These predictions were wrong and later rejected in *Elvis Presley v Cronwell* by the State of Tennessee when its courts were finally presented with a similar matter. State courts have no way to rectify these skewed interpretations of their own laws. Many state courts lacked mechanisms for advisory opinions or certification and were therefore could unable provide any form of mandatory or even persuasive guidance to federal courts.

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36 *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978)

37 *Id.* at 24.


39 Many states today do allow for certification, but *Pullman* is too narrow and federal courts occasionally ignore guidance from the very courts whose ruling they ought to emulate.

40 *See, United Services Life Ins. Co. v Delaney*, 396 S.W. 2d 855, 862-63 (Tex. 1965) (Regretfully refraining from certification as the Supreme Court of Texas lacked the pertinent procedural mechanisms. Consequently, the Court held that issuance of a Declaratory Judgment for the 5th Circuit constituted an “Impermissible advisory opinion.”); *See also, United Services Life Ins. Co. v Delaney*, 328 F. 2d 483
Diversity rulings are “coined predictions of state law” that may be seen as “less abrasive,”\(^{41}\) but they are nonetheless damaging to states’ rights.\(^{42}\) Perforation of state caselaw poses a federalism risk that can and should be mitigated. This mitigation should take the form of increased state guidance. While the Supreme Court has provided narrow circumstances for state intervention in diversity cases, it does not go far enough. Federal courts ought to be chomping at the bit to receive state tribunals’ “two cents,” on their own laws, but they currently fall short of even Supreme Court standards on certification and abstinence.

Without comprehensive change, these defects will get worse, not better. Symptoms of the “toxic cycle” will continue to jeopardize justice. America must have legitimacy in its courts. Fraud, exhaustion, and incongruence born of attunement and exhaustion make that impossible. Only by reversing the cycle can we preserve diversity jurisdiction as a viable mechanism to allow federal jurisdiction.

### IV. Solutions

The breadth and depth of these problems warrant comprehensive reform that is just as broad and deep. The Toxic Cycle of forum shopping, excessive removals, exhaustion of judicial resources, misprediction and incongruence, and incentive for more forum shopping continues and worsens at the expense of justice. Federal tribunals and litigants are in desperate need of change. In the words of AC/DC, “There ought to be a law… there ought to be a whole lot more.”\(^{43}\) We prescribe 5 solutions, both legislative and judicial, to cure these current defects. Our solutions are both legislative and judicial guidance and encompass the removal process and diversity jurisdiction all along the way.

Our Statutory claims consist of providing federal courts permissive powers to remand if a case’s amount in controversy drops below

\(^{41}\) Id Footnote 24

\(^{42}\) *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

\(^{43}\) AC/DC, *If you Want Blood (You’ve Got It)*, on *Highway to Hell* (Atlantic Records 1979)
the threshold, and to allow greater latitude to federal courts predicting novel or complex issues of state law, and to close the “Snap Removal” loophole. Next, our judicial prescriptions offer guidance to tribunals regarding Fraudulent misjoinders, Post Removal Damage Stipulations and reach out to states to ensure state law is interpreted correctly.

Applied altogether, these prescriptions will dramatically slim bloated dockets, allow courts to interpret state law more accurately, reduce artificial differences between the forums, and reduce the need for attorneys to forum shop. Like the toxic cycle that currently exists, this healthy cycle will clean out and recurring change will slowly but persistently promote positive change to diversity jurisdiction.

Litigants need these changes, judges need these changes, and justice demands these changes. We will prove that the benefit of implementing these changes is needed and for the greater good. These changes adhere to principles of federalism and are easily and uncontroversibly attainable. Lastly, we will prove that our approaches are the optimal way to make these needed changes.

A. Legislative Prescriptions

The first three solutions require Congress to provide relief. The Forum Defendant Rule, as it stands, does not promote justice. The text of this law reads “otherwise removable solely on the basis of diversity of jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”44 Currently, defendants who should be blocked from federal forums are able to circumvent that restriction by fleeing before they are properly served. Especially with the growth of technology in law, attorneys are hyper aware of impending lawsuits and able to see court filings long before being properly served in person. Additionally, defense attorneys may advise or encourage their clients to avoid or dodge service until they are able to remove. We propose that Congress rewrite this law so that the “and served” language is stricken. An acceptable solution could

be: “...may not be removed if any of the parties in interest properly joined as defendants is a citizen of the State in which such action is brought...”

As it is written, there are split circuits regarding snap removals. Experienced judges who take this route are not wrong, they are just using different statutory interpretations. Those courts which have found snap removals permissible do so under valid and sound reasoning. A textualism reading finds no fault with exploiting this loophole. After all, Defendants must have been served per the exact text of the law. Judges should not be forced to reject the text and rely on purposivism or legislative intent in their analysis. As Justice Kagan famously said, “we are all textualists now.”

Judges using a purposivism interpretation or legislative intent consider why this law was written, instead of the explicit text. This equally valid theory of interpretation looks to the purpose of the law: to prevent defendants from fleeing their home states. Many judges now recognize and reject snap removals. The ravine between purpose and text is a defect that should be cured by Congress. Fixing broken laws is not the prerogative of the federal judiciary. These powers belong to Congress, they do not belong to the judiciary. It is federal overreach for judges to apply this law flex-

45 Compare, Encompass Insurance Co. v. Stone Mansion Restaurant Inc., 902 F.3d 147 (3d Cir. 2018). There, the court reviewed whether § 1441(b)(2) permits snap removal by a forum defendant concluding the “language of the forum defendant rule in section 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in state citizenship only when the defendant has been properly joined and served.” The court acknowledged that “[r]easonable minds might” question the policy of that result, but did not consider that question relevant to its statutory interpretation. With Second Circuit precedent that “[t]he statute plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home state defendant has been ‘properly joined and served.’” Gibbons, 919 F.3d at 705 (quoting 28 U.S.C. § 1441(b)(2)). “By its text, then, Section 1441(b)(2) is inapplicable until a home state defendant has been served in accordance with state law[.]” Id. The Court added that “while it might seem anomalous to permit a defendant sued in its home state to remove a diversity action,” that practice “does not contravene’ Congress’s intent to combat fraudulent joinder.”
ibly purely because they want it to be that way. § 1441(b)(2) should therefore be rewritten.46

State court systems have evolved through American history. It was only in the mid to late 1900’s that states even uniformly established intermediate courts, and state supreme court certiorari was established even later.47 States have historically lacked procedures to provide effective guidance for diversity cases. Now, however, most states have adopted processes to advise in these instances. But federal procedure and caselaw limit state input. To ensure accurate prediction, circumstances should be expanded and methods for seeking state participation guidance should be enlarged.

The next legislative prescription is to grant courts wider latitude to receive state input regarding novel or complex issues of state law. Our solutions will conserve federal judicial resources and provide more time and energy to properly predict state rulings. However, increased resources are insufficient to rout misinterpretation. Although many federal district court judges will be from the state they preside over, they are still imperfectly suited to predict state law. Deviation in outcome is largely due to a lack of attunement of federal judges to state policy.

Especially at the appellate level, federal judges preside over broad regions of states. The 9th Circuit, for example, includes dramatically different state cultures from states such as California, Hawaii, or Alaska. Out-of-state judges are not attuned to state politics, history, or culture. They are also less experienced in interpreting state law. They therefore pose a federalism risk that can and should be mitigated. This mitigation should take the form of state guidance.


Current Abstention Doctrines include, among others, three separate cases: *Pullman*, *Burford*, and *Colorado River*.\(^{48}\) *Pullman* abstention permits diversity courts to “restrain” their adjudication when states can resolve litigation. This done to alleviate federalism concerns and practice “scrupulous regard for the rightful independence of state governments.”\(^{49}\) *Burford* abstention outlines two instances where federal courts can abstain from diversity proceedings: 1) “difficult [and substantive] questions of state law” or 2) judgment would be “disruptive [to] state efforts to establish a coherent policy.”\(^{50}\) Lastly, *Colorado River* abstention can stop proceedings when parallel case(s) are proceeding in state court.\(^{51}\) The *Colorado River* Court directed inferior courts to only abstain in “exceptional circumstances”.\(^{52}\) This doctrine, along with *Pullman* and *Burford*, are far too narrow.

While these three cases serve to limit needless proceedings and protect state judicial sovereignty, they do not go far enough. We propose Congress codify the express power for diversity courts to abstain from adjudication temporarily at the request of states, or liberally when any of these doctrines are met.

When there is uncertainty as to how a state supreme court would rule, they should liberally abstain from judgment. In these cases, federal courts should abstain from ruling until a similar case is decided on the state level, until they can obtain certification from the state, or until state courts can repair matters of law in the case. While state certification and advisory opinions are not technically mandatory, there is little to no reason that federal courts should not follow them. The right to create state law belongs solely to the state.

Federal courts benefit greatly from certification of novel and complex issues of state law. Certification amplifies the ability of

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49 *R.R. Commn. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)
50 *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)
federal courts to predict accurate legal outcomes. Congress should therefore codify greater authority for certification or the advisement of diversity rulings. Likewise, if certain legal issues can be severed, they should be repaired or remanded for state resolution. Again, federal courts already possess these powers, they simply need them expanded.

Lastly, Congress award courts permissive remand the amount in controversy drops below the threshold. Several courts have already set this precedent. They consider the policy implications as well as potential federalism issues. Indeed, if a case does not meet the threshold federal courts arguably lack jurisdiction and must therefore immediately remand. *St. Paul Mercury* leads to disagreement over this approach and appellate courts are consequently split. In fairness, since criteria is determined “at the moment of removal,” it is unclear how courts should respond.

More settled is the application of *St. Paul Mercury* to the diversity of citizenship criteria. It is well-established that if parties move during litigation, it does not destroy diversity. However, if it is later discovered that complete diversity of citizen did not exist at removal, courts are prohibited from retaining proceeding and must remand. Even final decisions have been post-humorously vacated if it is discovered that diversity jurisdiction conditions were not met.

The argument, therefore, is whether a non-meritorious claim was non-meritorious from the start. If so, and a subsequent dismissal merely represents a recognition of what already existed, it follows that courts should remand if the amount in controversy was insufficient initially. A policy consideration is that courts’ resources should


54 *Thermoset Corp. v. Building Materials Corp of Am.*, 849 F.3d 1313, 1315 (11th Cir. 2017). (Vacating summary judgment for the plaintiff where trial court lacked subject matter jurisdiction due to the presence of a non-diverse defendant); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 509 F.3d 271, 272 (6th Cir. 2007). (Finding there was a lack of diversity and reversing summary judgment for defendant); and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). (Allowing for vacation of judgment if there was no fed. jurisdiction)
be conserved for cases which warrant their attention. And who better than the presiding judge to make that determination. Admittedly, these remands would increase state caseload, but only nominally.  

This approach provides needed relief to the judicial system, while allowing defendants access to a neutral forum when the controversy is truly over $75,000. This prescription ensures that cases which belong in federal court, stay in federal court; it also leaves judges to discern which cases do not belong and would be preserved at the expense of other lawsuits.

These legislative solutions will provide an influx of judicial vitality and legitimacy. But making diversity jurisdiction justifiable is a daunting task – legislative change alone is insufficient. Not only must courts apply these legislative gifts, but they also have legwork of their own. Empowering legislation is applied ineffectively by overburdened courts; the stem of excessive and fraudulent drains of federal resources must be eliminated. This means stopping fraudulent proceedings from both parties. Our judicial prescriptions accomplish this, outlining actions, tests, and doctrine, that will aid courts. Court action is the way to do this.

