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The editing staff would like to graciously acknowledge those organizations and individuals who have supported the Brigham Young University Prelaw Review in this, its thirty-seventh volume. We are very appreciative of the support from:

BYU’s Pre-Professional Advisement Office
Kris Tina Carlston

We would also like to thank those who have made the printing and distribution of the journal possible:

Rawlinson Family Foundation
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The 2023 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 2023 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 Rawlinson Family 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

We are thrilled to present the 2023 edition of the Brigham Young University Prelaw Review, a publication that stands as a symbol of academic excellence and intellectual growth at our esteemed institution. The Prelaw Review remains one of the premier undergraduate experiences at BYU, providing a platform for our students to explore the intricacies of law and engage in thought-provoking discussions on a variety of legal topics.

Our authors and editors have faced numerous challenges throughout the creation of this publication, pushing them to think critically, question assumptions, and pursue innovative ideas. This rigorous academic process, coupled with the dedication and passion of our students, has resulted in a collection of articles that embody strong writing, thoughtful arguments, and meticulous research.

The value of the Prelaw Review is twofold. Firstly, it produces exceptional works that contribute to the broader understanding of contemporary legal issues, as well as encourage readers to reconsider preconceived notions and engage in meaningful discourse. Secondly, and perhaps more importantly, it fosters the personal and intellectual growth of our students. The journey of drafting, editing, and refining these papers instills in our authors and editors a sense of resilience, curiosity, and commitment to the pursuit of knowledge that will serve them well in their future endeavors.

The BYU Prelaw Review consists of both the paper-writing component, as well as an instructional course; neither of these endeavors would have been successful were it not for the hard work of members of the Review, and the other two members of the editorial board, Alex Hansen and Derrick Peterson. Likewise, without the guidance and support of Kris Tina Carlson, this edition of the Review would not have been the success it was.

As you peruse the pages of this edition, we hope that you will not only appreciate the outstanding quality of the articles but also
recognize the profound personal growth that each student involved has experienced. We trust that these works will inspire, challenge, and expand your understanding of the legal landscape, as they have for all those involved in their creation.

Warm regards,

Collin Mitchell
Editor in Chief

Baerett Nelson
Managing Editor
UTAH ANTIDISCRIMINATION EFFORTS: SHORTCOMINGS, CHALLENGES, AND THE WAY FORWARD

Greta L. Asay

I. INTRODUCTION

Consider this hypothetical situation: Ms. Friedmann worked as an accountant for five years at a Utah company. In her last year, her supervisor, Mr. Lewis, repeatedly made unwelcome sexual advances and comments directed at Friedmann. What started as more subtle forms of sexual harassment soon escalated into aggressive advances. Friedmann, upset and uncomfortable, went to the company’s Human Resources department to see what could be done to address these issues, but no meaningful action was taken. When Lewis heard that Friedmann had brought complaints against him to HR, he retaliated by threatening to demote her.

Recognizing the discrimination that she experienced, Friedmann filed a claim with the Utah Antidiscrimination and Labor Division Commission (UALD), which is designed to provide a framework for employees to seek legal action after experiencing unlawful discrimination based on identity. Similar to many victims of sexual harassment, Friedmann had no evidence to substantiate her claim, and the agency declared that no discrimination occurred. Friedmann decided to appeal this decision to the Equal Employment Opportunity Commission (EEOC), hoping to prove her case and receive

1 Greta L. Asay is a junior studying Sociology at Brigham Young University with a minor in Legal Studies. She plans to attend law school in Fall 2024. Greta would like to thank her editor, Juliette Ball. Juliette is a junior studying Microbiology at Brigham Young University. She plans to attend law school in Fall 2024.
reparations. Yet again, the decision was that officially, no discrimi-
nation had taken place. Frustrated after months of fighting for her
rights only to be told she was not discriminated against, Friedmann
ultimately quit her current job to find work at a different company,
while her supervisor faced no legal consequences.

Although this is a hypothetical example, situations of discrimi-
nation such as the one Friedmann experienced are common in
Utah. While being decidedly pro-business\(^2\), Utah is not considered
an employee-friendly state\(^3\): Utah seems to have chosen to privi-
lege employers over employees. According to a study conducted
by Oxfam, a nonprofit human rights organization, Utah was ranked
44th for “Best State to Work” in 2022; this index is calculated from
Utah’s score on wages, worker protections, and rights to organize.\(^4\)
Compared to other states, Utah guarantees limited protections and
few benefits to employees. Although Utah does have some laws in
place to protect employees from discrimination, the processes of
investigation, enforcement, and remedial action do not effectively
support and defend employees who experience unlawful discrimi-
nation. Utah’s government should revise the UALD’s subpoena and
remedial powers and investigation processes to address its current
shortcomings, which would meaningfully benefit employees to
increase efficiency and accountability.

**II. Background**

Discrimination in the workplace is experienced by people of
many different identities, especially institutionally disadvantaged
groups such as women, people of color, and members of the LGBTQ+
community. Discriminatory practices in the workplace generally

places/ut/ (last visited Jan 19, 2023).

\(^3\) What Are Employee-Friendly States?, Paycor, (Sep. 16, 2021), https://
www.paycor.com/resource-center/articles/what-are-employee-friendly-
states/.

\(^4\) Kaitlyn Henderson, Best and Worst States to Work in America 2022,
Oxfam (2022), https://webassets.oxfamamerica.org/media/documents/
take two forms: disparate impact or disparate treatment. While disparate impact includes unintentional discriminatory practices, disparate treatment is intentional. Both disparate impact and treatment can create an unhealthy and potentially unsafe work environment.

Although discrimination might be exhibited in a variety of ways, common examples include harassment, such as repeated inappropriate comments, offensive jokes, or ridicule; biased and unfair treatment, such as not receiving a reasonable pay raise or promotion for no valid reason⁶; a hostile work environment, where the words or actions of colleagues can negatively impact or interfere with an employee’s ability to work⁷; and retaliation, where an employer may terminate or take other adverse action against an employee when they make efforts to reduce the harm rendered by coworkers and supervisors.⁸ The difference between one-time jokes at the expense of another or passing over someone for a promotion and illegal discrimination is that illegal discrimination targets a “person’s race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.”⁹ “To be unlawful, the conduct must create a work

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⁵ Joshua Thompson, Understanding the difference between disparate treatment and disparate impact, Pacific Legal Foundation (2014), https://pacificlegal.org/understanding-difference-disparate-treatment-disparate-impact/?gclid=Cj0KCQiAorKfBhvC0ARI5AHDDzslum_r5VNvFM3U-KMlciXr-m8v-AgvqBv0NNKO8-JiESjDxod1kBU_fiaAv7cEALw_wcB.


environment that would be intimidating, hostile, or offensive to reasonable people.”

Discrimination in the workplace can have negative impacts on the mental health, work performance, and engagement of employees. All of these discriminatory practices are prohibited by both federal and state laws, but nonetheless overtly and covertly persist in workplaces. The Civil Rights Act of 1964 and the Utah Antidiscrimination Act of 1965 were created to protect workers from unlawful identity-based discrimination and provide a way for those who were discriminated against to pursue legal action.

A. Civil Rights Act of 1964

The Civil Rights Act of 1964 “prohibits discrimination on the basis of race, color, religion, sex, or national origin.” The purpose of this act is to protect individuals from unequal treatment and covers discrimination in employment by forbidding discrimination


based on sex and race in hiring, promoting, firing, and other employment decisions. Title VII of the Civil Rights Act created the Equal Employment Opportunity Commission (EEOC), which enforces the laws that protect against discrimination in employment practices.\textsuperscript{14} Since the Civil Rights Act of 1964, amendments have been made to the law, most notably with the Civil Rights Act of 1991; this was passed to amend Title VII and expand the rights and protections of workers.\textsuperscript{15} This law gives the EEOC the authority to conduct investigations of charges of discrimination in the workplace as well as to file lawsuits on behalf of clients.

B. The Utah Antidiscrimination Act of 1965

Similar to Title VII of the Civil Rights Act, the Utah Antidiscrimination Act (UADA) of 1965 “prohibits employment discrimination on the basis of race, color, religion, sex, age (40 or over), national origin, disability, sexual orientation, gender identity, pregnancy, childbirth or pregnancy-related conditions.”\textsuperscript{16} The UADA protects employees against unlawful discharging, demotions, retaliations, refusal to hire, or other discriminatory employment practices. The UADA established the Utah Antidiscrimination and Labor Division Commission (UALD) of the Utah Labor Commissioner’s Office. The Employment Discrimination Unit of the UALD is charged with enforcing both state and federal laws pertaining to discrimination in employment and is the agency that investigates claims of discrimination.


Filing a discrimination claim with the UALD is open to any employee, with or without legal representation. Discrimination claims can be cross-filed through the UALD and the federal administrative agency, the EEOC; because the UALD is a Fair Employment Practices Agency (FEPA) under the EEOC, it has the authority to act as an agent of the EEOC. It is not necessary to file with both the UALD and the EEOC. These two agencies cooperate to process claims through a ‘work-sharing agreement’; when cases are dually filed with the EEOC and UALD, it is the UALD that handles the case.

The process for both agencies is similar: intake, mediation, and investigation. An individual must first file a complaint, either through an attorney or pro se, with the UALD within 180 days or with the EEOC within 300 days of the date that the filer believes they were discriminated against. Both agencies provide the option of mediation; the use of a mediator between an employee and their employer can help resolve disputes. However, if mediation is rejected by either party or if an agreement is unable to be made, the charge is supposed to be forwarded to an investigator. After obtaining and examining the facts of the claim, the investigator will come to a decision about the validity of the claim. The individual who filed the claim can appeal the decision and seek litigation two times at the state level; if they remain dissatisfied with the decision, they can

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20 A Performance Audit of the Utah Antidiscrimination and Labor Division’s Employment Discrimination Unit, (Jan 2017) [Hereinafter Performance Audit].