Success of the legislative prescriptions depends on turning the gears and giving courts breathing room to digest and fully take advantage of new laws. Until that happens, forum shopping will continue to plague diversity cases. The front lines of forum shopping are removals, which make up a substantial portion of diversity cases. Both parties are guilty of greedy manipulation to the detriment of justice. First, defendants employ Snap Removals and other tricks to secure their judge and forum. Judges should recognize Snap

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55 Data analysis from the 1970s and 1990s calculated an increase of only around 1 percent to state dockets from abolition of diversity jurisdiction. See Victor E Flango & Nora F Blair, The Relative Impact of Diversity Cases on State Trial Courts 252-253 (1978). (“If diversity cases were distributed evenly among the states, each state would experience an average 1.03 percent increase in civil filings . . . .”); Kramer, supra note 1, at 110–17 (calculating that complete abolition of diversity jurisdiction would increase state caseloads by around 1 percent and workloads by about 5 percent)
Removals and use their newfound authority to dismiss and sanction attorneys who ignore the law.

Contributing to the arms race of jurisdictional manipulation, “Masters of the Claim” also work to deny their opponents the upper hand. Plaintiff schemes needlessly burn judicial resources and attempt to rip away defendants’ legitimate rights. Plaintiffs focus typically revolves around the criteria required for removal. They primarily use two methods to destroy federal jurisdiction, attacking it both preemptively and reactively. Our paper focuses on two prevalent breaches: fraudulent misjoinders and Post Removal Damage Stipulations. Chronologically, plaintiffs first attempted to cheat the system comes before state proceedings are even initiated; enter the fraudulent misjoinder.

B. Judicial Prescriptions

Courts have long recognized plaintiff use of the fraudulent joinder as a scam to anchor their case to state court. This doctrine is when plaintiff joins invalid or fraudulent claims or parties to an otherwise removable case. These “spoilers” convolute federal proceedings upon removal. Federal courts must sort out whether the claims are valid and must formulate a response. The accepted way to handle this is to determine if invalid joinders exist and move to sever or dismiss them. Evaluating claims upon removal is difficult, and the element of “fraud” in fraudulent joinders need not stem from an act of fraud or misrepresentation.

Indeed, courts often must take the time to carve out earnest or legitimate joinders, effectively performing an analysis akin to how they would in response to a 12(b)(6) motion to dismiss. This burns court resources, but the practice has been well documented, and courts have caught on to this deceit. Although it takes time, the Fraudulent Joinder Doctrine has evolved and now streamlines court reactions.56

What is less clear, however, is how to respond to a fraudulent misjoinder. Here, plaintiffs join legitimate claims or parties. A fraudulent misjoinder is also referred to as a “Procedural” misjoinder, as the problem is not substantive but procedural. Fraudulent Misjoiners occur when an unrelated claim or party is linked to another in a way that destroys diversity. This destruction can arise when complete diversity between the parties is spoiled, or when the unrelated party is tethered to state court under the Forum Defendant Rule. This Doctrine may not be understood by defendants or may not be recognized or applied by courts. In either case the result is the same, defendants are denied their rights. Even if a court recognizes and applies the Doctrine, plaintiffs force them and defendants to incur needless costs.

Circuit courts are split on the Doctrine of Fraudulent Misjoinder. Those which do not recognize it have different rationales. Some insist that state courts have the responsibility to sever these claims, but states may lack time and experience needed to respond to every instance of fraudulent misjoinder. Defendants often rely on Federal courts as their first opportunity to be disconnected from spoilers. Other courts simply see remand under diversity jurisdiction as too complex already; they reject the Fraudulent Misjoinder Doctrine as “adding layers of complexity” to an already convoluted process. These responses are understandable, but a defendants’ right to legitimate diversity jurisdiction must be protected, regardless of Federal confusion or unfounded concerns of federalism dangers.

Uniform adoption of the Fraudulent Misjoinder Doctrine would smooth out needless proceedings and eliminate costly confusion. We prescribe the uniform approach needed, as well as distinguish the authority by which courts can identify, sever, and sanction in instances of fraudulent misjoinders. There is a dire need to prevent needless proceeding and deprivations of rights caused by rampant fraudulent joinder.

Tapscott laid the groundwork as courts faced valid spoilers which were improperly joined to destroy diversity of an unrelated claim or party. Since then, courts have applied a “Reasonable Basis” test to determine whether legitimate claims should be joinder. The Tapscott Court wrote that “other tests are problematic and raise federalism
concerns because they inappropriately encourage federal courts to resolve ambiguous or novel questions of state law…”

Using the Reasonable Basis Test to apply the Fraudulent Misjoinder Doctrine protects rights while reducing judicial drain.

While fraudulent misjoinders destroy diversity of citizenship criteria. Post removal damage stipulations impact the amount in controversy requirement. When plaintiffs contest that the amount in controversy bars removal, some courts have applied a “preponderance of the evidence” test, while others have applied a “facially apparent” test. Still other circuits have set precedence applying the far more stringent “Legal Certainty” test, which places the burden of proof squarely on the plaintiff to prove to a legal certainty that the amount does not allow federal oversight.57 Parties may reach the requisite amount through various methods. First, aggregation of damages is allowed when a plaintiff has multiple claims against a defendant or multiple plaintiffs share similar claims against a defendant that arise from the same circumstances. It is worth noting that CAFA also raises the $75,000 threshold to $5 million in class actions.58 In any case, when courts are not confident that the amount in controversy or complete diversity criteria have been satisfied, they will turn the case over to the proper state venue.59

Many plaintiffs assert that they are master of the claim and as such know best how much relief they are requesting. Still others connected through affidavit that they will reject relief over $75,000 even if it is awarded. Courts are split on how to receive and regard these post removal damage stipulations. Some circuits have held that St. Paul Mercury, prevents consideration of these stipulations if filed

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57 (i.e., a “fair reading” of the complaint) that the amount in controversy exceeds $75,000, the defendant has the burden to submit evidence that the amount in controversy is satisfied. Williams v. Best Buy Co., 269 F.3d 1316, 1321 (11th Cir. 2001). (Subject Matter Jurisdiction: Diversity–Time to Cross Your “T’s” and Dot Your “I’s” https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2017/subject-matter-jurisdiction-diversity-cross-ts-dot-is/)

58 The Class Action Fairness Act of 2005

59 Federal courts must “zealously insure that jurisdiction exists.” See Smith v. GTE Corp., 236 F.3d 1292, 1299 (11th Cir. 2001).
after removal. Indeed, allowing affidavits to alter the amount in controversy post removal opens the door for plaintiffs to flee federal court any time litigation does not go their way.60 Some circuits stand by outright rejection of post removal damage stipulations, but other courts take a more liberal view.

Some circuits are willing to accept stipulations indiscriminately. Even if plaintiffs fail the Legal Certainty Test, these courts may permit carefully phrased affidavits as the final word on the amount in controversy. In support of their decisions, courts reason that the plaintiff is the master of the claim and should have control over what relief they are seeking. What’s more, allow plaintiffs to amend their relief requested with the intent to avoid federal court. Districts and circuit courts have allowed plaintiffs to “sacrifice” relief for the strategic purpose of keeping their preferred forum. Still other courts fall somewhere in the middle of the spectrum, only recognizing post removal damage stipulations in certain circumstances.

Many circuits have held that while post removal damage stipulations cannot be considered as new evidence to amend their complaint, they may serve to clarify the amount requested. This approach strikes a balance that these authors endorse. Allowing stipulations to serve as clarification adheres to Supreme Court precedent and respects plaintiffs’ right to exercise control over their case. Additionally, this approach offers uniform fairness to plaintiffs in all states, as litigant complaints’ may be subject to Ad Damnum clauses certain restrictions depending on the state. These restrictions vary widely.

Ad Damnum clauses are sections of the complaint which list to relief sought- either attached to the cover page or just in the text of

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60 A Device Designed to Manipulate Diversity Jurisdiction recognizing Wait and See tactics when “plaintiffs… devilishly move to limit their damages and return to state court only after litigation has taken an unfavorable turn.” (Brooks v. Pre-Paid Legal Servs., Inc., 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001); see also Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6th Cir. 2000). (stating that “[i]f plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable”); Simmons v. PCR Tech., 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002). (stating that post-removal stipulations are “likely to manipulate the amount in controversy to secure jurisdiction in the desired court”))
the complaint. States have total control over how litigants must structure these clauses. Some states require a complaint to specify a range of damages. Other states may require an exact amount, still others disallow plaintiffs to list any specific dollar amount as numbers may act as an anchoring bias to juries or may ignite public attention if a case unrealistically sues for extravagant amounts.61

Restrictions are all based in different rationale determined at the sole discretion of state legislature. Federal courts are powerless to change state policy; they must, however, recognize and react to these differing standards. The variance in these restrictions necessitates allowing plaintiffs to stipulate as clarification. Since for many plaintiffs a stipulation might be the first possible opportunity for them to specify a dollar amount.

Our prescription regarding post removal damage stipulations is that courts should recognize carefully crafted post removal damage stipulations if done as clarification of their originally requested amount. These stipulations should then shift the burden of proof to defendants under the “Reverse-Legal Certainty Test.” Stipulations must be filed alongside a motion to remand, this precludes wait and see tactics.

If plaintiffs can “clarify” amount in controversy at any point during federal proceedings, they could wait to see how their case fares and destroy diversity if the outcome begins to look unfavorable. This destructive behavior must be prevented. Requiring stipulations to accompany motions to remand or else be waived eliminates confusion and belated remands. Plaintiffs can remain Master of the Claim, but courts are not subject to wasted proceedings at the whim of a plaintiff stipulation.


“[W]hen the state in which the federal court is sitting either does not require that the complaint contain a demand for a specific monetary amount, expressly forbids the inclusion of such a demand in the prayer for relief, or requires only that more than a certain threshold state court jurisdictional amount be alleged[,] it is not surprising] the federal courts have had some difficulties in measuring the amount in controversy.”
These 5 legislative and judicial claims address and resolve many diversity defects. Conserving judicial resources and empowering courts to accurately predict state law, will promote adherence to the *Erie* Doctrine. Issues of federalism, policy concerns, and the general interest of justice will be promoted if these prescriptions are applied.

V. Conclusion

When federal courts adjudicate under diversity jurisdiction, they merely act as venue; the governing law is unchanged. The objective is to ensure consistent application of law between all citizens, but diversity jurisdiction is broken. Ironically, this mechanism now promotes inconsistency in rulings and reduces justice in intra state litigation.

Diversity jurisdiction relies on variance between federal and state courts; they are not supposed to be exactly the same. But the legal outcome must be. Some variations between the tribunal detract from justice. Over the years, artificial differences have warped diversity litigation. Despite clear guidance otherwise, courts are ill equipped to predict state decisions.

The problems in diversity jurisdiction are cyclical in nature: 1) legal incongruence between state and federal outcomes incentivizes excessive and illegitimate proceedings; 2) the resulting flood of proceedings overwhims federal courts, exhausting them and forcing decisions under the gun; 3) cramped for time, unattuned federal courts fall short of accurately and swiftly predicting how a state court would rule, thus creating more incongruence in legal outcomes. This toxic cycle is perpetuated at the expense of justice.

American courts must have legitimacy. Exhaustion and incongruence diminish that. Only by reversing the cycle can diversity jurisdiction work as a viable mechanism. Courts must act to save diversity jurisdiction, but as they lack some tools to do so, Congress must also empower them with a legislative overhaul. First, federal courts need greater legislative authorization to receive state input on novel or complex issues. Streamlined processes for certification, repair, and advisement should be accompanied by expansion of Abstention Doctrines.
Second, courts require legislation permitting permissive remand when the amount in controversy below the requisite threshold. Courts should weigh federal intervention against policy and federalism concerns. Bestowing these powers provides permission for judges to redistribute, at their discretion, sorely needed judicial resources away from cases which no longer justify federal focus.