21 Filing a Discrimination Claim - Workplace Fairness supra note 18

appeal their case at the federal level.\textsuperscript{23} If a client filed with the UALD but wishes to sue, they can withdraw the charge and request a Notice of Right to Sue through the EEOC.\textsuperscript{24} These remedial options are meant to provide employees with adequate means for legal action.

However, there are currently issues with the UALD’s abilities to properly, effectively, and adequately deliver justice for those who were discriminated against. The UALD is currently unable to properly investigate the claims of discrimination it receives. This commission lacks the necessary resources to effectively address the needs of the individuals who file claims. Additionally, the separation of the UALD and EEOC creates problems, specifically in regard to power and authority, for clients, attorneys, and the UALD. Because the UALD does not have the power or resources to adequately enforce or investigate claims of discrimination in the workplace, changes can and should be made to the UALD by the State of Utah to effectively address the claims and enforce the protections provided by federal statutory law.

III. PROOF OF CLAIM

A. Successes of the UALD

It is important to note that the structure and system of the UADA has significant potential to be an asset to both employers and employees. The UADA is successful in many ways in ensuring and protecting equality in the workplace. Employees in Utah enjoy the rights and protections against unlawful discrimination, and violations of


these antidiscrimination laws are theoretically enforced; however, they are not consistently or sufficiently enforced. Additionally, in the case that an employee is unlawfully discriminated against based on the identities protected, the UADA provides a way for those individuals to seek legal action and potentially receive reparations. Through the UALD, individuals are entitled to pursue remedial action when wrongfully discriminated against. Continuing the example of the case of Ms. Friedmann, as an employee, had the protected right to pursue legal action for the discrimination she faced. Those who experience unlawful discrimination are also able to participate in mediation, which has been successful in some cases. The UADA is important because it not only protects employees from discrimination, but can preempt it, discouraging discrimination in the first place.

B. Shortcomings of the UALD

1. Investigations

Despite the general successes of the UALD, there are many shortcomings of the agency that have significant impacts on the effectiveness, efficiency, and integrity of the agency. To investigate and review the effectiveness and efficiency of the Employment Discrimination Unit of the UALD, a performance audit was conducted by the Office of the Legislative Auditor General (OLAG) in 2017 and reported to the Utah Legislature. The audit examined multiple issues of the UALD and laid out both general and specific grievances with the process and internal organization. As a whole, the main issue was that the process of the investigations and outcomes were inadequate, inconsistent, and largely disorganized. According to the OLAG, the investigative process itself has proven to be generally inadequate, and the various components of the system that are used to conduct investigations and make decisions are individually and collectively problematic.

25 Performance Audit supra note 20, at 22. Note: In 2016, 31% of cases closed participated in mediation. 49% percent of these were successful mediations.

26 Id. at 20
The OLAG found that the investigators are not adequately qualified due to the lack of a formal training program; training in the UALD is referred to as “handholding” by the staff, which means that instead of formal training, there is informal job shadowing and explanations of cases. The training programs that are currently in place have proven to be insufficient in preparing investigators. Both the initial training for new investigators and re-training for the seasoned investigators was informal, not tracked, and insufficient. The major contributor to this insufficiency is limited funding—the UALD does not have the budget or resources to either train investigators themselves or send investigators to be trained by other agencies, such as the EEOC.

Another issue that impacts and complicates the shortcomings is the lack of resources and time. Due to the number of claims filed in proportion to the number of staff, those who work at the UALD are often overworked, which results in backlogged investigations. If the staff of the UALD are unable to spend adequate time and effort on their investigations, it is possible that some cases do not receive the attention that they need to reach an accurate decision, and thus are decided prematurely.

Additionally, there is the relatively minor but nevertheless relevant issue of promptness; investigations are not conducted in a timely manner. Although there are some deadlines in place, these deadlines are generally ignored and are not enforced. This issue exacerbates the general disorder and mismanagement of the investigation process; the lack of policies puts the UALD at risk for conducting inadequate and inconsistent investigations. Furthermore, unnecessarily lengthy investigations inconvenience all parties involved, taking up more time, resources, and money than it needs to.

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27 Id.
28 Id.
29 Id. at 54
30 Lauren Scholnick Personal Interview (2022)
31 Snow Interview supra note 23
i. Low Rate of Cause Findings

Around the country, employment discrimination cases are notoriously difficult for a plaintiff to win\textsuperscript{32}; in Utah, they are even more difficult. Compared to other federal and state agencies, the UALD is less likely to rule in favor of employees.\textsuperscript{33} The ultimate outcome of an employment discrimination case is whether there were ‘cause findings’ or ‘no cause’. When the UALD investigation findings lead to a ‘no cause’, it means that there was no sound reason to believe that illegal discrimination had occurred; the UALD findings of ‘no cause’ (67.7\%) was higher than the EEOC (65.2\%) or FEPA average (60.3\%).\textsuperscript{34} The cause findings, which refer to when “the UALD determined there was reasonable cause to believe illegal discrimination occurred based on evidence obtained during an investigation”, are considered merit resolutions because they are outcomes that are beneficial to the client.\textsuperscript{35} Compared to the other agencies, the UALD has an abnormally low rate of cause findings–comprising only 0.4 percent of their investigations; this is below the national average of state FEPAs (1.5\%) and the EEOC average (3.5\%).\textsuperscript{36} This low rate of cause findings could indicate that employees who were discriminated against are unlikely to receive a favorable outcome.

The low rate of cause findings and high rate of ‘no cause’ findings may be a reflection of the inadequate investigations, which contributes to the public’s perception of bias in the system. The OLAG found reason to believe that the “division’s low rate of cause findings is influenced by several factors, including a lack of processes and investigator training, weak performance measures, which refers to the evaluation of employees based on a standard, and high

\begin{thebibliography}{99}
\bibitem{33} Performance Audit \textit{supra} note 20, at 33
\bibitem{34} \textit{Id.}
\bibitem{35} \textit{Id.} at 31
\bibitem{36} \textit{Id.}
\end{thebibliography}
turnover.” Additionally, the investigations conducted by the UALD overwhelmingly fail to provide clear justification and evidence of how and why a case outcome decision was reached. There is little internal oversight in the justification of the investigation process, and the oversight process that is in place is informal and not standardized. External review of the conclusion of the investigations is also limited, which has resulted in reduced accountability for the investigations and the outcomes.

ii. Navigating the System

Clients may have a difficult time navigating and going through the UALD system, namely because they have a heavy burden of proof. Clients must be able to use physical evidence to prove that they were discriminated against; however, this can be very difficult, since most discrimination happens through words or actions, which are rarely documented. Complaints of retaliation are the most common form of discrimination that are reported to the UALD; it is likely that there are more complaints of retaliation than other forms of discrimination because it is easier to document and prove.

37 Id. at 33
38 Id. at 11
Because those who file the claims have a heavy burden of proof to prove that they were discriminated against, many ultimately cannot prove that discrimination occurred, resulting in the UALD declaring ‘no cause’. Because of the general inefficiency and inadequacy of the UALD, lawyers may actually recommend to their clients that they go through the EEOC instead.42 While the requirement for evidence is similar for both the EEOC and UALD43, going to the EEOC is more likely to result in a favorable outcome for the client, and thus may be more appealing to them.44 The discouragement of clients from going through the UALD and choosing to file with the EEOC instead is counterintuitive because by doing so, the UALD becomes obsolete while the EEOC is further overworked.

2. Mediation

Mediation early in the process has the potential to be productive and beneficial for the plaintiff and the defendant because it gives the parties the opportunity and flexibility to reach an agreement, and thus avoid the investigation and other legal process.45 Even if mediation doesn’t end with a resolution, it can allow both parties to better understand each side’s case and perspective.46 The UALD is required by law to make mediation available to parties prior to the

42 It doesn’t matter what you say’ supra note 39
44 Performance Audit supra note 20, at 30
46 Snow Interview supra note 23; see id. Kerwin.
and currently employs two full-time certified mediators that conduct mediations for disputes relating to its employment, housing, and wage divisions. However, some clients may prefer to use outside mediators if they believe it will benefit their case more so than if they used the UALD’s mediators; these outside mediators may come from law firms or other legal organizations, such as an alternative dispute resolution provider. Outsourcing professional mediators, while perhaps beneficial in theory, is much more expensive than using the services by the UALD’s mediators. Even if parties do opt to outsource mediators, those mediators may lack court-qualified training that is specific to mediation.

While it can be helpful for both parties to meet and potentially reach an agreement, mediation does not always equally benefit both sides. Early mediation may even benefit the defendant more than the plaintiff by using the information and evidence that the plaintiff presents to build a stronger defense. It is also possible that browbeating can occur during mediation, which is when the mediator consciously or subconsciously forces or steers an outcome of the negotiation that favors the defendant over the plaintiff, perhaps in the interest of time

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or resources. Because browbeating can make mediation unequal, it weakens the integrity of mediators and the mediation process itself. The legal intention of mediation is to benefit both parties equally, but if this is not the case, changes need to be made to address this.

The mediation process as it currently is practiced does not follow the intent of the law: the UALD conducts investigations at the same time as the mediation process is taking place, when it is the law for mediation to be completed before an investigation is started. Although it may seem minor, it is important that mediation is conducted before the investigation begins so that the process of the investigation doesn’t interfere with or impact the outcome of mediation. When the investigation and mediation are conducted at the same time, it may defeat the purpose of mediation.

3. Powers

The UALD does have subpoena power to “subpoena witnesses to compel their attendance at a hearing, to take testimony, and to compel a person to produce documents at a hearing”; however, this power isn’t useful because the UALD does not hold hearings. The subpoena powers of the UALD are limited, irrelevant, and cannot meet the needs of the agency. Specifically, while the UALD does have some power to obtain records, it does not have the power to subpoena evidence, such as records from employers for its investigations. Because of this, an employer may refuse to submit incriminating evidence, thus placing the discriminated party at a further disadvantage. This lack of power leads to and produces obstacles that hinder the progress and ability of investigations and may mean there is a lack of useful evidence that can be used to make a fair decision.