The third and final legislative prescription is for Congress to prevent snap removals. The chasm between the text and its intent indicates a deficit in the law itself, but judges should not fix broken laws. Congress must ensure judges can uniformly respond to this loophole.

Courts need codified foundations when they fill gaps in diversity jurisdiction. Courts must act, but a separation of powers demands the introduction of these written laws to avoid judicial overreach. With these three legislative arrows are in their quiver, federal tribunals must also apply two judicial salves to fully heal diversity jurisdiction. These prescriptions eliminate circuit splits and set the standard for remanding diversity cases.

Uncertainty and circuit splits exist over the fraudulent misjoinder and post removal damage stipulations. The responses to these are best left to the judiciary, although like the first three legislative prescriptions, they could benefit from collective federal action.

First judges should uniformly adopt the Fraudulent Misjoinder Doctrine and sever spoilers which would improperly destroy diversity. Once these spoilers have been dismissed or remanded, federal courts are free to adjudicate. Second, judges must allow plaintiffs to clarify their requested relief thorough damage stipulations. When these stipulations accompany a motion to remand, they should be given wide deference and the Reverse-Legal Certainty Test should be applied. To survive remand, defendants then face the burden of proving to a legal certainty that the amount in controversy meets the requisite threshold.

Diversity jurisdiction will become more viable if these prescriptions are applied and enforced. Fatigued federal tribunals will be rejuvenated after using these prescriptions to streamline and standardize procedures. Litigants’ rights will be protected, and federalism concerns will be diminished. Since the sickness of diversity
jurisdiction extends to all stages of litigation, its solutions must also address aspects from removal to dispositive motions. We therefore propose these five claims as a wholistic salve. We are confident that they will be greater together than the sum of their parts.

The Founders envisioned diversity jurisdiction to ensure equal access to justice. But it currently perpetuates injustice by spewing unequal results. We cannot stand idly by as our court systems fails to protect the right to honest resolutions. Everyone deserves a fair and balanced rule of law. Justice cannot depend on the venue. Ending the toxic cycle seems daunting, but through implementation of these prescriptions, it can be done.
Government codes can be messy, long, and confusing, whether at the city, state, or federal level. As new problems arise and unique circumstances come to light, the government tries to help control all possible situations, even the most unlikely. Zoning is a situation-specific government-regulated process that is either quite comprehensive or not comprehensive enough. As time goes on, people change, and so do their needs, wants, and codes. Laws and codes can be updated quickly and efficiently. However, buildings cannot always be repurposed or torn down on time. This means that when zoning is changed, some structures and uses of those structures are grandfathered in, often with many restrictions. This process differs from state to state, but the same basic principle applies where a use that was allowed but no longer is under new zoning guidelines can apply and be granted a non-conforming use status.

The purpose of a non-conforming use status is to update an area or a specific piece of land to the new wants and needs of the surrounding area without the government overreach of taking land away from a private landowning individual or company. Non-conforming uses allow landowners to slowly transition away from their original
use of the land and repurpose or sell the property to other potential buyers. This is potentially problematic, as this new status can, in some instances, create total artificial scarcity of that resource. This scarcity creates conflicting interests between the government and the operator of the non-conforming use. The push and pull between the two users might lead to instances in which the use never leaves. Numerous municipalities and states have adopted many restrictions that prevent this non-conforming use from having as many abilities as permitted uses. One of these restrictions is the ability to expand or enlarge the use. However, this term is not very clear. Does it mean enlargement of the physical footprint, the number of services provided, or even the number of byproducts created? Could it possibly be all of them and more? Confusion across state lines can make issues enforcing when legal precedent is a mixed bag.

This article lays out the framework for cities and states to adopt a new definition for expansion or enlargement of legal non-conforming uses. The definition of enlargement or expansion of a legal non-conforming use varies by municipality and state. However, this definition should be made uniform to mean only an increase in the physical footprint of the use structures on the legal lot or parcel. We also would propose exemptions for uses with diminishing returns.

II. BACKGROUND

Zoning was instituted in the United States with the Standard State Zoning Enabling Act (SZEA) of 1926 and the following Standard City Planning Enabling Act (SCPEA) of 1928. These two pieces of legislation laid the framework for states to adopt zoning codes and city planning ordinances to regulate and control development of all types. Each state then adopted its own legislation and gave individual municipalities the power to make their own. As cities grew and urbanization expanded, so did the city and state codes that governed zoning.

Zoning is used to control development without constituting a land taking as laid out in the 5th and 14th amendments of the Constitution. One tool municipalities can use to prevent growth when zoning changes are granting the status of “non-conforming use.”
This classification allows now non-compatible uses to be grandfathered into new zoning codes and ordinances. However, these non-conforming uses tend to have many restrictions. The process of granting and allowing non-conforming uses to continue operation varies by municipality and state, but one thing remains relatively constant. Non-conforming uses are usually barred from enlarging or expanding the use of the property. However, the definition of what constitutes expansion or enlargement of use is not well defined in most state and city codes, leading to confusion on what constitutes a violation of their non-conforming use status.

Some key terms relevant to the discussion include:

- **Zoning:** “Legislative act dividing a jurisdiction’s land into sections and regulating different land uses in each section in accordance with a zoning ordinance”\(^2\)
- **Land Use:** The purpose of the property or legal lot. This is what is being done/used/accomplished and the why of a piece of land.
- **Non-conforming use:** “Also known as a prior non-conforming use (PNU), this exists when a zoning code is changed, but a parcel of land that is already being used for something disallowed by the new zoning code is “grandfathered in” (is allowed to continue). For example, if a neighborhood zoning is changed to residential, a corner grocery store may be allowed to continue to operate. The PNU will generally end when the use of the land is changed (so if the grocery store closes, the new zoning code will bar a new store from moving in).”\(^3\)
- **Diminishing returns use:** A use that will eventually run out on a parcel of land because it is being used to gather materials or goods. For example, a gravel pit, a mine of any type, an oil field, or a lumber field.
- **Taking:** This is when the government seizes private property for legitime public use. There are many forms


\(^3\) Id , https://www.law.cornell.edu/wex/nonconforming_use.
of this, such as the literal taking of the land or taking of total economic value or benefit from the landowner.

Challenges to zoning ordinances were made shortly after the implementation of *Village of Euclid vs. Ambler Realty Company, 1922.* Ambler Realty sued the city of Euclid, Ohio, after the town changed the zoning on their large piece of property into three different zones. They claimed the change was a taking and not allowed under the V and XIV amendments to the Constitution. The courts disagreed and found that zoning was a legitimate form of police power that both municipalities and states could exercise if it pursued general public welfare. The case defined public interest and the bounds and limits of zoning. This case is considered the landmark case that made zoning stick nationally.

Another case that focused heavily on takings and what constitutes takings regarding land uses and restrictions was *Hadacheck vs. Sebastian* (City of Los Angeles), 1915. Mr. Hadacheck was issued a citation for operating a brickyard within the new Los Angeles city limits where it was prohibited. He claimed that he was in operation before the annexation of the territory and should be exempt. However, the courts found that it was not a legitimate use because it was not a legal or monitored business before the annexation. This case went to the U.S. Supreme Court, where it was also decided that this was not a taking as defined under the Equal Protection Clause of the XIV Amendment of the Constitution. They found zoning not only to be a legitimate form of police power but that, to be a taking, they would have to deprive him of all economic value/potential of his land, which in this case, it did not.

Other cases regarding non-conforming uses determined that amortization of the use was allowed if the timing was “reasonable and just” in order for the person to make a return on the land’s investment. In two cases, *State ex rel. Dema Realty Co. v. Jacoby* and *State ex rel. Dema Realty Co. v. McDonald,* it was found that the use of amortization used by New Orleans city officials was a legal

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5 U.S. Const. amend V & XIV
right of the municipality and did not constitute a taking as the time
period allowed was one year. The process of amortization in zoning
is the time limit in which a non-conforming use can operate until it
must come into conformity with the new zoning code. Other cities
have created restrictions that end the non-conforming use, such as
transfer of lease or failure to conform with building design and code
regulations whenever repairs or alterations are made.

Zoning has traditionally been a messy and confusing topic. Muni-
cipalities and states have extensive and lengthy codes and titles
that try to overcome all the possible situations and combinations of
issues that could arise. Numerous federal and state organizations
have been created to help mitigate some of the more prominent
issues that arise in zoning. The most prominent environmental pro-
tection act related to urban land uses is the National Environmental
Policy Act (NEPA). NEPA was passed in 1970 and was the start of
the environmental push by the federal government that created the
Environmental Protection Agency (EPA). This organization helped
layer more restrictions on the growth of many development types.
However, over the last 100 years, there have been other missed def-
initions, contradictions, and mixed-up terms in this pursuit.

As the needs of municipalities have changed, so have the terms
and conditions of zoning. Creating a non-conforming use allowed
historical uses to be grandfathered into a new zoning code to pre-
vent zoning from being a total taking of someone’s property. The
purpose of a non-conforming use status is to allow the property
owner to leave on their own terms and prevent a business or use
from being an abandoned or damaged eyesore. However, the issue
in this status is that it creates artificial and total scarcity of that type
of use in the area and drives up the demand. This puts the use owner
in direct conflict with the municipality trying to zone it out in the
first place. With this contradiction and the desire of the municipal-
ity to control zoning but not the business, restrictions on the growth
or development of these non-conforming uses have been defined.

7 State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 S. 314 (1929)
: State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 S. 613
These definitions, however, are not consistent or clear in many states and municipalities. The most ambiguous terms are “expansion” or “enlargement” in some areas.

Think of a restaurant in a residential neighborhood. The municipality changes the zoning to all residential and gives the restaurant non-conforming use status. This restaurant now has no competition and will have no new competition. The restaurant decided to expand its dining room on its lot. It is prevented from doing so as it is violating its status by expanding the non-conforming use. However, what about the number of deliveries or meals it serves every night? Before the status of a nonconforming use, it served 200 people a day and made 15 deliveries on average. Post-zoning change, the restaurant now helps over 500 people and has over 500 deliveries a day on average. There has not been an expansion or enlargement of the structure but an expansion of the use. This is where code and titles tend to disagree within the same state or municipality. What counts as an expansion is an issue.

One such case in New Jersey, *Bonaventure International v. Spring Lake* ran into issues when the nonconforming use status of a restaurant was brought into question. The restaurant was first granted non-conforming use in 1974 and was a small 48 seat restaurant and bar. Over time the building was sold, expanded, and its use was changed. However, it always partially remained a restaurant. The beachfront restaurant was always a popular location and never met with much opposition. However, the state of New Jersey and the local municipality started to change and limit the expansions and exchanges of legal non-conforming uses. In the 1990s, the restaurant became a 98 seat restaurant that also was a banquet and wedding venue. The plaintiff argued that since the banquet services were new, and they brought tons of customers at once, this was an expansion that is now barred under the new zoning code. The municipal boards did acknowledge and accept that the restaurant is still technically a legal non-conforming use as of 1974, but they did allow for any of the expansions or transfers that happened from 1974-2000. The

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planning board approved the expansion but put limits on the number of catering services the bar and restaurant could provide and limited the ability of the restaurant to apply for further liquor license renewals and business licensing. This case is an example of one state where the expansion of the building footprint did not change, but the intensity of the use did, and the state voted in different directions in different years as to what constituted an expansion.