51 Scholnick Interview supra note 30
52 Utah Code §34A-5-107(3) supra note 47
54 Performance Audit supra note 20, at 25
Another issue with the UALD relating to its power is the limited remedial options. Those who file discrimination claims with the UALD have a relatively narrow choice of remedies compared to those who file with the EEOC\textsuperscript{56}: the UALD offers reinstatement, back pay and benefits, and attorney’s fees and costs\textsuperscript{57}; the EEOC offers non-discriminatory placement, back pay, front pay, attorney’s fees and costs, and compensatory damages.\textsuperscript{58} Because of this, many clients choose filing with the EEOC over the UALD, making the UALD, to a certain extent, both obsolete and redundant. Due to the relationship and power division between the UALD and the EEOC, the UALD possesses statutory authority over employers that the EEOC does not have, meaning the EEOC cannot require certain actions or reparations of the employer while the UALD can\textsuperscript{59}; for example, the UALD can require the reinstatement of a terminated employee.\textsuperscript{60} While this in itself is beneficial for the UALD, it is not indicative of the general power the UALD holds.

One problem that has significant ramifications for Utah employees is that in order to receive the protection of the UADA, there must be at least 15 employees in the company they work for.\textsuperscript{61} This requirement\textsuperscript{62} was initially created by the federal government to

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{56} Employment Discrimination \textit{supra} note 16
  \item \textsuperscript{59} EEOC FILINGS UPDATE \textit{supra} note 41
  \item \textsuperscript{60} \textit{Id.}
  \item \textsuperscript{62} Title VII \textit{supra} note 14
\end{itemize}
\end{footnotesize}
“avoid placing too great a burden on smaller employers,”⁶³ which, while appropriate at the time it was created in 1964⁶⁴, cannot fit the needs of most states now. Since the Civil Rights Act was passed in 1964, the country, including Utah, has experienced significant population growth, increased diversity, social and cultural change, and technological innovation⁶⁵—all of which have changed how people work.⁶⁶

In response to these advancements and the diversification of the economy, many states have lowered their minimum number of employees⁶⁷; Utah, however, is not one of these states. Utah is currently home to a significant number of small businesses⁶⁸: 96.7% of Utah businesses are considered small businesses, and approximately 47.2% of all Utah employees are employed by small businesses.⁶⁹

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⁶⁴ Title VII *supra* note 14


However, these employees cannot claim the rights and protections of the UADA, thereby putting them in vulnerable and potentially unsafe environments. Additionally, there are currently no remedial options for those discriminated against in businesses with less than 15 employees, which leaves a significant number of employees completely unprotected from unlawful discrimination. This can pose serious threats to these employees, particularly institutionally disadvantaged groups.

C. Prescriptions

Solutions that could significantly benefit the effectiveness of the UALD can be made on both major- and minor-levels. These solutions can be organized into three general areas: investigation, mediation, and power; the significant and insignificant issues of the UALD can be resolved through the prescriptive elements in these three categories. The UALD would benefit from changes made within the agency and the investigation process. In the 2017 audit, the OLAG recommended several solutions that could address the issues that were identified. The suggestions that were made were in direct response to the problems and shortcomings that the OLAG identifies, and thus, in conjunction with other solutions, would improve the investigations and mediation process and strengthen the power of the UALD.

1. Investigations

Because of the current inadequacies of the investigations conducted by the UALD, the OLAG recommends a few ways that these issues can be addressed. One such way is the standardization and formalization of the investigation process. This is a commonsensical

70 Scholnick Interview supra note 30

71 In Gottling v. P.R. Inc. (Gottling v. PR INC., 61 P.3d 989 (2002)), the plaintiff, Gottling, was unlawfully terminated by her supervisor because she refused to maintain a sexual relationship with him. Gottling brought forward the case on the grounds of wrongful termination. However, she was unable to seek legal reparations because she worked in a business that had less than fifteen employees.
improvement that can be made, and there is considerable merit to this recommendation. Establishing a structured investigation process should include active and meaningful oversight from the investigator’s supervisor(s) to ensure the consistency and thoroughness of all investigations. Standardizing investigations ought to include creating a comprehensive policy and procedures manual that can provide UALD employees with the necessary instructions to conduct a complete and thorough investigation. Developing and establishing a “formal, standard, and documented investigation program … should improve UALD’s management and investigation of employment discrimination charges.”⁷² The investigators and supervisors must be held accountable for the entire process of the investigation. The proper management of investigations is required to ensure this, and would benefit not only the UALD itself, but also all those who are involved, such as the employers, employees, and attorneys. Increased organization and order is a relatively straightforward way to improve the UALD, its investigations, and people’s experiences and interactions with the agency.

Formal training of investigators is another key way to improve the UALD investigations. It is necessary to the integrity and accuracy of investigations that those charged with fact-finding and decision-making have proper, up-to-date, and continuous training. Investigators should be required to undergo thorough training when they are first hired as well as consistent and continual re-trainings as they continue to work for the UALD. This required training will help investigators learn the essential instructional information, necessary skills, and proper procedures for conducting investigations; re-training allows employees to review the information and procedures, further develop their skills, and be of greater help to newer employees.

Additionally, a potential way to improve investigations is to limit the appeals process, which could free up the UALD’s time and resources. Limiting the appeals process at the state-level from the opportunity of two appeals to one would still provide the clients to seek reparations and legal action but would require them to take their case directly to the federal-level if they lost the first appeal. It is

⁷² Performance Audit supra note 20, at 18
important that the client would still have the benefit of another chance to try their case if they didn’t agree with the outcome at the state level because it provides them with more opportunities to seek legal action. This restriction would ultimately be advantageous because it would allow the investigators to focus on the cases at hand and allow them to give more effort to thorough investigation. Thus, it would likely benefit the plaintiffs, because their cases would receive more attention; the defendants, because they would not have to go through as many appeals; and the staff of the UALD, because they would not be as overworked and could put in greater effort into their cases.

2. Mediation

Because mediation is a viable and potentially productive way for cases to be settled earlier in the process, the system and structure of mediation should be as constructive and beneficial as possible. To improve the mediation process, changes should be made to the program as well as to the training and education of the mediators. One straightforward change that can be easily implemented is for the UALD’s mediation program to follow the process as intended in the law, specifically regarding the order of processes. The law clearly states that mediation should come first, and, if it is not successful, only then can the investigation be conducted; mediation and the investigation should not be happening at the same time. When mediation comes before the investigation, parties are more likely to be receptive to resolution than if the investigation was already taking place. Additionally, conducting the mediation first “saves Commission resources by avoiding the investigation of a charge that might be appropriately resolved through mediation.” Conducting mediation before the investigation is in the UALD’s best interest because it can

73 Scholnick Interview supra note 30
74 Utah Code 34A-5-107(3) supra note 47
75 Performance Audit supra note 20, at 23
77 Id.
potentially save them resources and time.\textsuperscript{78} It is necessary that every process, system, and part of the UALD is following the intent of the law because it ensures accountability and transparency of the agency and its workings.

If parties opt to outsource a mediator from an agency or firm, it is crucial that they have adequate knowledge of the law and that they are equipped with the necessary skills to help both parties reach a resolution.\textsuperscript{79} Because mediation is a potentially important and private way that clients and their employers can reach an agreement, it is crucial that mediators are not only well-trained, but that they have specialized mediation training.\textsuperscript{80} Requiring that all mediators, whether they are on the staff of the UALD or not, have the necessary and proper training will help standardize the mediation process while still allowing mediators the flexibility to take different approaches and techniques.

Additionally, it would be beneficial if training included information on how mediation can potentially be unproductive and even harmful for plaintiffs; when a mediator is aware of this, they are in a better position to avoid unequal mediation. This sensitizing training can help mediators learn how to conduct mutually beneficial mediations. Although training by itself may not be enough to adequately address all problems associated with mediation, it can help provide mediators with important negotiating and sensitizing skills, thereby improving the mediation process for both the plaintiff and defendant. The certification of training that is specific to mediation would better equip mediators to appropriately and sensitively mediate; this would strengthen and ensure the integrity of the mediation process.

These improvements would benefit the mediation process and those involved by increasing transparency, accountability, efficiency, and neutrality. It is important that mediators are not only well-trained, but that they have the transparent intention to be of help to

\textsuperscript{78} Resolution Conferences \textit{supra} note 30

\textsuperscript{79} Scholnick Interview \textit{supra} note 30

\textsuperscript{80} Jepson Personal Interview (2022)
both parties as much as they can. It is also important that the integrity of the UALD’s mediation process is upheld and strengthened. With these improvements, mediation becomes a more productive and potentially beneficial option for the plaintiffs and defendants. While mediation does not mitigate discrimination itself, it is nevertheless important because it provides a way for those who have already experienced discrimination to seek and potentially receive reparations.

3. Powers

The UALD should be granted different and broader subpoena power than it currently is entitled to. One of the strengths of the EEOC over the UALD is that it is “entitled to all information relevant to allegations that have been listed in the charge”, which is permitted due to the subpoena power of the EEOC to obtain this information. With increased subpoena power, the UALD would have access to more evidence that could potentially have importance in the investigations and trials. Additionally, the UALD would be able to conduct its investigations more efficiently.

To address the issue of limited remedial action, the OLAG calls for the revision and increase of remedial powers granted to the UALD. This would likely prove to be greatly beneficial to the plaintiffs because

81 Id.
82 Performance Audit supra note 20, at 25
83 Id.
84 Id.
it offers them more options to address their specific needs.\textsuperscript{85} As previously mentioned, the power of the UALD is not as well-equipped to address the needs of those seeking reparations and justice when compared to that of the EEOC\textsuperscript{86}; therefore, a sensible solution to this that would significantly benefit the clients of the UALD is additional remedial power. The UALD should be granted meaningful independent powers to fulfill its role as protector of employees’ rights. This would be a worthwhile change because it would allow the UALD to be able to adequately and separately initiate legal action pertaining to the discrimination claims instead of relying on the EEOC to accomplish this\textsuperscript{87}. These remedial options would ideally parallel those of the EEOC.

Providing legal protections for those who work in businesses with a staff of fewer than 14 would significantly benefit those employees.\textsuperscript{88} The Utah State Legislature, which holds the power to decrease the minimum number of needed employees, should follow

\textsuperscript{85} One example of a state that has expanded its legal remedial options for employment discrimination is California. California’s state agency that handles discrimination cases is the Civil Rights Department (CRD). The CRD offers a wider variety of remedies than the UALD, including covering back pay (past lost earnings), front pay (future lost earnings), hiring/reinstatement, promotion, out-of-pocket expenses, policy changes, training, reasonable accommodations, damages for emotional distress, punitive damages, and attorney’s fees and costs (\textit{Employment Discrimination, Civil Rights Department, State of California}, https://calcivilrights.ca.gov/employment/#faqABody (last visited Feb 2, 2023)). The wider range of remedial options increases clients’ discretion in seeking compensation that they believe would be most appropriate to their situation. Because of these remedies, California is significantly better equipped in addressing discrimination claims and has more success in effectively settling issues. For example, most clients in California go through their state agency rather than the EEOC, unlike Utah (\textit{2020 Annual Report: Department of Fair Employment and Housing}, https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/01/2020-DFEH-Annual-Report.pdf (last visited Feb 2, 2023)).

\textsuperscript{86} EEOC Remedies \textit{supra} note 58

\textsuperscript{87} Steve Bedar \textit{Personal Interview} (2022)

\textsuperscript{88} Scholnick Interview \textit{supra} note 30
the example of the other states that have lowered their requirement\(^89\) and amend the UADA to extend legal protection to include businesses with fewer than 15 employees. Recently, a bill, titled ‘Workplace Protection Amendments’, was proposed that moved to lower the required number of employees to qualify for protection under the UADA from fifteen to five.\(^90\) However, this bill was not passed. Creating and passing another bill to amend the UADA, perhaps at a higher number than five, would be an important and much-needed change. Increasing the minimum number from five could be a better compromise that would make the bill more likely to pass. This extension of protection would greatly benefit employees working in small businesses by providing them the opportunity to seek legal action if they are discriminated against. Because small businesses and their employees are such an integral part of Utah’s economy and workforce, it is crucial that the UADA protects as many of these workers as it can.

**D. Significance**

Importantly, the UALD recognizes its own shortcomings, and agrees that the agency, as it currently operates, is unable to fully address the issues raised by the OLAG. In response to these problems, internal solutions and changes are currently being made. For example, amendments were recently made to the UADA, granting the UALD increased power to investigate and settle discrimination claims\(^91\); notably, the UALD was granted subpoena power during investigations.\(^92\) The changes that were made were intended to improve the agency and its power generally by addressing specific

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89 Employment Discrimination Laws in Your State *supra* note 67


issues that had arisen. While these changes are undoubtedly beneficial and necessary, additional solutions can also be adopted to further improve the UALD.

Implementing the changes previously described will likely yield significant improvements in the UALD. Positive results would theoretically include a greater number of cause findings, increased investigation efficiency, strengthened integrity and accountability of the UALD and its processes, greater equity between employers and employees, and extended protections to a greater number of Utah employees. These changes would help the UALD to be more in line with the law and the ideal of justice. The UALD would also be able to better address the current issues within its agency, thereby helping to address discrimination in the workplace in Utah; this would likely make Utah a safer and better place to work in.

The existing system and structure of the UALD has the potential to address discrimination in the workplace. It is important that the system and structure are already in place, but changes and adjustments need to be made in order to improve the system and structure, thereby fulfilling its potential. While the EEOC can be a useful alternative for Utah employees, the agency is not equipped to handle every discrimination case in Utah in addition to its cases from all over the country. Furthermore, the state agency was created for the sole purpose of helping its citizens, and therefore is in a significantly stronger position to address the unique needs and ensure protections for Utah employees than the EEOC.93 For example, the UALD has greater initial jurisdiction over employers than the EEOC, meaning the UALD can be better equipped to offer legal action.94 The UALD should be able to effectively protect employees from unlawful discrimination and help those who have been subject to discrimination receive the legal reparations to which they are entitled.

93 Bednar Interview supra note 87
94 EEOC and UALD FILINGS UPDATE supra note 41
IV. Conclusion

For Utah employees facing discrimination in the workplace, limited meaningful action can be taken on their behalf. Because of how the UALD currently operates, those seeking remedial action or compensation are unlikely to receive that which they believe they are entitled. Issues such as informal and insufficient claim investigations, lack of training for investigators and mediators, inadequate mediation, limited resources, and narrow remedial options all negatively impact the effectiveness of the UALD, thereby failing to fully protect employees from unlawful identity-based discrimination. Changes that can and should be made by the state of Utah include internal improvements to the investigation process to increase efficiency and thoroughness, increased training and education for both investigators and mediators, revision of the mediation process to protect the plaintiff’s interests and increased remedial options. Through the adoption of these changes, the UALD is better equipped to protect Utah employees as well as support those who experience unlawful discrimination.
AGAInst CAPItAL PUNiSHMENT

Zac Bright

I. INTRODUCTION

In 1986, police found Ronda Morrison, a White woman, dead at her place of work in Monroeville, Alabama. Gunshot wounds, evidence of assault, and an empty cash register evidenced a gruesome murder. After six months of investigation, police arrested Walter McMillan, a Black man, as the alleged killer. The sheriff put Mr. McMillan on death row before conviction for the next fifteen months. Following those months, Mr. McMillan was convicted of murder and sentenced to life in prison with no possibility of parole. This sentence, however, did not sit well with a trial judge who proceeded to override the jury’s ruling and sentenced Mr. McMillan with the death penalty. As first-degree murder was a crime that warranted the death penalty, capital punishment seemed like a better fit for the crime committed by Mr. McMillan. As a result, he returned to death row to await his execution.

In 1993, however, Mr. McMillan was acquitted of all charges and released from death row. Why? Because the conviction and arrest of Mr. McMillan violated 42 U. S. C. § 1983, in which no individual can deprive another of their Constitutional rights and other relevant legal rights. Here are at least three reasons found by the Court for why Mr. McMillan’s case breached this law. First, there were several Black
witnesses who testified that Mr. McMillan was eleven miles away at the time from where Ronda Morrison was murdered. At first, these testimonies were largely disregarded due to the social status of Black people in this time period. Second, law enforcement coerced witnesses to commit perjury (there is a tape recording). Third, Mr. McMillan’s arrest was initiated by a coerced, false testimony from a convicted, white murderer in Monroeville. Ultimately, Mr. McMillan was on death row because of racist attitudes and rumors from a small town, and a state court that disregarded legal procedure.3

Despite these three violations of the law, justice was ultimately served in this particular case. The Court acquitted all charges against Mr. McMillan, and he walked away a free and innocent man. Regardless of the outcome, this case extracts two problems to consider: (i) the effectiveness and accuracy of our criminal judicial process and (ii) the legal and moral issues with capital punishment. My paper will be concerned with the latter. I will argue that death row should not have even been an option for Mr. McMullin. He was fortunate that he had a legal team to exonerate him. Others are not so fortunate.

Capital punishment has a strong legal precedence in the United States. Since the country’s founding, capital punishment has been a penal option for those who commit conspicuously wrong acts. For such acts, the punishment seems to be proportional to the crime. In addition to the punishment’s adherence to proportionality, capital punishment mitigates problematic outcomes such as the possibility of a convicted felon escaping to commit more murders (both in and out of prison) and removing the deterrent effect of future crimes.

I will argue, however, that capital punishment should be classified as “cruel and unusual punishment”, i.e., a violation of the eighth amendment, because the penalty is disproportionate to any crime (e.g. Furman v. Georgia); as such, The Federal Death Penalty Act of 1994 should no longer be considered a valid law in light of its constitutional violation.

3 Id.
II. BACKGROUND

A. Key Concepts

For various reasons, the Supreme Court has ambiguously interpreted the “cruel and unusual” clause in the Eighth Amendment. Its ambiguous interpretation allows the “cruel and unusual” clause to have wider scope to maintain relevance for various cases. However, the Court has articulated some reasons behind their classification of a punishment as “cruel and unusual”. In this section, I will synthesize the reasons Courts have used to adjudicate which punishments violate the Eighth Amendment. This will be followed by a careful defining and clarification of each reason.

The Supreme Court generally cites the following reasons to evaluate whether a punishment qualifies as cruel and unusual: (i) the proportional standard, (ii) unreasonable pain, (iii) evolving standards of morality, and (iv) arbitrariness. Interpretations of these reasons varies, thus exacerbating their enigma. Regardless, these are the legal reasons often cited, so providing context will be useful. Contextualizing these broad scope reasons within the relevant case law will be helpful to understanding and evaluating my argument.

First, the proportional standard means that the punishment should match the crime in severity, or there should be a relatively equivalent compensation. This standard has been well-established and seems to best match our intuitions regarding our desire to have a legitimate criminal justice system. To illustrate this standard, imagine someone steals your watch and then destroys it. The criminal is caught, and you demand compensation. The criminal seems to deserve punishment because they acted contrary to the social mores. According to the proportional standard, you should either receive a new watch of the same value or money to match the value. The Court has acknowledged that the proportional standard’s ambiguous nature grants the courts and juries significant interpretive power: “[O]ur cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive.”