For this purpose, I claim a framework that allows for any state or municipality to accept this definition of expansion or enlargement into their respective codes or titles and adjust it to their specific needs. The definition of enlargement or expansion of a legal non-conforming use varies by municipality and state. However, this definition should be made uniform to mean only an increase in the physical footprint of the use structures on the legal lot or parcel.

III. Proof of Claim

A. Constitutional Protections

As stated earlier, zoning is a legitimate use of police power for states and cities to use as long as it pursues benefits for the general good and the public. Above this, however, the Equal Protection Clause of the Fourteenth Amendment and the Fifth Amendment protects individuals from takings.9 The Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation.”10 These amendments prevent planners and lawmakers from creating such laws that would destroy the economic value of a person’s private land and property. For this reason, grandfathering rules such as conditional use permits and non-conforming use statuses have been integrated into many states. Some may argue that the regulations and restrictions of each of these permits/statuses constitute takings. However, both allow operation of existing use without expanding and enlarging the use as it no longer contributes to the public good as determined by the law-making body that approved

9 U.S. Const. amend XIV, § 1.
10 U.S. Const. amend V, § 1.
the zoning change. While there is much to be said about the constitutionality of specific state and municipalities restrictions and rules of non-conforming uses, this paper focuses solely on the definition of expansion and enlargement.

B. Why Zone Out Specific Uses?

Certain businesses and types of uses may be zoned out for aesthetic reasons only, but many are for more practical ones, such as removing unsightly or unwanted uses. However, these uses can range from a restaurant to a chemical processing facility. The process for removal must follow the constitutional rights of the landowner, as explained in the previous section, which means much time is dedicated to moving out unwanted uses. The regulations of sexually-oriented businesses are one of the most popular uses that are zoned out. Sexually-oriented businesses include things such as strip clubs, sex shops, adult theaters, and so on. Another common way is to zone-out buildings that do not add to the visual appeal, like factories in high-end commercial districts.

Regardless of the real reasons behind the zone change, most planners and lawmakers prefer an efficient change that limits the amount of time a property is vacant or not in use. As these reasons show, this transition should be helped by promoting the business or use to continue and end on their terms while also helping accomplish the planners’ goals as they pursue the public good.

C. NEPA and Application

Some may argue that by allowing places to become more intense in their use or efficiency of the use, they may produce more noxious or unwanted by-products. These could be anything ranging from air and water pollutants to noise and even smells. The reason for not involving environmental restrictions on expansion of the intensity of the use is due to existing environmental and noxious use codes at the municipality, state, and federal levels. Instead of trying to regulate businesses even more, leaving the definition of enlargement at the proposed claim, there is less redundancy in code regulation.
The EPA enforces and also complies with NEPA in all of its policies and initiatives. Through NEPA, however, individual states may also choose to add on or make the regulations even more restrictive when it comes to specific environmental protections. NEPA regulates a list of some of the most harmful and potentially dangerous pollutants that might be produced by certain land uses or industrial processes. They regulate waste overall and pollutants coming from or accumulating from a use. When a specific land use applies to be a non-conforming use, this falls under a type of conditional use permit that will trigger NEPA environmental reviews regularly if the use produces one of these harmful pollutants is in excess. However, this does not cover all possible types of negative or noxious by-products.

States may create their own more regulating agencies, but they only can be equal to or more restrictive than those standards of NEPA. For example, California and Illinois have the respective environmental regulating and permitting agencies, CalEPA and IEPA. Under CalEPA, any and all land-use changes or developments, including zoning changes that would require non-conforming or conditional use permits, require a complete environmental impact study in order to be approved. This may seem extreme, but this gives the state and municipalities the ability to regulate noxious or unwanted uses and prevent them from increasing their efficiency if that efficiency creates more pollutants or environmental issues.

NEPA, or any other state regulating agency, may not have complete control over specific noxious uses that may have slightly more noise, light, or smell pollution. Instead of trying to target it in application to non-conforming uses, a municipality should pursue a separate code change that covers the expansions of ANY noxious use that has these less severe pollutants. This way, all land-use types would fall under this regulation, and non-conforming uses would not be targeted individually, something that might start a constitutional right violation or claims of a taking.

D. Uses of Diminishing Returns

An exemption suggested with this claim and definition of enlargement is those uses that are of diminishing returns. As defined earlier,
this is any use that is gathering some sort of resource from the legal lot or parcel that will eventually run out. Examples would be lumber fields, gravel pits, mines, quarries, or sandpits. These uses are intended to take what the legal lot offers and then repurpose it to sell-off. The purpose behind these uses is short-term, and the intention is never to stay indefinitely. With these intentions, limiting these uses when the zoning changes to not expand the physical structures or area of the use to the entirety of the legal lot would constitute a taking. This violation of constitutional rights can be avoided if uses that are determined to have diminishing returns are allowed to continue the use under a non-conforming status to the entirety of the legal lot.

There is an example of this in Utah. The owner of a 160-acre gravel pit in Tooele County requested the ability to expand his gravel pit within his lot while under a non-conforming use status. The county rejected the request, and the defendant appealed it, arguing that the use was one of diminishing returns and, therefore, a legitimate action he could take. According to Utah Code § 17-27a-510, expansion of a nonconforming use is permitted if the user is found to be in line with the doctrine of diminishing assets. The case Gibbons & Reed Co. v. North Salt Lake City was the landmark decision that ruled and found that these uses with diminishing assets could expand but only within the legal lot. Other states have similar rules, but the adoption of this exemption would allow a use with a definite end to continue under a non-conforming use status. The use would, as stated earlier, still need to comply with any new or additional environmental regulation that may apply to it.

E. Other Exemptions

Even with the exemption for diminishing returns, municipalities should include sections in their code that allow for an exemption that promotes general health and welfare and promotes overall public safety. Because of the specific needs and case-by-case situations that could arise, the exact wording of these exemptions will depend on the municipality’s needs at the time of code adoption and the size

11 Gibbons & Reed Co. v. North Salt Lake City, 431 P.2d 559 (Utah 1967).
and scope the municipality wishes to take control of land-use decisions. Some states have taken it upon themselves to adopt specific policies regarding non-conforming uses that may alter this definition of expansions under a non-conforming use.

1. Exemption for rebuilds/reconstruction of destroyed non-conforming use

   a. This case comes from the state of Washington. The plaintiff attempted to rebuild his lumber mill that burned down during its non-conforming use status. Before the permit for the rebuild was requested, the municipality passed a new ordinance that banned lumber yards in the area of the town where the mill was located. However, the Washington Supreme Court ruled that non-conforming uses could not be destroyed or taken away unless their continuance was detrimental to public safety, health, etc. Other similar findings were found in Texas as well (see Crossman v. Galveston).\(^\text{12}\)

2. Challenging a non-conforming use definition

   a. In American Wood Products Co. v. City of Minneapolis, the courts found that the burden of proof for challenging the definitions of expansions or enlargement of a nonconforming use fell on the landowner in order to challenge a municipality's definition or classification.\(^\text{13}\) This meant that unless a non-conforming use owner could prove that their use was no detrimental effect or that the municipality definition was not protecting the public health, interest, etc., then the definition and restrictions would stand.

The specifics of what constitutes a definition of enlargement or expansion still stand at the expansion of the physical use structures.

\(^\text{12}\) Crossman v. Galveston, 112 Tex. 303, 247 S.W.810 (1923).

\(^\text{13}\) American Wood Products Co. v. City of Minneapolis 1 F. (2d) 440 (D. C. Minn. 1927); af’d. 35 F. (2d) 657 (C. C. A. 8th, 1929).
While some exemptions are possible, the semantics and logistics of specific cases need to be addressed as they come into the municipality or as the needs of the municipality change.

IV. CONCLUSION

Overall, non-conforming use classifications are quite individual and depend on the situation as a whole. However, this type of classification allows for more efficient and fair transitions for landowners and lawmakers as cities and needs change. Promoting the business or use while slowing the use to go on their own time allows for a more economically fiscal and overall better transition for the municipality, state, and landowner. However, the problem of ambiguity over the terms “expansion” or “enlargement” has led to confusion and has hindered the ability of this land-use transition. The focus of these terms should only refer to the literal expansion of the physical footprint of the use buildings, but not in the efficiency of the use in the same physical space. The exemptions for this would be any use that is of diminishing returns, and any time the transitional cost or thought of physical expansion is not detrimental to the overall public health and well-being as seen by each specific case-by-case decision.

This claim is not a call to action for all municipalities and states to adopt uniform zoning codes and definitions. That would defeat the purpose of acknowledging and using the many differences experienced across the United States to our advantage. However, this is the framework for planners and lawmakers to adopt a more uniform definition that will benefit them and the many private landowners in their jurisdictions. This allows for more straightforward rules and restrictions to protect those with non-conforming use statuses and the municipality from frivolous lawsuits on unclear violations of the non-conforming use status. Most importantly, this definition clarification will allow businesses to grow and eventually leave on their terms while also allowing the municipality and planners to accomplish their goals for the public. Restrictions do not have to be detrimental to the survival of a business, and property rights do not have to be the bane of governmental intervention in the pursuit of the overall public wellbeing.
In 2013, April Parks, the owner of a professional guardianship company—“A Private Professional Guardian, LLC”—knocked on Rennie and Rudy North’s home in Las Vegas. Although Parks had never previously been in contact with the Norths, she informed them that she was there to remove the Norths from their home and transport them to an assisted living facility. Unbeknownst to the Norths, April had obtained legal guardianship over the couple. The Norths were not summoned to court nor had a lawyer to defend their rights. Working closely with a physician’s assistant, Parks obtained a vague medical certification of incapacity. With this documentation, she successfully convinced the court to grant her guardianship of the Norths. Due to Parks’ guardianship, the Norths were unable to intervene as their property was taken from them and sold. Although Parks’ scheme
was ultimately discovered and she was sentenced to up to forty years in prison, the damage done to the Norths was irreparable.

One study shows that as many as 550,000 persons over the age of 60 in the United States experienced neglect or abuse in some form in the year 2000.\textsuperscript{6} Financial exploitation is described as the misuse of an individual’s assets for the abuser’s personal gain through means of dishonesty or manipulation.\textsuperscript{7} However, although 12\% of the elder population experienced financial abuse, less than 21\% of those cases were reported to Adult Protective Services.\textsuperscript{8}

Due to the dramatic problem of elder abuse, it is paramount a solution be accessible and streamlined in order to protect the estate of the elder. Additionally, the elderly are not the only demographic targeted for financial abuse: many physically and mentally disabled adults are taken advantage of through the conservatorship system. We refer to ‘incapacitated adults’ as both elders and adults with physical or mental limitations who are unable to manage their own estate. In this paper we argue that limited conservatorships must be standardized by creating an efficient national conservatorship system to protect incapacitated adults from financial abuse. Although the terms ‘guardianship’ and ‘conservatorship’ differ among various states, this paper utilizes the term ‘conservatorship’ to discuss a capable adult managing the estate of an incapacitated adult.

I. Background

In general, courts grant conservatorships for an incapacitated adult who lacks functional ability. The conservatee relinquishes certain rights to a conservator who is better equipped to understand and manage their affairs. Ideally, the conservator does what is best—legally, financially, socially, mentally, etc.—for the incapacitated adult.


\textsuperscript{7} \textit{Id.}

\textsuperscript{8} \textit{Id.}
adult for whom they are caring. However, in many cases conservatorship leads to neglect and abuse.

The number of conservatorships in the United States has greatly increased in the past 50 years. In 2016, there were an estimated 1.3 million adult conservatorships. Many factors contribute to the increase such as advancements in medical treatments which increase life expectancy and a higher percentage of elderly generations in comparison to other adults and adolescents.