Consequently, the Court holds that other factors outside of the crime, such as human dignity, are considered with regard to the proportional standard.\(^5\)

Second, unreasonable pain has a twofold meaning. Unreasonable pain means that the punishment cannot be an “unnecessary and wanton infliction of pain”.\(^6\) Additionally, the punishment cannot be a violation of human dignity. The Court determines whether these two conditions are met by appealing to the evolving standards of morality, which I will address.

Third, of the evolving standards of morality Chief Justice Warren wrote, “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”\(^7\) This reason has come under scrutiny in several dissenting opinions of Supreme Court cases because there are no indications of what the current societal moral norms could be. However, the Court has argued that there are in fact legitimate ways to ascertain the current societal norms. One way is to look at the legislation relevant to the punishment and see if the laws are in favor or against the punishment.\(^8\) Another way would be to elicit consensus among American citizens.\(^9\) The evolving societal standard of morality remains to be one of the primary reasons for certain crimes to no longer have the death penalty as a penal option.

Fourth, punishments should not be arbitrary. When the Court says the punishment should not be arbitrary, they have two conditions in mind. The first condition is that the punishment should not be sentenced \textit{ad hoc}. The second condition is that the punishment should not arbitrarily target individuals on non-relevant facts (e.g., race, sexual orientation, or gender). Justice Douglas argued that

\(^5\) \textit{Trop v. Dulles}, 356 U.S. 86 (1958): “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”


The high service rendered by the “cruel and unusual” punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, non-selective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.\(^{10}\)

The Court holds that the judicial and legislative branches, as well as citizens, have a responsibility to not sentence harsh sentences and that laws which facilitate this behavior should be eradicated or deemed unconstitutional.

**B. Legislation**

Although *Furman v. Georgia* (1972) determined the death penalty to be unconstitutional, by 1976 state governments significantly improved statutes to provide more objective and context sensitive guidelines for juries. These improvements allowed juries to adjudicate less arbitrarily regarding which criminals did deserve the death penalty sentence.\(^{11}\) With these adjustments made, the Supreme Court overruled its prior precedence and reestablished the death penalty as a constitutional practice. This resulted in more state statutes establishing rigid guidelines. Such guidelines helped juries better sentence punishments proportional to the crime thereby ensuring the punishment was neither unreasonable nor disproportional. As a result, the federal government ratified The Federal Death Penalty Act of 1994. This act outlines around sixty crimes where capital punishment is a penal option.\(^{12}\) These sixty crimes generally fit into these three categories: (i) homicide offenses, (ii) espionage and treason, and (iii) non-homicidal narcotics offenses.

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C. The Timeline of the Supreme Court

*Furman v. Georgia* was the first Supreme Court case to judge that capital punishment was unconstitutional. Following this case, capital punishment was no longer federal law. Yet, within four years, the death penalty went from unconstitutional to constitutional. By 1976, the state of Georgia legislated standards and guidelines for juries on how to deal with capital punishment cases. As such, in *Gregg v. Georgia*, capital punishment regained its constitutional status. Since 1976, there has been a shift towards the abolition of capital punishment.

*Coker v. Georgia* argued that the death penalty was determined to be a “grossly disproportionate” punishment for the crime of rape. This decision marked the introduction of another controversial legal precedent for the Eighth Amendment and its relation to capital punishment. “[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Now the decision of whether or not capital punishment is “cruel and unusual” lies in the judges’ power.

From there, there are cases like *Atkins v. Virginia*. This case decided that the execution of a person with “mental retardation” violates the Eighth Amendment. Interestingly, the dissent argues that the proportionality fails because the proportionality is decided by the intellectual judge, not the people of the jury. Then there is *Roper v. Simmons* which prohibits the execution of individuals who were under 18 at the time of the offense. And more recently, *Kennedy v. Louisiana*. In this case, the U.S. Supreme Court struck down as unconstitutional a Louisiana statute that allowed the death penalty for the rape of a child where the victim did not die. Each of these cases are only here to demonstrate the relevance of capital punishment and the evolving legal standards of the Supreme Court.

III. Proof of Claim

Recall the argument: capital punishment should be considered a violation of the Eighth Amendment “cruel and unusual” clause.
Capital punishment violates the Eighth Amendment because (i) the punishment is disproportionate to any crime, (ii) it’s arbitrarily assigned, (iii) removing capital punishment is more cost effective, and (iv) there are effective penal alternatives. As a result of capital punishment becoming unconstitutional, The Federal Death Penalty Act of 1994, and any other state legislation via the Fourteenth Amendment, would cease to be law in the United States.

This section will largely follow the same structure as the previous sections. First, I will analyze what the Supreme Court means by what I call the proportional standard. I will look at the various uses of “proportional” and attempt to elucidate the underlying logic behind these uses. Once there is some bearing on what the proportional standard is to the Supreme Court, I will show how capital punishment is disproportionate to any crime. This will be the most philosophical portion of my paper. Second, I will move to a more empirical approach. I will look at issues such as the number of death penalties, as well as race, and the deterrent effect of capital punishment. Third, I will transition to practical suggestions of what we ought to do with criminals who previously qualified for the death sentence. Fourth, I will demonstrate that capital punishment is more expensive than life imprisonment (a penal alternative).

A. The Proportional Standard

The proportional standard has never been clearly defined by the Court, but it has been repeatedly used. From the several Supreme Court cases that cited proportionality, I found elements, or features, of the proportional standard. I will attempt to fit them together to provide a general picture of the underlying reasons and logic of the proportional standard. The elements are the following: (i) the current moral standards of society, (ii) consequentialism, and (iii) the dignity of humans.

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1. The Evolving Standards of Morality

The reason cited most often for why the death penalty, or any punishment, may be disproportionate to the crime comes from *Trop v. Dulles*: “[The] words of the [Eighth] Amendment is not precise, and… their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”\(^{14}\) With each review of the constitutionality of capital punishment, the Court checks on the public attitude and legislation relevant to this punishment. It is helpful here to look at the legislative trends of capital punishment in the United States.

In 1995, the year after the FDPA was ratified, 38 states and the federal government had capital punishment as a legal penal option. As of July 2021, the death penalty is authorized by 27 states and the federal government – including the U.S. Department of Justice and the U.S. military – and prohibited in 23 states and the District of Columbia, according to the Death Penalty Information Center. Virginia, which has carried out more executions than any state except Texas since 1976, abolished capital punishment in 2021. Virginia followed Colorado (2020), New Hampshire (2019), Washington (2018), Delaware (2016), Maryland (2013), Connecticut (2012), Illinois (2011), New Mexico (2009), New Jersey (2007) and New York (2004). Furthermore, there were 2,570 people on death row in the U.S. at the end of 2019, down 29% from a peak of 3,601 at the end of 2000, according to the Bureau of Justice Statistics (BJS).\(^{15}\)

This decline in legislative support indicates that the standards of morality in society are trending towards the abolishment of capital punishment. It is unlikely there will be any sudden increases in support for capital punishment, so the Court should accept the legislative trend and take a judicial stance to oppose capital punishment. The punishment, according to societal mores, is disproportionate to the crime. The punishment may have been permissible in the past, but this does not reflect the current consensus.


Every major capital punishment Supreme Court case that reevaluates its constitutionality uses the “evolving societal standards of morality” argument. Yet, surveying the current social mores to determine the proportionality of a punishment to a crime seems deeply problematic. First, this standard for interpreting the Eighth Amendment is too relative. The attitudes and legislation of the American people vary and will continue to change, for better or for worse. Furthermore, what should a Court do when it lacks legislative support, but wants to determine a punishment unconstitutional? In *Kennedy v. Louisiana*, the Court had to extract data from several sources because there were many instances where the legislative support did not favor the Court’s opinion. Second, the way in which this standard is used makes legislators out of judges.

Courts are not representative bodies. They are not designed to be a good reflection of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

For example, there was never a time when segregation should have been permissible, yet according to the social mores’ standard for judiciary considerations, segregation would be a permissible practice. If there is a shift in moral standards, the shift will happen democratically through legislative means, as opposed to judiciary means where they must assume the current laws as valid.

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Despite surveying social mores as being poor legal reasoning, societal moral trends can be an indication of the need for change and how we determine the proportionality of the punishment to crime. This line of reasoning from the Court does not seem to be robustly defensible against any capital punishment abolitionist position.

2. Consequentialism

In addition to surveying the national consensus regarding capital punishment, courts often defend consequentialism. In layman’s terms, consequentialism says the right action is the one that leads to the best overall consequence. The converse is true as well—an action is wrong if it leads to the worst overall consequence. In this section, I will look at two cases, elucidate their consequentialist reasoning, and evaluate their reasoning and how this affects the proportional standard.

The first case is Coker v. Georgia. In Georgia, a prisoner serving time for murder, rape, kidnapping, and aggravated assault escaped prison. The escapee was caught and convicted of rape armed robbery, and other offences. This prisoner was originally sentenced to death for the rape of an adult woman. The Supreme Court overruled the sentencing, arguing that capital punishment “is grossly out of proportion to the severity of the crime.”¹⁹ They also argued that the punishment was an unnecessary infliction of pain. A closer look at this case will reveal that the Court utilizes consequentialism to justify why the punishment is disproportionate to the crime.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder.... [The] death penalty... is an excessive penalty for the rapist who, as such, does not take human life.²⁰

Rape does not compare to murder because rape does not result in the loss of a human life. Two conclusions can be drawn from this, one of which is that the value of a human life is disregarded. The other

²⁰ Id. at p. 598.
is that one life lost requires another life to be taken. This could be either directly proportional, i.e., a life for a life, or a capital punishment is an effective deterrence for other lives being lost. The former conclusion implies an eye for an eye principle that is intuitive, but ultimately indefensible. Following this logic would, in the case of the rapist, require the rape of the convict, i.e., a rape for a rape. Not only is this direct proportionality bizarre, but it also becomes untenable. For example, if someone stole twenty cars, does the law require that we steal twenty of their cars? Obviously not. The latter conclusion, however, yields more promising results and better reflects the court’s intention. Before expounding on this, I will summarize another court case since similar reasoning can be derived from it.

In *Kennedy v. Louisiana*, capital punishment for child rape was determined to be an unconstitutional punishment. The Court argued that

> [T]here is a distinction between intentional first-degree murder and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but ‘in terms of moral depravity and of the injury to the person and to the public,’ *Coker*, 433 U.S., at 598 (plurality opinion), they cannot be compared to murder in their ‘severity and irrevocability.’ *Id.*

The loss of human life is incomparable to the rape of a child, according to the Court, because the result is not as severe nor is it revocable. The reliance on results indicates that courts depend on consequentialism: “Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed.”

The unifying principle to which they prefer is to drive down the number of capital punishments in the country. This reflects a largely consequentialist view of why capital punishment is violative of the proportional standard.

22 *Id.* at p.26.
23 *Id.* at p.28.
The Court considers the total number of deaths in the country and seeks to minimize this number as much as possible, for victims and criminals.

This brings us back to the conclusion mentioned in Coker v. Georgia that courts are attempting to make a massive calculation to evaluate the proportionality of the punishment to the crime. This calculation seeks to ensure that the most lives possible are spared. Although the Supreme Court used this argument to conclude capital punishment for rape was unconstitutional, most cite this calculative approach to argue against capital punishment for convicts who have committed first-degree murder. This is called the argument from deterrence. Essentially, if the convict who committed murder is executed, then there is no risk of future lives being taken and there is no risk of the convict killing fellow prisoners (as they are more prone to kill inmates). Furthermore, by having capital punishment as a penal option, people will be disincentivized to commit crimes such as first-degree murder. In the total calculation, more lives are saved when capital punishment is in force.

The argument from deterrence, however, is highly speculative. A famous study conducted by Isaac Ehrlich24 was supposed to definitively show that capital punishment did have a deterrent effect. However, John Lamperti25 found that the regression model used by Ehrlich has significant flaws. With better technology and more accurate statistics, we can conclude the results of capital punishment effectiveness as a deterrent are inconclusive.26 This does not mean


26 Per the Death Penalty Information Center (DPIC) and the World Population Review: Japan and Jamaica have the death penalty. The former has the lowest murder rate in the world, the latter has the second highest. El Salvador and Luxembourg abolished the death penalty about forty years ago. El Salvador has the highest murder rate in the world, while Luxembourg has the fourth lowest.
that we should throw out consequentialist reasoning altogether in arguing for or against capital punishment. In fact, I think that consequentialist reasoning will conclude that the death penalty is not proportional to any crime. To argue this, I will have to maintain that a calculation of the numbers of lives lost and saved should be ignored. This assumption rightly avoids the speculative realm of trying to calculate the quantitative effect of keeping or removing the death penalty. The courts will have to move to a more hybrid approach of making a quantitative and qualitative calculation.

The Court appears to already take seriously a consequentialist approach to see its fit into the proportional standard. Their calculation includes a qualitative component, however, there needs to be an analysis of the value of a human life. Once the value of the human life has been violated by some other human, that someone must have their value violated, i.e. be sentenced to death. We will keep consequentialist reasoning in our back pocket. For now, let’s analyze human dignity.

3. Human Dignity

There are serious questions whether the qualitative value of a human life can be measured by any court, let alone be put into some calculation. These speculations are warranted, but courts cannot help appealing to human dignity. The two cases cited in the previous section have strong indications of the sense of respect courts have for human dignity. In the cases I have cited, and many others, crimes such as first-degree murder warrant the death penalty because in committing the action of ending a valuable human life, the criminal has lost their value in some sense. This section may admittedly feel like I am veering away from supporting the proportional standard, but I will argue that once we understand human dignity and its effect on moral responsibility, the death penalty will be disproportionate to any crime. This categorical rejection of any crime qualifying will rely on an intuitive assumption, but I am confident it won’t prove to be problematic, as will be shown later in the paper.

Human dignity, according to cases, constitutes the intrinsic value of a human life and the extrinsic value added by the context of the human’s life. There are no clear arguments in cases for the
intrinsic value of human life. The intrinsic value of humans seems to be an unquestionable assumption that all courts endorse, so I will not spend more time on this, although it is an important baseline. The extrinsic value, however, does introduce an interesting nuance that I think the courts have already considered, but not explicitly.

In 2002, the Supreme Court affirmed that the death penalty cannot be a penal option for those who are intellectually disabled:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.27

The Court considered external (in value, not physiologically) facts and concluded that a criminal who is intellectually disabled does not qualify for capital punishment. There are simple facts about the individual that mitigate their moral responsibility because they cannot help but act contrary to moral norms.

This relates to my argument because if we consider the external factors of any criminal liable to death row, their moral responsibility would be mitigated. Hence capital punishment should not be a penal option for them. In considering the external facts, the judicial system may adopt a common argument used by capital punishment abolitionists: “[If] the innocent victim had a right to live, so does

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the murderer.” Yet, one could quickly object “Is there no human so wicked that they do not deserve the death penalty?” Let’s consider the case of Robert Harris.

In the late 1970s, Robert Harris was going to rob a bank with his brother Daniel. They were trying to hotwire a car, but unsuccessfully. Then Harris spotted two sixteen-year-old boys in another car. He told his brother they would steal that car. Harris and his brother stepped in the car and threatened to kill the boys if they did not let them use their car for their robbery. The boys complied. Harris drove them to a hill and let them out, promising they would not be harmed. Daniel watched the boys walk up the hill when suddenly he heard a gunshot. Harris shot one of the boys. Harris then went up to the recently shot boy, put a gun to his head, and shot him. After this horrific act, Harris waved his gun in the air and laughed.

To make matters worse, after killing the young boys he proceeded to eat their hamburgers. While eating the dead boys’ food, he joked with his brother about how funny it would be to dress as police officers and tell their mothers their sons were dead. Well, Harris’s sick jokes did not become a reality. Robert Harris was quickly convicted of kidnapping, armed robbery, and murder. He was promptly put on death row.

But Robert Harris’s horrific behavior does not stop there. While in prison, he caused death, injuries, and was generally an unpleasant individual, even for the inmates. On the day of his execution, the whole prison held a celebration for the death of this cold, wicked man. In other words, if there was a man wicked enough to deserve the death penalty, Robert Harris seems to be the perfect candidate. Not sentencing someone like him to death may be an indication of the moral failure of our justice system.

I argue that we should consider the external factors, so let’s look at the external factors of Robert Harris and see whether moral

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responsibility could be mitigated. Robert Harris’s life began poorly and never improved. When his mother was pregnant, his father came home drunk, accused his mother of adultery, and kicked her forcefully in the stomach. The kick caused hemorrhaging causing Robert Harris to be born early. The father developed the belief that Robert was not his own and treated him as such. This caused his mother grief, so she took her anger out on her son. Robert was repeatedly abused and neglected. He would beg for love or just physical contact, but he would be kicked to the side. Harris ended up in federal prison at the age of fourteen where he was raped and beaten. Once out of prison, Robert Harris, according to his sister, had all the good beaten out of him. Harris began killing animals which then escalated to the killing of humans. 30

As we can see whether there is a man or woman so wicked that they do deserve the death penalty is a complicated issue. Most criminal backgrounds are tragic—terrible home life, abuse, high drug use, lack of affection, etc. When we look at these external factors, we seem to have a more compassionate reaction to the criminal as a human. The act may have been wicked and deserves retribution, but not to the point of taking a human life; their moral responsibility is simply mitigated. 31 I want the following point to be clear, that the convicts who commit these horrible crimes are not exempt from all responsibility. There should be punishments for those who commit crimes; the punishment should match the crime. However, when considering external factors of those who commit crimes worthy of capital punishment (at least, according to the law), their moral responsibility is mitigated enough to question the merit of capital punishment. How someone like Robert Harris could be properly penalized will be addressed in the section about penal alternatives.

B. Arbitrariness

This section will primarily be focused on empirical observations. The empirical evidence indicates a certain level of arbitrariness in death penalty sentencing. The punishment seems to primarily affect Black males. This seems to be either arbitrary or an inherent bias of our justice system. Nearly all (98%) of the people who were on death row at the end of 2019 were men. Both the mean and median age of the nation’s death row population was 51. Black prisoners accounted for 41% of death row inmates, far higher than their 13% share of the nation’s adult population that year. White prisoners accounted for 56%, compared with their 77% share of the adult population. As such, the current legal practices and statutes cannot sufficiently rule out racist conceptions of individuals in juries. No “objective indica” or current legislations in place sufficiently guardrail against racial biases.

Some may refute this claim by considering other factors regarding the black population. Commonly there are arguments that there is a lack of fathers, less police force, and an overall victim attitude. These considerations may be worth exploring, but they depart from the context of capital punishment, and the discussion would turn into speculative conclusions drawn from conflicting statistics. Whether or not they are true, the effect of capital punishment is clear—proportionally, more Black men are dying on death row than other races. Removing capital punishment would resolve this particular concern and would not disrupt the concerns of those who find issues with the statistics above.

C. Cost

According to the Office of Defender Services of the Administrative Office of the U.S. Courts “The average cost of defending a trial in a federal death case is $620,932, about 8 times that of a federal
murder case in which the death penalty is not sought.” Importantly, this is only the federal number. In other states, the problem of monetary cost persists. In Kansas, the cost of a death penalty case averaged about $400,000 per case, compared to $100,000 per case when the death penalty was not sought. The state of California showed that the cost of the death penalty has been over $4 billion since 1978. One final example: North Carolina studies found death penalty costs to be $2.16 million more expensive per execution than sentencing murderers to life imprisonment.