Although the specific process of obtaining a conservatorship varies between states, some general procedures remain constant across the United States. First, the person seeking to become a conservator—often a family relation—petitions the court in the jurisdiction where the incapacitated adult currently resides. This petition typically includes affidavits from doctors stating that the incapacitated adult lacks functional ability to perform necessary tasks. After the petition has been processed, the court will appoint a guardian ad litem to represent the incapacitated adult’s best interest. The guardian ad litem then completes an evaluation of the allegedly incapacitated adult, informs them of their legal rights, discusses possibilities, and reports back to the court regarding the individual’s physical, emotional, and mental state as well as their wishes and opinions. The alleged incapacitated adult may also hire a lawyer to represent them or the court may be required to do so. Depending on the state, the guardian ad litem may also meet with family members, doctors, and other caregivers to gain a better understanding of the situation that the potential conservatee is in. The court may also require a doctor’s personal assessment. As the process continues, the incapacitated

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11 Id. at 364

12 Id. at 369

13 Id. at 370

14 Id. at 371
adult may respond in several ways: consent, disputed proceedings, and inability to respond.\textsuperscript{15} If the incapacitated adult consents, the court will appoint a conservatorship. If the alleged incapacitated adult or their family objects, the petition may go to trial in probate court. In this case, sufficient evidence must show the alleged incapacitated adult is unable to care for themselves, make decisions, or use proper judgment.

II. PROOF OF CLAIM

A. Conservatorships Are Not Always Necessary

One conservatorship case highlights the dangers of full conservatorship. Mr. S, an 88-year-old man desired to leave his property to friends rather than family when he passed away.\textsuperscript{16} Upon hearing this, the son of Mr. S. filed a petition to the court for conservatorship with the argument that family members should receive transferred property, even when the aging family member does not desire to bequeath their property to their own posterity. The guardian ad litem who represented Mr. S. expressed that, although he had a good sense of awareness, Mr. S. suffered from an absence of judgment. Upon conversing with the guardian ad litem and making his desires known, Mr. S. waived his own presence at the hearing. The court, however, ruled that Mr. S was incapable of managing his finances and granted full guardianship to his son. In this case, Mr. S. became powerless and has been stripped of his personal autonomy. He cannot write a check, choose where he lives, choose where he travels, and many other basic freedoms.\textsuperscript{17} Other atrocious cases reported in Southern California regarding the financial abuse of incapacitated adults through means of conservatorship highlight the unacceptable shortcomings of the system. Reports include paying taxes and

\textsuperscript{15} Id.


\textsuperscript{17} Id.
investing using the conservatee’s savings.\textsuperscript{18} Others include the conservatee’s home being sold to the conservator at a significantly lower price than market value.\textsuperscript{19}

Full conservatorships may cause as many problems as they resolve. Those who are put under full conservatorships lose independence and have no power over the actions of the conservator. This can be increasingly problematic with respect to preserving the conservatee’s basic rights. In the examples listed above, both the North family and Mr. S were helpless in stopping the encroachment of their personal property and both parties suffered dire consequences. Lack of personal autonomy causes financial exploitation of these individuals even easier and defeats the original purpose of a conservatorship. As a result, full conservatorships should be a last resort in order to protect an incapacitated adult’s estate.

B. Power of Attorney

Rather than conservatorships, individuals should instead prepare a power of attorney in the case of cognitive decline or an inability to make life decisions. A power of attorney is a written authorization that gives an individual the power to act on behalf of another’s private, financial, and legal affairs. Unfortunately, less than 18\% of adults in the United States have a power of attorney prepared.\textsuperscript{20} If a larger percentage of adults were to have a power of attorney, the need for conservatorship would be drastically reduced.

One example showcasing the importance of having a power of attorney prepared is the case of Mr. Andrews.\textsuperscript{21} Mr. Andrews was a retired veteran who lived with his wife. Upon her sudden death, he

\begin{itemize}
  \item \textsuperscript{18} Kenneth Heisz, \textit{Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California}, 17 \textit{NAELA Q.}, 1, 5-6 (2021).
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} Merrill A Bank of America Company, \textit{Leaving a legacy: A lasting gift to loved ones}, 3, 2021.
\end{itemize}
began struggling with the management of his home and self. Soon after, Mr. Andrews suffered a stroke and was consequently diagnosed with Alzheimer’s. ²² With this diagnosis alone, the physician who diagnosed Mr. Andrews wrote to the court recognizing a need for a conservatorship. Although Mr. Andrews strongly opposed any form of conservatorship, his lawyer went against his wishes and filed an official petition to the court for a joint conservatorship. The only evidence contained in the petition was an unclean house and a diagnosis of Alzheimer’s. With this evidence alone, one of Mr. Andrews’ cousins was appointed conservator over all of his assets and decision making. The guardian then proceeded to sell Mr. Andrews’ house and possessions— all done without the consent of the conservatee. This specific case would have taken a completely different direction had Mr. Andrews prepared a power of attorney beforehand. If he had planned in advance who would manage his estate once his ability to make decisions had deteriorated, there would have been no need for a petition for conservatorship. It was apparent that Mr. Andrews did not want his cousin to be his conservator, but because the petition was granted, the cousin was able to have free reign over Mr. Andrews’ assets. If Mr. Andrews would have prepared a power of attorney before, then the cousin would not have been able to take control. To prevent the misuse of conservatorship, it is necessary that individuals prepare a power of attorney to avoid the pitfalls of the conservatorship system.

C. Limited Conservatorships are Preferred

Despite the possibilities of harm due to conservatorships, they are often necessary in various cases as a form of protection: disabilities, elderly, injury, etc. However, due to the serious nature of the disadvantages of conservatism, it is crucial that conservatism be limited when possible. As fundamental rights are taken away from an individual while they are placed in a conservatorship, the power of the conservator should be as limited as possible. Courts across the nation should approve petitions for full conservatorship only after all other

²² Id. at 36
options, such as a limited conservatorship, have been thoroughly examined. While a complete conservatorship allows the conservator power over nearly every aspect of the incapacitated person’s life—residence, finances, personal matters, etc.—limited conservatorship restricts the power given to the conservator. The restrictions of a limited conservatorship can be scaled back to include only finances, residence, real estate, investments, medical, etc. Ideally, incapacitated adults would maintain as many of their rights as possible while still being protected from fraud by family and the court. Thus, a limited conservatorship is useful to allow a conservator access to only what the incapacitated adult actually needs help and support in successfully accomplishing.

The United State’s courts have recently moved to favor limited conservatorship and many state laws reflect this. In the State of California, the term conservatorship refers primarily to the overall wellbeing and life of the person rather than the finances. The state law declares that a limited conservatorship may ask for any of the following powers:

1. Fix the conservatee’s residence or dwelling
2. Access the conservatee’s confidential records or paper
3. Consent or withhold consent to marriage on behalf of the conservatee
4. Enter into contracts on behalf of the conservatee
5. Give or withhold medical consent on behalf of the conservatee
6. Select the conservatee’s social and sexual contacts and relationships
7. Make decisions to educate the conservatee

24 Id. at 1.1
25 Id. at 3.3
Thus, the conservator is able to have direct power to control what is necessary in order to protect the conservatee. However, it also allows the conservator to have limited power in case of neglect or misuse. For example, if an elder is unable to have functional ability to control their medical needs, a child would be able to step in and decide what medical procedures would be most beneficial for the elder. However, this would not limit the elder’s power to decide where to live.  

Although the idea of a limited conservatorship is beneficial, directly stating different types of limited conservatorship limits the courts in their ability to follow an incapacitated adult’s specific need. Proposed bill to modify Utah Code 75-5-304 in the 2020 session states: “The court may modify the powers of the guardian to the specific needs of the incapacitated person subject to the guardianship upon clear and convincing evidence that modification is necessary to address the needs of the incapacitated person.”

This proposed bill emphasizes the personal nature that ought to be displayed by the court when determining the powers of a limited conservatorship. Therefore, we propose that it is not ethical for courts of any state to directly outline what is included in a limited conservatorship. It can easily undermine the true purpose of a limited conservatorship whose primary goal is to create a conservatorship over only what the incapacitated adult cannot maintain with true functional ability. Wisconsin law 54.18(1) states: “Ward retains all rights not assigned to guardian.”

Thus, the incapacitated adult will maintain all rights not specifically granted to the conservator by the court. This provides the court the ability to grant the conservator power only what the incapacitated person is legitimately unable to accomplish and allows the incapacitated person to maintain as many rights possible. This process is frequently done with conservatorship and guardianship towards those with disabilities. It has been the desire of courts in the past several years to allow for the highest degree of independence possible for adults with disabilities. Thus, if a disabled individual is

26 Id.
able to have control over a credit card, they should have the power to do so as increased independence often creates increased sense of purpose and confidence.

The desire for independence among disabled individuals has led to the creation of companies such as TrueLink. TrueLink is a prepaid visa credit card that is given to incapacitated adults whether it be for disability, physical limitations, or their advanced age. While the incapacitated adult is still able to have their own debit card and have the independence to purchase their own things, a responsible adult—presumably a child or family member—controls how much money is available for spending. Thus, the incapacitated adult may decide how they spend their money, but a conservator may control how much money is spent. This is precisely what we propose: controlling what must be controlled for the safety and security of the incapacitated adult while still allowing the incapacitated adult as much personal independence as possible.

E. Removal of Conservatorship

Generally speaking, a conservatorship ends upon the death of the conservatee.\textsuperscript{29} However, there are cases when a conservatee regains their mental or physical capacities and desires a removal of their conservatorship.Removing a conservatorship can be challenging for the conservatee for several reasons. Primarily, it may be difficult for the conservatee to obtain and hire a lawyer to terminate the conservatorship because they do not have direct access to their finances.\textsuperscript{30} Furthermore, some conservatorships prevent the conservatee from having the ability to legally contract a lawyer or other professionals. In many cases it is the conservator who approves the request for a lawyer when the conservatee petitions for a termination of conservatorship.\textsuperscript{31} If the conservator is exploiting the conservatee, they would not approve any attempts to end the conservatorship, effectively

\textsuperscript{29} Wood, supra note 8 at 371.

\textsuperscript{30} Id. at 372.

\textsuperscript{31} Id.
trapping the conservatee in their state of helplessness and restriction of autonomy.

Removal of a conservatorship is possible; however, it remains both difficult and expensive to terminate a conservatorship. A conservatee or someone supporting the conservatee is required to file a petition to the court, a process often lasting several months. It should, however, be easier to remove a conservatorship than to put one into practice, further protecting the incapacitated adult. If an error is made, it ought to be on the side of rights given to the conservatee. The ability to restore one’s individual liberties should be significantly quicker and easier than the ability to remove one’s individual liberties. Additionally, those who are under a conservatorship should be informed that they can petition to end the conservatorship with sufficient cause. Ensuring the ability to escape a conservatorship—should the need arise—is essential for the protection of the rights of the incapacitated adult.

It is paramount that a conservatorship be eliminated if or when the incapacitated adult regains functional abilities. Conservatorships ought to encourage the incapacitated adult to make decisions on their own behalf and regain the ability to manage their own affairs. For example, Colorado law 15-14-418(2) states: “A conservator shall …encourage the person to…develop or regain the ability to manage the person’s estate and business affairs”. This law is more likely to affect those with disabilities, encouraging them to be able to regain and grow their own independence. While it is true that the functional ability of many elders will not increase, increased independence ought to be encouraged. Conservatorship of the injured may also lead to an individual gaining more abilities despite originally lacking fundamental capacity. Thus, it is helpful to attempt to increase an individual’s independence despite their age and situation. As with countless other aspects of the conservatorship system within the United States, the process for ending a conservatorship is poorly laid out at the state and national level. Essentially, current laws fail to contain competent or universal system for such an important practice.