Furthermore, a study conducted by Susquehanna University found that, on average, the total cost of keeping an inmate on death row to execution was approximately $800,000 more than an inmate who is sentenced to life imprisonment. Sentencing criminals to death row is simply more expensive. If capital punishment were eliminated as a penal option, the money saved could be put towards improving prison systems, rehabilitation programs, or towards other important government projects. It would be more productive to allocate the additional resources to improving rehabilitation programs and prison systems for the other penal alternatives.

D. Penal Alternatives

Life in prison without possibility of parole seems to be a sufficient penal alternative, but there may be other penal alternatives more effective than life imprisonment (e.g., solitary confinement). Life imprisonment without possibility of parole costs less and adds no significant burdens to the American public.

Another penal alternative could be rehabilitation programs. The advantage of life imprisonment is the possibility of rehabilitation for

the criminal. A study conducted by Lipsey and Cullen found that correctional rehabilitation programs are an extremely effective practice. Hundreds of studies and systematic reviews of rehabilitation programs confirm that rehabilitation is more effective than punitive programs.\textsuperscript{36} It is important to keep in mind that life imprisonment is still a punishment, even with rehabilitation programs. Our justice system should punish wrong acts, and convicted criminals should lose certain privileges and responsibilities that the law-abiding citizen enjoys. Our justice system should have moral robustness.

One may not be convinced that rehabilitation programs are worth the effort or the cost. The economic consequences of instituting rehabilitation programs are unknown and potentially costly. What if a prisoner, like Robert Harris, never rehabilitates? Or any prisoner who has been sentenced to life in prison without possibility of parole? Rehabilitation programs may be off the table then, but the argument against capital punishment does not require rehabilitation programs. The argument only requires an effective penal alternative, in which life imprisonment without possibility of parole succeeds.

IV. \textsc{Conclusion}

I have argued that capital punishment should no longer be a penal option for criminal cases at the federal level in the United States. The punishment constitutes “cruel and unusual punishment” because (i) the punishment is disproportionate to any crime, (ii) it is arbitrarily assigned, (iii) removing capital punishment is more cost effective, and (iv) there are effective penal alternatives. Some points are supported by philosophical reasoning, others by more empirical data to support the overall argument. As a result of this, The Federal Death Penalty Act of 1994 should cease to be federal law. A consequence of the invalidation of this federal law would be the catalyst to the elimination of capital punishment at the state level. This categorical rejection of capital punishment as a viable punishment may cause

worry about the boundaries of power between state and federal laws, but I am not confident the categorical removal of capital punishment would entail any problems for federalism. If my argument holds, capital punishment is unconstitutional. Therefore, the punishment should no longer be legally sanctioned in any federal or state laws.
THE GIG-ECONOMY WAR:
THE DRIVE TOWARDS REGULATING RIDESHARE EMPLOYMENT MISCLASSIFICATION

Inae Cavalcante1

I. INTRODUCTION

For such an omnipresent activity in the life of most Americans,2 little attention is given to employment classification. The terms employee or independent contractor are seen as mere legal technicalities that for the layperson might only signify their tax withholding strategy. However, making a distinction between the two requires more than just monetary consideration. Rather, it signifies protection under the law.

By default, the absence of a federal employment classification entrusts the responsibility to address this issue to each state. In California, the definition of employer is the person who “employs or exercises control over the wages, hours, or working conditions

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2 See U.S. DEPT. OF LAB., BUREAU LAB. STATS., THE EMPLOYMENT SITUATION--DEC. (2022). This report details the United States national labor statistics. They report that the United States unemployment rate was 3% at the time of report publication.
of any person.” Following this definition, an employee is a person employed to perform services in the affairs of another and who—with respect to the physical conduct in the performance of the services—is subject to the other’s control or right to control. As a consequence of the employer and employee relationship, the employer is liable to “wage order protection to all workers” who are engaged in the business. In contrast, an independent contractor is a person engaged in their business without the supervision of an employer. When an independent contractor provides their service, the contractee is not legally liable for any costs or responsibilities towards the workers.

The gig-economy model is characterized by a system of free markets where businesses hire independent workers for short-term commitments. Within the gig-economy, rideshare apps such as Uber Technologies, DoorDash, GrubHub, and others are woven into the fabric of the American economy as many households depend on their services regularly. The gig-economy is remarkable because it has revolutionized the traditional employment model. Workers have a new capacity to work at any time and from any place.

To determine employment classifications of gig-economy workers, the California Courts established the Borello Test. It carries different factors that are used to properly define if a person who provides service to a business should be classified as an employee or an independent contractor. The ideation and implementation of this employment framework was born out of compensation and law

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5 Wage orders refer to minimum wages, required meal & rest breaks.
6 Dynamex Operations W., Inc. v. Superior Ct., 4 Cal.5th 903, 913, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018).
7 Id. at 913
8 Ben Lutkevich, What is the Gig Economy, TECH TARGET (Nov. 2022), https://www.techtarget.com/whatis/definition/gig-economy. The usage of gig in the nomenclature is a colloquial term for a position with a set duration.
protection claims in the California courts. However, the Borello Test hasn’t succeeded at wrestling with the ascension of the new gig-economy labor model.

Due to these innovative employment conditions stemming from the popularity of the gig-economy, the California Courts were faced with reassessing the increasingly obsolete Borello Test for this new workforce. The biggest case against a rideshare app company was brought to the California Courts in 2013 in *O’Connor v. Uber Technologies*. *O’Connor* challenged the drivers’ classification claiming that the drivers were being misclassified as independent contractors based on their relationship with Uber. When using the Borello Test to classify drivers who offer their services to rideshare apps, the test became ambiguous and did not address the factors that make this new market so unique, such as schedule and location flexibility.

In turn, the California Assembly passed new legislation known as Assembly Bill 5 in 2019. It contained the guidelines for the ABC Test and is known as The Gig-Economy Law because it addressed, in a clearer manner, the rideshare app drivers’ employment classification. According to the ABC Test, the drivers are classified as employees. However, this movement towards enforcing employment classification in the gig-economy incited a significant legal response from rideshare app companies as the decision to legally classify as independent contractors was at stake. Uber, the world’s most valuable ride-share company and primary focus of this article, defended itself in this way:

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10 Complaint for Injunctive Relief, Restitution, & Penalties at 266, People v. Uber Techs., Inc., 56 Cal. App. 5th 266 Cal Rptr. 3d 290 (2020) (No. CGC-20-584402)

11 Uber Newsroom, *The Hist. of Uber*, UBER (Nov. 2022), https://www.uber.com/newsroom/history/. Uber Technologies was founded in 2009 and quickly grew to become the world’s most valuable startup.
In this litigation, Uber bills itself as a “technology company,” not a “transportation company,” and describes the software it provides as a “lead generation platform” that can be used to connect “businesses that provide transportation” with passengers who desire rides. Docket No. 213 (Colman Decl.) at ¶ 6. Uber notes that it owns no vehicles, and contends that it employs no drivers. Id. Rather, Uber partners with alleged independent contractors that it frequently refers to as “transportation providers.”

In opposition to the allegation that Uber was a transportation company, Uber argued that their main product was their software that connected drivers to passengers rather than the service itself. Uber’s focus on software eliminated any possibility of misclassifying its workers since it technically did not have its own employees. In a general perspective, Uber disagreed with the idea that their drivers were employees considering all the flexibility they received as independent contractors. Throughout the present article, the issues associated with Uber’s viewpoint will be addressed and juxtaposed with the voice of the plaintiffs, or drivers.

In light of this debate, rideshare app companies funded the historical ballot measure Proposition 22, passed in California in December 2020. This proposition had the goal of ending the dispute by unequivocally labeling rideshare app drivers as independent contractors. The California Courts have pending litigation regarding the constitutionality of Proposition 22. The customarily lengthy legal procedures associated with the pending litigation are delaying drivers’ right to proper classification. While the ruling is imperative for the future of the employees of the gig-economy, a more permanent solution lies in new company policies and reforming the ABC Test. This article suggests a successful resolution to the gig-economy war

13 Id. at 1137
that would consist of mutual benefits for rideshare apps and drivers alike through a more precise test for employment classification.

II. BACKGROUND

With the emergence of the gig-economy, the doctrine distinguishing independent contractors from employees is extremely relevant to the state of California and to the nation due to the growing number of workers who engage in this market. The gig-economy draws its labor force from independent contractors and freelancers with the express purpose of assigning these workers to temporary and part-time positions. The gig-economy gained popularity in 2008 largely due to the employment opportunities it offered amid the financial crisis. While remaining strong in the following decade, it gained further momentum during the COVID-19 pandemic by growing 33% in 2020 in the U.S. alone. This jump contributed to the 1.1 billion gig workers that currently exist worldwide. Future projections estimate that about half of the U.S. population will have participated in the gig-economy by 2024.\(^\text{15}\) Because participation in the gig-economy is so widespread, a complete understanding and application of employment classification proves imperative.

Regarding employees, the California Supreme Court stated that the pertinent question was “not how much control a hirer exercises, but how much control the hirer retains the right to exercise.”\(^\text{16}\) Even with such a binary relationship, courts may review other pertinent facts and circumstances of the relationship, such as (a) whether or not the one employed is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employers or the workman supplies the


\(^{16}\) O’Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1139 (N.D. Cal. 2015).
tools, instrumentalities, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) whether or not the work is a part of the regular business of the employer; and (h) whether or not the parties believe they are creating the relation of employer and employee.17

According to California’s wage and hour laws, minimum wage, overtime, meal periods, and rest breaks are rights granted to employees.18 In the same manner, workplace safety laws and retaliation laws protect employees but not independent contractors. Additionally, employees can go to state agencies such as the Labor Commissioner’s Office to seek enforcement of these laws; independent contractors must resolve their disputes and enforce their rights through other means. Thus, the law offers far more space under its protective umbrella for employees than independent contractors.