Wood, supra note 8 at 372.

F. Rushed Conservatorships

The process of obtaining a guardianship functions to protect the incapacitated adult. As shown in the background, the future conservator must file a petition to the court. This petition includes affidavits from doctors which state that the incapacitated adult lacks functional ability. The court then completes an evaluation of the alleged incapacitated person. The court may also be required to meet with family members and other caregivers or require a doctor’s personal assessment. However, in emergency cases, this procedure is often overlooked leading to possible fraudulent activity against the incapacitated individual.

It is crucial, therefore, that the petition for conservatorship requires a mandated doctor’s assessment of the alleged incapacitated individual prior to the court’s granting of a conservatorship. Additionally, it ought to be federally mandated to interview close family members and inform them of the possible conservatorship. Even in emergency and rushed cases, these procedures must be followed to protect the incapacitated individual’s rights. Emergency conservatorships may occur due to multiple different reasons such as a medical emergency, death of a spouse, or sudden fraud. Although emergency conservatorships may provide a quick resolution of abusive situations, they can be misused when there is not an actual emergency present as we have seen in previous examples. In most states, a conservator can receive a limited conservatorship in only a few days.

G. Flaws in Accountability of Conservators

Many laws are designed to protect incapacitated individuals, however, in actuality, many are not implemented as they should. Additionally, some laws are designed for the convenience of the court rather than the protection of the conservatee. For example, Utah Code 75-5-303 states: “Counsel for the person alleged to be incapacitated...
is not required if no attorney from the state court’s list of attorneys who have volunteered to represent respondents in guardianship proceedings is able to provide counsel to the person within 60 days of the date of the appointment."\textsuperscript{36} The reality that an incapacitated adult may be denied counsel to protect their rights simply because an attorney is unavailable within 60 days illustrates the gaps in the legal system. Therefore, it becomes even more crucial that a standard, federal system be developed to protect adults in the conservatorship system. See additional information on our proposed federal office below.

In November 2005, the Los Angeles Times published a series of articles displaying its findings on conservatorship cases in Southern California.\textsuperscript{37} The study examined more than 2,400 professional conservators between 1997 and 2003. A professional conservator, also known as a professional fiduciary, is a conservator who is not a family member of the incapacitated adult and takes a paycheck from the adult’s finances—should they be able to afford it—to pay for their services. This study found that more than half of the cases involving professional conservators were granted on an emergency basis which led to mandated procedures to be ignored; 56% of cases were granted without notice to the proposed conservatee or the incapacitated adult’s family; 64% were granted before an attorney was appointed, and 92% were granted before the court was given the court investigator’s report.\textsuperscript{38}

Additionally, the study found that the court’s supervision was inadequate. Probate courts “are supposed to monitor [the conservator’s] conduct, scrutinize their financial reports and fine or remove those who misuse their authority.”\textsuperscript{39} Yet the courts have “failed dismally in this vital role” and “frequently overlooked incompetence,

\begin{itemize}
\item \textsuperscript{36} Utah Code Ann. § 75-5-303 (LexisNexis <2017>)
\item \textsuperscript{37} Kenneth Heisz, Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California, 17 NAELA Q. 1, 5-6 (2021).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\end{itemize}
neglect and outright theft.”

The lack of accountability is partly due to the low number of court investigators: despite a 38% increase in conservator cases from 1995 to 2005, the number of court investigators remained the same. Therefore, the court investigators’ caseload was too large they were unable to properly examine each conservator’s actions.

H. Office of Adult Conservatorship and Guardianship Enforcement

Perhaps the most glaring flaw of the current system of conservatorship in the United States is the lack of supervision and accountability of the conservator once the petition for conservatorship has been granted. It is apparent that the courts alone cannot enforce granted conservatorships. The individual state laws regarding the oversight of conservators vary widely. The actual enforcement of oversight and monitoring amongst the states is inconsistent. Oftentimes conservators are only required to file an annual report and accounting information of the conservatee’s finances. Many judges and those in the court systems view a conservatorship case “closed” as soon as the conservatorship has been approved, effectively shutting the door for any enforcement. Infrequent oversight of the conservators can lead to the mismanagement of the conservatee’s finances. There are many cases that involve the conservator using the conservatee’s finances for their own personal means. Being a conservator can be a large undertaking, and without proper and consistent accountability, there is often nothing but integrity preventing the individual from pilfering the finances of the conservatee. These actions could stem from an entitlement of the conservatee’s assets with the mentality of being compensated for their efforts. This mindset can easily grow into large amounts of finances being greatly misused.

For conservatorships to function as they were originally intended it is paramount that greater attention be placed on conservators once

40 Id.
41 Id.
42 Wood, supra note 8
43 Heisz, supra note 36
the conservatorship has been granted. Enforcement on conservatorship should be thoroughly and consistently executed and implemented. A solution to the lack of oversight of conservators would be to nationalize the inconsistent and unreliable system of conservatorship that exists at the state level and institute a federal agency dedicated to establishing more accountability in the conservatorship system.

The proposed federal office would be established as the Office of Adult Conservatorship and Guardianship Enforcement (OACE) under the United States Department of Health and Human Services. One of the primary functions of this office would be to ensure that conservators, if appointed, are kept in check and are operating within the bounds that the conservatorship has placed upon them. Upon petitioning for a conservatorship, many states will have the petitioning conservator file a general plan or outline of their plan for managing the estate of the conservatee. The court will then review an annual report completed by the conservator each year after the original granted request. With a lack of manpower, it becomes difficult for the local courts to review reports if they were to be submitted with more frequency than annually. The current conservatorship system fails to address the great power a conservator has over the individual and that this power needs to be put in check. How can a court give someone complete control of a conservatee’s life to an individual and not certify that they are doing what they have been appointed to do? As the system stands, what is to stop the conservator from abusing their power? The proposed federal office would take the weight off of the local courts and be dedicated to reviewing and auditing these reports. With this change, each conservator would be required to file reports quarterly rather than only reporting annually. Quadrupling the number of reports would substantially increase the responsibility placed on conservators.

The staffing and resources of a United States office focused on the preservation of the conservatee’s rights would undoubtedly improve the safety and efficiency of conservatorship. In terms of enforcement, the OACE will ensure that each conservator knows

\[44\] We’d like to especially thank Allison Barger for her invaluable comments and insights on this topic.
the repercussions for mishandling the finances of a conservatee. With the ability to process more reports regarding the finances of the conservatee, the OACE will better be able to oversee the execution of the conservatorship.

With the increased monitoring of conservatorships, the courts will have a better knowledge of any finances that have been pilfered or inappropriately used. While it is now easy for conservators succeed with financial mismanagement, with additional oversight, the conservators would have greater accountability. The OACE would be present in states and counties throughout the nation and would have the jurisdiction to handle disputes and reported cases of abuse or neglect. The office would receive these reports and have the resources to enforce the conservatorship how it was originally meant to be. In addition to thoroughly reviewing submitted annual reports from the conservator, the office would have the ability to interview conservators regarding the conservatorship and how the finances are being managed. Keeping an up-to-date record of the conservatees’ assets will be valuable in making sure that the liberties of the conservatee are being adequately maintained.

III. Conclusion

Due to the increasing number of cases regarding the financial exploitation of the incapacitated adults, conservatorship initially appears to be a prime solution for preventing these incidents. However, a full conservatorship actually has the ability to make the incapacitated adult individual even more prone to exploitation. There exist countless cases of those who abuse the power of a full conservatorship. As a result, states across the nation have instituted limited conservatorships to strike a balance between personal autonomy and protection of the incapacitated adult’s estate. The Office of Adult Conservatorship and Guardianship Enforcement would streamline the process of obtaining and auditing a limited conservatorship. As a result, the elderly and other incapacitated adults will be more protected from potential financial abuse and exploitation while at the same time maintaining their personal freedoms.
Most United States high school graduates share the distinct memory of sitting in a classroom with their peers and learning about how puberty will affect their bodies. These memories include recollections of hushed giggles, nervous teachers, pads, tampons, and deodorant. Experiences range from the dreaded maturation night with your parents to gym teachers or school nurses talking about sexual intercourse, explaining that sex is a beautiful thing, or warning that sex will surely lead to a sexually transmitted disease, or worse, a pregnancy. Some parents continued the conversations at home, others did not. Yet, the negative effects of a deficient sexual education, namely unwanted pregnancies, high abortion rates, sexually transmitted diseases, and high sexual assault rates, continue to plague our youth. Conversations concerning these issues usually center on which approach to sexual education could best help to combat them.

Solutions have become divided into two schools of thought: those who advocate for abstinence-only sexual education and those who advocate for a more comprehensive sexual education. Those who advocate for a more comprehensive sexual education argue that the rate of youth sexual activity warrants schools providing increased information regarding sexuality outside the bounds of

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abstinence-only. During the 2021 Utah Legislative Session, Representative Carol Moss proposed HB177 which would require schools in the state to teach consent in their sexual education curriculum. The proposed bill garnered intense scrutiny in the predominantly conservative legislature. Despite attempts from Representative Moss and her Democratic caucus to compromise with the Republican opposition, the bill failed on the floor. Republican representative Merrill Nelson stated, “I think this bill is headed in the wrong direction, something better left to professionals who understand the legal concept of consent, and to parents who better know their child”.

This episode in Utah politics reflects the fierce debate in America regarding sexual education.

Studies offer conflicting evidence about the efficacy of abstinence-only and comprehensive sexual education. While the debate about which approach best suits American youth continues, gaps remain in the sexual education system. This paper does not argue for one approach to sexual education over another; instead, the proposals in this paper aim to bridge these long-standing disputes by creating a new standard of sexual education that also addresses the major downfalls of both current curricula. Various components of sexual education represent areas neglected by the law and that, if addressed, will significantly help students obtain accurate and science-based information about sexuality.

To encompass these necessary changes, this paper proposes that Abstinence-Only Until Marriage (AOUM) programs, which will be discussed at length later in the paper, should be disbanded and their funding be reallocated to a less restrictive, science-backed program that allows for greater state autonomy in deciding sexual education curriculum. We argue for a less restrictive environment that would be conducive to innovation in sexual education programs. To facilitate this, we propose the following three prescriptive changes to sexual education in the United States. First, states should require sexual education before high school graduation. Second, federal funds and

3 H.R. 177, Leg. 64th Sess. (Ut. 2021).
standards should be focused on providing schools with educators better equipped to teach the complexities of sexual education, regardless of the values the state or school prescribes to. Finally, there should be increased parental involvement in the course curriculum. These federal standards will significantly help the development of sexual education programs by fostering an environment where new education programs can incorporate science-backed methods for effective sexual education.

This paper will begin with a brief history of sexual education in the United States to the present day, highlighting pertinent bills and grant programs in recent years. Shortcomings of the two major sexual education curricula are expounded. Following that, the paper will discuss how to implement these changes at the federal level and the benefits such changes will provide. Then, an explanation for the value of the three provisions proposed for a new federal funding program will follow.

I. HISTORY OF SEXUAL EDUCATION

Sexual Education in the United States can be traced back to World War I. Among American soldiers the spread of Sexually Transmitted Diseases (STDs) became a significant issue. To combat this issue, Congress passed the Chamberlain-Kahn Act of 1918 which served as a public health plan to educate soldiers on the dangers of venereal diseases.\(^5\) The efforts proved effective in decreasing STDs among soldiers. Because of the success of this concerted effort to educate about STDs, state agencies--along with the cooperation of the Public Health Board--began implementing educational programs about STD prevention. These efforts became the first time the government implemented community sexual education and influenced programs now taught today outside of schools but funded by the government at

locations such as Planned Parenthood facilities, churches, and community centers.  

Sexual education continued to develop, and, in 1981, Congress passed the American Family Life Act (AFLA) which promoted and provided funding for abstinence-only sex education. In Bowen v. Kendrick, the Supreme Court ruled for the first and only time on the constitutionality of federal funds used for abstinence-only sex education programs. This case specifically challenged the use of funds by grantees through the AFLA. The suit, brought to the Supreme Court by the American Civil Liberties Union (ACLU) on behalf of federal taxpayers, clergymen, and the American Jewish Congress, argued that the AFLA violated the Establishment Clause of the 1st Amendment. The ACLU argued that the Court should strike down the AFLA in its entirety because it violated the separation of church and state created by provisions that required grantees to dictate how they would include religion in their sexual education programs and allocate money to specific religious groups. Because these funds benefitted specific religious groups, the Supreme Court ruled that the AFLA was in violation of the Establishment Clause. While the Supreme Court did rule that the primary effect of the AFLA was not the advancement of religion, and that there was no unnecessary entanglement of church and state, they still argued against the misuse of funds and remanded the case back to the District Court for further decision and resolution.

The federal government funds state sexual education programs through two separate types of federal grant streams: Abstinence-Only Until Marriage (AOUM) programs and Adolescent Sexual

7 Social Security Act, H.R. 3982, 97th Cong. § 300z (1981).
Health Education and Promotion Programs. Since 1996, the federal government has funded abstinence-only programs such as the Title V Sexual Risk Avoidance Education (Title V SRAE) Program. Programs such as this contain rigid restrictions on the contents of sexual education. The federal government requires states and organizations which receive AOUM funding to create programs that are consistent with the ‘A-H’ definition of ‘abstinence education’ prescribed in the Social Security Act. Consequently, states that do not meet each of these requirements forfeit federal funding through AOUM, leaving them to find other means to fund sexual education programs in their schools. The requirements enclosed in AOUM programs incentivize states to teach AOUM sanctioned sexual education rather than choosing other options. Since 1982, the federal government has spent $2 billion funding AOUM programs. This makes up the bulk of sexual education funding.

13 H.R. 3982, Pub.L. 104-193. (A. Has as its exclusive purpose teaching the social, psychological, and health gains to be realized by abstaining from sexual activity. B. Teaches abstinence from sexual activity outside marriage as the expected standard for all school-age children. C. Teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems. D. Teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of sexual activity. E. Teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects. F. Teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society. G. Teaches young people how to reject sexual advances and how alcohol and drug use increase vulnerability to sexual advances. H. Teaches the importance of attaining self-sufficiency before engaging in sexual activity).
Science-based sexual education often draws from research conducted by experts in sexual behavior, and principles found in correct anatomy and physiology practices. This differs from AOUM programs which are founded in traditional cultural norms of sexual behavior. In 2010, President Obama implemented two new science-based sexual education federal funding streams: Personal Responsibility Education Program (PREP) and the Teen Pregnancy Prevention Program (TPPP). These programs fall under Adolescent Sexual Health Education and Promotion Programs. These programs were created to fund and support sexual education programs backed by science and evidence and focus on reducing teen pregnancy. These programs teach abstinence along with contraceptive use which is a break from the AOUM approach to sexual education. Prior to the creation of these small federal funding streams, the federal government only funded AOUM programs.

During the Trump administration, the use of TPPP funds came into question as President Trump attempted to divert these funds towards abstinence-only sexual education, or, as he rebranded it: “Sexual Risk Avoidance”. In 2017, Trump attempted to eliminate the TPPP altogether through the creation of a budget proposal entitled, “A New Foundation for American Greatness.” This proposal, along with the appointment of Valerie Huber—a prominent leader in the AOUM movement—as Chief of Staff to the Assistant Secretary of Health and Human Services, resulting in the elimination of any science-based sexual education and replacing it with AOUM education. The Trump administration abruptly terminated these funds two years before their set end date. The abrupt elimination of TPPP

17 Id. at 710.
19 Id. at 1.
resulted in multiple lawsuits based on the illegal termination of TPPP funds allocated to various states and organizations. In the many lawsuits that ensued, the courts unanimously ruled in favor of TPPP.

More recently, Senator Cory Booker of New Jersey introduced into the 117th Congress, the Real Education and Access for Healthy Youth Act of 2021. This act attempts to increase access to comprehensive sexual education along with access to sexual and reproductive health services. This act also eliminates AOUM programs such as Title V included in the Social Security Act. To facilitate these changes, the Healthy Youth Act implements a new grant which would allocate federal funding to state education systems and private entities that qualify. The act proposes that the federal funding for this grant be reallocated from the eliminated AOUM programs and funneled into this new, comprehensive sexual education grant. The Healthy Youth Act focuses on providing comprehensive sexual education to marginalized groups, particularly those groups which have historically endured forced sterilization along with sexual and reproductive violence at the hands of the federal government. The act awaits further deliberation in the Senate Committee on Health, Education, Labor, and Pensions along with the entirety of Congress.

State courts have adjudicated most of the cases regarding sexual education. A California case, American Academy of Pediatrics v. Clovis Unified School District, challenged whether the Clovis County School District’s sexual education program violated California law stating that, “Students have a right to sex education that is complete, medically accurate, and free of bias, and that abstinence-only-until-marriage instruction is unlawful on the grounds of medical accuracy and bias.” Because the Clovis County School District implemented an abstinence-only-until-marriage program, the Supreme Court of California held that their program did violate state law. In response,
the district made drastic changes to their sex education curriculum resulting in the plaintiffs dropping the charges against the district.

A case in New Jersey, *Smith v. Ricci*, determined the constitutionality of a state requirement to implement sex education in schools. After the New Jersey State Board of Education issued a rule that made it necessary for school districts to create a family life education program that included lessons on sexuality, upset families sued arguing that this requirement violated their right to free exercise of religion. The rule issued by the State Board of Education included a policy that allowed parents to excuse their child from engaging in the lessons, but the plaintiffs did not believe this was sufficient protection. The court ruled in favor of the New Jersey State Board of Education, arguing that the program did not violate their free exercise of religious rights, nor did it violate the Establishment Clause. The court reasoned the opt-out policy sufficiently provided an avenue for any individuals with religious or moral objections to excuse their children from participation. Similar cases in Hawaii and California resulted in decisions which also affirmed the courts’ agreement with requirements to teach sexual education with opt-out policies.

**II. Weaknesses of Comprehensive Sexual Education**

The mission of comprehensive sexual education is twofold. The first, is to promote abstinence-only sexual protection among adolescents. The second, is to provide correct and healthy information to adolescents who choose to be sexually active, and to reduce the unwanted effects of sexual activity, such as STDs, abortions, and unwanted pregnancies.

The inability to address both purposes is what renders comprehensive sexual education ineffective. Many comprehensive programs

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in use right now are not able to meet either of the purposes, or they can accomplish one purpose but not the other.\(^\text{27}\) This is the case of the “Cuidate!” comprehensive education program. This program is geared to help Latinx students understand the risks of HIV and how to prevent contracting it through promoting condom use. One study observed that “Cuidate!” succeeded to achieve increased condom use twelve months after the course was taken by students. However, twelve months later, students were also more likely to become sexually active or return to sexual activity if they had previously committed to abstinence during the course. To confirm these results, the study was replicated, and researchers could not duplicate the effectiveness of the program.\(^\text{28}\) Often a program in comprehensive education is inaccurately deemed effective, where any positive effect occurs. This is interpreted to be the general impact of the curriculum on both desired outcomes.

Another shortcoming to comprehensive sexual education is the vastly different meanings that are referred to by the term ‘comprehensive.’ People arguing for comprehensive sexual education often do not agree among themselves about what should be taught in the curriculum. Some wish only to include consent and healthy relationships in addition to an abstinence-only curriculum. Others go as far as including sexual orientation, and racism to the list already mentioned. Because of this diverse interpretation of the curriculum in comprehensive sexual education, it becomes difficult to rally people together behind the vague title of “Comprehensive Sexual Education.”

The proposal by Senator Booker for The Real Education and Access for Healthy Youth Act of 2021, is a similar approach to what we will later recommend in ameliorating the issues surrounding sexual education. Senator Booker further proposes to disband AOUM funding in place of a more modern, comprehensive sexual education program. We find two major flaws in the Real Education and Access for Healthy Youth Act. The first, is that the act advocates

\(^{27}\) Id. at 5-6.

\(^{28}\) Meredith Kelsey et al., Replicating ¡Cuidate!: 6-Month Impact Findings of a Randomized Controlled Trial, 106 Am J Public Health S70, S75 (2016).
for an expansive version of comprehensive sexual education. The curricula that it establishes includes healthy relationship dynamics, LGBTQ+ issues, institutional racism, and contraceptive use. While this certainly falls under the definition of comprehensive, Booker’s realization of comprehensive sexual education may not reflect the same values as other proponents of comprehensive education. The second, is that the proposed bill essentially organizes the comprehensive counterpart to AOUM federal funding, which further enforces that schools should comply with either of the pre-existing schools of thought to qualify for funds. This restricts the flexibility to innovate new programs that are better adapted to the needs of our youth. Ultimately, the act is contrary to the goals we aim for which would create more innovation for sexual education, and greater autonomy for school districts to choose the curriculum they teach.

III. WEAKNESSES OF ABSTINENCE-ONLY UNTIL MARRIAGE PROGRAMS

Abstinence-only is the main form of sexual education taught in the United States school systems. AOUM programs fail to provide students with the necessary information to safeguard them from the risks of sexual behavior. Individuals that prescribe to abstinence-only views regarding sexuality fear that teaching students about contraceptives or the risks of engaging in sex, will encourage greater sexual activity. Public health studies show that informing students about how to engage in safe, protected sex does not lead to adolescent sexual activity. In the United States, the average age of marriage is 8.7 years after a woman’s first sexual experience and

29 S.1689 §2.
11.7 years after a man’s first sexual experience.\textsuperscript{32} This gap indicates that although the average age of first marriages among American youth is increasing, the average age for first sexual encounters is not. American youth engage in sexual behavior regardless of the type of sexual education they receive. The difference is that in states that teach abstinence, rates of teen pregnancy and sexually transmitted diseases are higher than in states which teach outside the bounds set by AOUM programs.\textsuperscript{33}

AOUM programs promote abstinence as the surefire way to avoid unwanted pregnancies and the transmission of STDs. However, the implementation of AOUM programs “violate[s] medical ethics and harm[s] young people ” by failing to include science-based research regarding pregnancy, contraceptives, and STDs.\textsuperscript{34} AOUM programs fail to prevent young people from engaging in sex and fail to address the needs of youth by not providing them with accurate information about sexuality.

The history of these AOUM programs reflects a deep connection to religious thought on sexuality. The circumstances that preceded the Supreme Court’s ruling of \textit{Bowen v. Kendrick} exemplify this connection. Christian rights groups promoted the AOUM movement which began during the Reagan Administration. Further, these groups created and promoted their own abstinence-only programs. The AFLA began to reflect similar ideas as those promoted by Christian rights groups.

The language to qualify for AOUM funding as contained in Title V of the SRAE states that, “Programs must have as their ‘exclusive purpose teaching the social, psychological, and health gains to

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\textsuperscript{34} Laura D. Lindberg & Leslie M. Kantor, \textit{Adolescents’ Receipt of Sex Education in a Nationally Representative Sample 2011-2019}, Journal of Adolescent Health, (2022).
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be realized by abstaining from sexual.” The Act further states that programs must teach that a “mutually faithful monogamous relationship in the context of marriage is the expected standard of sexual activity,” and that having children “out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society.”

Not only were the messages tied to religious thought, but religious organizations also received funding from these federal programs which the Supreme Court later struck down. Under these AOUM programs, beneficiaries of funding had to teach principles about sexuality which aligned with those prescribed by Christian rights groups to qualify for funding. These principles were cloaked in messages of deep religious thought and shame regarding sexual activity. These shame messages prove harmful to developing youth and contribute to misunderstandings about sexuality.

IV. Current Federal Funding Programs

The United States Federal Government provides funding for sexual education to states through federally funded programs and grants such as the Social Security Act, and more recently the Coronavirus Aid Relief and Economic Security Act (CARES). The states then have the discretion to allocate these funds to school districts under the guidelines each state sets for sexual education. School districts have further discretion in the use of these federal funds and the curricula they decide to implement. However, states are bound by certain requirements depending on which federal program their money comes from. If school districts abide by certain standards, they are awarded these funds. Although school districts are awarded money for sexual education, often, these funds are diverted to other school programs such as school lunches and summer programs. Programs such as these are expensive to maintain but are crucial to the well-being of students. Because AOUM programs are typically heavily

funded, schools are more enticed to opt into AOUM programs to supplement funding for their schools’ needs outside of sexual education, regardless of their values concerning the sexual education curriculum. Although this benefits a schools’ other programs, we argue that the sexual education programs in these schools do not meet the needs of the students.

V. PROOF OF CLAIM

A. Reallocation of AOUM Funding

The stringent requirements for states to qualify for AOUM funding restricts their ability to implement science-backed programs and the autonomy of what sexual education curriculum to teach their youth. Given the overwhelming weaknesses contained in AOUM programs, we propose they should be repealed, and their funding be reallocated to a new program that allows states the discretion to decide what to include in their curricula. The history of AOUM programs’ affiliation to harmful messages of shame and religious thought are further reasons to reallocate the funding. Many states rely on AOUM funding for their sexual education programs which indicates that the issues that stem from AOUM are perpetuated throughout the country. To ensure that these states do not lose this funding, we propose that federal money be reallocated to programs that do not contain the stringent requirements that AOUM programs have.

A new program would allow for the flexibility that is needed in a modern sexual education program. This new program would not be biased or based on the religious or philosophical views of any sexual education program. Instead, the standards needed to qualify for federal funding would be standards that foster a healthy environment for how sexual education is taught to youth. These requirements include requiring sexual education for graduation, qualifications for sex educators, and parental involvement in the course. This new standard will allow for innovation while maintaining a level of healthy perspectives on sexuality and while also showcasing multiple perspectives on sexual health.
B. Requiring Sexual Education for High School Graduation

A recent U.S. government study compared pregnancy rates across 21 different countries, and the results indicated that Americans have the highest rate of teen pregnancy, with those highest rates existing among American minorities. The state with the highest rate of teen pregnancy in the United States is Texas. In Texas, the state has no mandate requiring schools to teach sexual education. In Texas, 58.3% of school districts taught abstinence-only to their students, 16.6% taught abstinence-plus, and 25% received no sexual education at all. In contrast, the state with the lowest rate of teen pregnancy in the United States is New Hampshire. Unlike Texas, New Hampshire does require its school districts to teach sexual education. All students in New Hampshire receive sexual education and school districts have the discretion within certain bounds to choose what they teach.

While many factors can contribute to the differences in teen pregnancy rates between Texas and New Hampshire, access to sexual education is at the crux of this issue. The AOUM programs which fund abstinence-only education in states throughout the country promote inaccurate and incomplete information regarding sexuality. States that rely on AOUM funding for the implementation of sexual education cannot teach anything outside the bounds set by the AOUM standards. This greatly limits the information available to students, which in turn, impacts their ability to avoid risky sexual behaviors. The flaw is not in teaching abstinence, but in purporting that it prevents any kind of sexual risks with 100% accuracy. The problem further exists in the way that abstinence-only is taught.

through these AOUM programs which contain messages of shame and are deeply tied to religious thought. AOUM programs operate under the assumption that teaching other protective measures will encourage youth to engage in sexual activity, despite the statistics that prove otherwise.

There are currently no federal requirements for sex education to be taught in schools nor what sex education curriculum should include. States have the authority to dictate requirements for sex education curriculum. Currently thirty states and the District of Columbia require schools to teach sex education. Challenges to state requirements for sex education have resulted in courts upholding the constitutionality of these programs so long as they include an opt-out option for parents based on religious or moral grounds. In *Smith v. Ricci*, the Supreme Court of New Jersey ruled on the constitutionality of state requirements to teach sex education to students. The State Board of Education issued a regulation that required each school district to implement a family life education program in both elementary and high schools. This program includes topics on sexuality and an opt-out option for students. The plaintiffs argued that the implementation of these programs violated their right to free exercise of religion and the Establishment Clause contained in the First Amendment. The Supreme Court affirmed the action of the New Jersey State Board of Education, thus ruling that the requirement to implement a sexual education program with an opt-out option

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41 State Policies on Sex Education in Schools, Research, https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx#:~:text=As%20of%20October%21%2C%202020,students%20receive%20instruction%20about%20HIV.


does not violate the Establishment Clause nor does it violate individuals’ right to the free exercise of religion. This case, along with similar ones in Hawaii and California, demonstrate the Supreme Court’s agreement with regulations that require standards of sexual education. Given the Court’s support of requirements, along with the option for excusing students based on religious, moral, or other grounds, there seems to be no reason to not implement a federal requirement that all states must teach some form of sexual education. Giving states the discretion to decide what to include in the curriculum will limit federal overreach and safeguard state autonomy, while providing students with increased access to critical education for their sexual development.

A new federal funding program for sexual education should function similarly to the No Child Left Behind program, instated by President George W. Bush in 2001. No Child Left Behind is an education program that is intended to “close the achievement gaps” in every grade so that each child has access to a high-quality education. No Child Left Behind federally requires testing at each grade level, however, each state and school district is given the freedom to organize and tailor this program to their students. The sexual education requirements that we propose would work in a similar fashion, ensuring that these standards are reached while giving states the leeway to construct the best curricula for their communities.

C. Qualification Requirements for Educators

One of the greatest issues with the sexual education system in the United States, is the discrepancy in the standards required for sexual educators. Each state, and further, each school district, has the

44 Supra note 23.
46 Id.
discretion to determine its sexual education curriculum and who teaches it. Candidates for teaching courses in any other subject in public and private schools not only need a teaching certification but also a relevant degree in the subject matter to be considered for the position. However, we have observed that in sexual education, these requirements are lacking. Some require an additional health or nursing degree. Commonly, health teachers, physical education teachers, school nurses, and third parties contracted with schools, complete the sexual education of most middle and high schools. Other schools require a short training session delivered through PowerPoint which outlines what they cannot teach, which encourages parents in the school district to volunteer to teach the class despite having no specialization or education in this field. The essential piece lacking is addressing this delicate, polarizing issue by someone who not only understands the science-based mechanics of sex but someone who understands human development and how these adolescents are maturing both mentally and physically. The current legal framework surrounding sexual education insufficiently addresses these issues. No part of the law dictates standards for sexual educators in middle or high schools despite having standards for all other educators working in the United States. Qualifications to teach any subject from kindergarten to 12th grade in the United States requires a bachelor’s degree in teaching and passing a state test to obtain a teaching license.

In *Vergara v California*, parents and students argued for the constitutional right to education equality and instruction by competent teachers. Minority students, upset with the poor quality of teaching they received in comparison to students in higher income areas, challenged California statutes regarding teacher tenure and pay. They argued that these statues violated student’s rights to equal education opportunities and had disproportionate effects on low income and minority students. The trial court ruled in favor of the plaintiffs, arguing that the challenged statues were unconstitutional. The California Appeals Court reversed this decision, holding that the statues were constitutional. When the plaintiffs appealed this
decision to the California Supreme Court, the court refused to hear the case. While the Appeals Court ultimately reversed the decision of the lower court, this case represents an important movement among students and parents advocating for qualified educators. The right to quality educators is essential to a student’s long-term success. The right to quality educators should extend to the subject of sexual education. The Supreme Court of California should have affirmed the lower court’s decision to enshrine in the law the right to quality educators. This case sought to close the gap that exists due to socioeconomic disparities, by providing students with qualified educators. To close the wide gaps that exist in student’s sexual education, they deserve to have quality educators. The standards currently fluctuate from state to state and in some cases are haphazardly put together. Some states allow parents to volunteer to teach sexual education, where the only preparation and training they receive is a PowerPoint presentation. We cannot expect our students to be prepared to face difficult sexual decisions without informed education. Such education comes only from trained experts in the field.

Studies have shown that community-based sexual education more effectively decrease sexual initiation and increase condom use among teenagers who have chosen to be sexually active.49 The significant difference between school-taught programs and these community programs is in who was teaching the course. Community centers are more inclined to have qualified community members teaching the course. Although participants in community-based classes about sexual education may be predisposed to be sexually responsible, the difference in the environment created by these qualified professionals is significant. We argue that replicating this environment in a school setting would help to reach the aims of a complete sexual education. This is often left out of the conversation in sexual education because programs are over-focused on the subjects taught in these courses rather than how they are delivered.

Teachers who have degrees in Human Development or Marriage and Family Sciences would be adept at properly teaching sexual education in whichever curriculum a school may choose. Professionals can do so without causing shame, by addressing questions appropriately and with current science-based evidence. Furthermore, access to qualified educators is even more attainable in rural areas, with the help of online options, such as video conferencing-styled classes which allow students to receive education by professionals regardless of their location. Students would benefit from learning sexual education from a teacher with these qualifications, regardless of which program they are taught, because of the age-appropriate environment that the teacher can create. Thus, legally codifying the requirement to standardize sexual educator qualifications will ensure American youth receive an accurate sexual education.

D. Parental Involvement

Increased parental involvement would cultivate a healthier environment for sexual education both inside and outside the classroom. Not only does this healthy environment lead to better learning outcomes but would also address common concerns raised by parents regarding sexual education. Requiring parental involvement in classwork or homework assignments, opens guided, meaningful communication channels for the child and parents. Ultimately, the parent becomes the main point of access for information beyond the classroom. Furthermore, this allows for parents to observe and participate in what lessons teachers present to their teenagers. Requiring parental participation as the new standard can assure concerned parents that teachers do not undermine their authority and rights as parents while also ensuring that teachers cover specific topics at the appropriate times.

States should reserve full discretion concerning what the realization of each of these aspects could look like, like the No Child Left Behind program as described above. Ideas for these options could be weekly parental or guardian observance of the class online or in-person, homework assignments requiring parental input, final projects including parental involvement, and take-home lessons with
parents, etc. The purpose of these assignments is to allow the parent to participate in teaching while monitoring the learning of their student and opening channels of communication for future conversations on this topic in the home.

VI. CONCLUSION

No existing curriculum for sexual education is effective enough to address the social issues that plague our society, especially among our adolescent youth. Despite this apparent discrepancy, the political climate of our legislative system continues to focus mainly on pursuing an already existing curriculum, rather than looking for improvements that foster progression and promise solutions. Both sides are looking to realize the same goals: reducing unwanted teen pregnancies, curtailing abortions, lowering rates of STDs, and increasing an abstinence-only-until-marriage lifestyle. The current curriculum standards are proving to be powerless in changing these statistics. The proposed plans outlined in this paper address these exact issues. Creating a more conducive environment for accurate sexual education provides students with adequate sexual knowledge to effectively address the issues that they face at their stage of life, allows for learning and development, and ultimately leads them to a healthy and successful life.