The gig-economy, namely Uber Technologies, has neatly nestled itself into the interstitial space between both classifications. While Uber portrays their partners—or those who engage in work with Uber—as independent contractors, the onboarding process would indicate otherwise. One is required to upload their driver’s license information as well as vehicle’s registration and insurance during the initial application. Passing a background check, a city knowledge test, and bringing the car to an interview with an Uber employee19 are also required pre-employment activities. Upon completion of the application stage, the driver must sign a contract with Uber to which they have no bargaining power. Uber retains the ability to terminate the relationship with the drivers at any time through their rating system. If a driver has less than 4.6 stars, Uber reserves the right to end the relationship with the driver. The contract also dictates the relationship of independent contractors and the fee or payment that drivers will receive upon completion of each ride. The employment contract explains that Uber sets fares based on the miles traveled by


19 O’Connor, 82 F. Supp.3d at 1136.
the rider and the duration of the ride. Because Uber receives the rider’s entire fare, the employment contract stipulates that Uber will automatically deduct its own fee per ride before it remits the remainder of the fare to the driver.

The nature of the non-negotiable employment contract generates plenty of discussion points. Drivers remain responsible for obtaining their own mode of transport or work tools, but they report to Uber and follow company guidelines. Uber does not supervise scheduling of drivers. However, Uber’s rating system supervises the quality and occurrences during the time that the drivers are working. Contracts are unilateral, but drivers benefit from the service they perform through offering rideshares with no limit to the number of rides.

The following cases will illustrate the injustices of employment classification as presented above:

**A. S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989)**

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, an employer failed to comply with worker’s compensation for cucumber harvesters through the assumption that the harvesters were independent contractors. The California Courts argued that a work details test should be applied. They considered the nature of the work and the agreement between parties. An eight-factor test was established to determine classification, and the suit ultimately classified the harvesters as employees. The eight factors that determine employment classification according to the Borello Test are:

(a) whether the one performing services is engaged in a distinct occupation or business;

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20 Id. at 1136 (Taken from Coleman Depo. at 187:20-188:16).
22 Id. at 410.
(b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
(c) the skill required in the particular occupation;
(d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(e) the length of time for which the services are to be performed;
(f) the method of payment, whether by the time or by the job;
(g) whether or not the work is a part of the regular business of the principal; and
(h) whether or not the parties believe they are creating the relationship of employer-employee.23

While a start in the right direction, the Borello Test did not address crucial factors such as the contract bargaining power and proportion of revenues generated and shared (in the context of rideshare apps, the cost of a ride and a driver’s profit).24 The Borello Test has shown efficiency and positive results in general employment classification. However, it struggled to adapt to the gig-economy due to the difference in market models.

B. Martinez v. Combs (2010)

The Supreme Court of California established the meaning of employ and employer in Martinez v. Combs in 2010. In this case, seasonal agricultural workers were not receiving minimum or overtime wages from their employer, Munoz & Sons. The workers sought to recover wages according to the California Labor Code.25 The Court deemed the language in the California Labor Code imprecise and adopted a definition of employer as the person who “employs or exercises control over the wages, hours, or working conditions of

23 S.G. Borello at 48 Cal.3d 341, 367-368.
any person. This case further established how employment classification should be determined, but it failed to address the emerging gig-economy.


Dynamex is a carrier company based in CA. They work with delivery, same day delivery, and on-demand delivery to the public and to their business customers, such as Office Depot and Home Depot. Its drivers had always been classified as employees, but in 2004, Dynamex decided to change their employment classification. The reason was solely associated with the costs saved with this classification. In turn, drivers had to provide their own vehicle, pay for gas, insurance, taxes, and so forth. A class action lawsuit ensued, prompting the court to rule in favor of drivers, stipulating that they were being wrongly misclassified. This case catalyzed the rise of the ABC Test. On April 30, 2018, the California Supreme Court enacted a new standard for determining employment status. The ABC Test targets independent contractors. According to the ABC Test, an independent contractor must meet the following criteria:

(A) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
(B) the person performs work outside the usual course of the hiring entity’s business; and
(C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

According to this test, the employer has the burden to prove that a worker, or a driver in this article’s scenario, is an independent contractor. While all three factors challenge Uber’s current situation,
item “B” directly conflicts with the rideshare apps’ business model. Contrary to their legal argument, Uber’s primary service is transportation, not software.\(^{28}\) It is clear that drivers engage in the central service of the business. Without the drivers, the software would have little application in the economic world. Although the ABC Test seems very beneficial to drivers, it currently only applies to California wage orders which limits the scope of the test.\(^{29}\)

Because of the *Dynamex* ruling, labor unions and gig companies lobbied the California legislature to alter the scope of the employment law statutes. While rideshare companies were interested in a revision to *Dynamex* that would either ease the criteria for determining whether a worker qualifies as an independent contractor or clearly spell out exceptions for on-demand platform providers, labor unions pushed for the legislature to cement the *Dynamex* decision into law.\(^{30}\)

**D. California Assembly Bill 5 (2019)**

Pursuant to the lobbying of labor unions, Governor Gavin Newsom signed Assembly Bill 5 in September 2019 which, conforming with *Dynamex*, turned the ABC Test into an official employment status test. Some of the arguments in favor of this bill were “the harm to misclassified workers who [would] lose significant workplace protections,”\(^{31}\) the loss of revenue to the state, and the unfairness to companies that compete with companies that misclassify workers.\(^{32}\) Additionally, the bill covers all the aspects of the California

\(^{28}\) O’Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1138 (N.D. Cal. 2015).


\(^{32}\) *Id.*
Labor Code. Exempt to this test and classified by the Borello Test are: lawyers, accountants, engineers, architects, investment advisors, physicians, surgeons, dentists, psychologists, and veterinarians.33 The existent exceptions to AB-5 are due to different organizations’ lobbying efforts.34 This legislation was targeted at the gig-economy employers. Even while AB-5 puts forth the right intention to avoid misclassification, the legislation still needs to be improved to prevent enforcement gaps such as health insurance, overtime, mealtime, and so forth.

Rideshare companies such as Uber and Lyft did not comply with the changes. Uber and Postmates, another rideshare app, filed a lawsuit in federal court challenging the constitutionality of AB-5.35


In attempting to address the enforcement gaps of Uber Technologies, O’Connor v. Uber Technologies36 was brought to the California courts in 2013 and made history as the first judicial attempt to challenge Uber’s preying upon employment misclassification. In O’Connor, plaintiffs claimed that Uber exercised considerable control and supervision over the drivers’ work through their termination policy that entailed conduct with customers, the cleanliness of their vehicle, compliance with waiting time to pick up customers, and their general conduct.37 Uber countered plaintiffs by stating that drivers had the freedom to set their own hours and work schedule. This case sought to establish drivers’ rights and reimbursement processes for the misclassification of employment in addition to minimum wage

33 Id.
37 Id.
violations, overtime, mealtimes, and premium claims. The lawsuit also incorporated violations to the Federal Fair Labor Standard Act (FLSA), 29 U.S.C §§201 et seq. that required reimbursement for the minimum wage claims for the hours that drivers had worked, as well as overtime for all the hours that exceed forty per week.

If drivers were classified as employees and not independent contractors, they would be entitled to all the protections of the California Labor Code including gas and vehicle use reimbursement. O’Connor primarily based its argument in the S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations case where the California Supreme Court established the Borello Test to include whether the potential employer has all necessary control over the manner and means of accomplishing the result desired, although such control need not be direct, actually exercised, or detailed. After the ABC Test became effective, O’Connor switched and used the ABC Test as its central argument. Through the rise of Dynamex and its ABC Test, “Uber bears a hefty burden to establish that its drivers are not employees, since they are presumptively considered employees and Uber can only overcome that liberally construed in a manner that serves its remedial purposes.” The ABC Test contains additional criteria of discernment between employees and independent contractors that the Borello Test failed to include. The Court determined that Uber’s claim of being a technology company rather than a transportation company was not creditable since the argument focused on the intricacies of the platform more than on the service that the company aims to provide. O’Connor resulted in a settlement between the parties.

38 California Lab. Code §226.8 & §2753.
39 Id.
40 California Lab. Code §2802.
42 O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1147 (N.D. Cal. 2015).
43 Id. at 1141.
F. Proposition 22

The positive legacy of the O'Connor\(^{44}\) verdict failed to endure with the introduction of Proposition 22 on November 03, 2020.\(^{45}\) This regulatory measure was proposed during the COVID-19 pandemic due to a number of factors. First, there was a sudden increase in the number of drivers given the unemployment conditions brought by the pandemic. Second, the high demand for food and grocery deliveries created demand for more delivery drivers. Third, it was meant as a definitive response to the misclassification matter after AB-5 seemed to permanently change the gig-economy. Proposition 22 largely benefited the corporations at fault in misclassifications. The same duality expressed in the factors that Uber used for the employment classification can be found in this legislation, demonstrating that Proposition 22 was written by app companies for app companies. While this legislation offers minimum earnings of 120% during engaged time – the time between when a driver accepts a ride or delivery until the time the driver completes it – there is no guaranteed protection or enforcement by the California Labor Code. Drivers spend about 33% of their time waiting and only get paid for 67% of their time.\(^{46}\) Similarly, issues are found within the related commitments such as mileage compensation, health care subsidies, medical and disability coverage, and protection against discrimination and sexual harassment. Proposition 22, in the attempt to improve work conditions for drivers that still favor companies, has created a new employment classification whereby drivers are still independent contractors, but they receive more protections than a typical independent contractor outside the gig-economy.

\(^{44}\) See generally O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015)


\(^{46}\) Ken Jacobs & Michael Reich, The Uber/Lyft Ballot Initiative Guarantees only $5.64 an Hour, U.C. BERKELEY LAB. CEN. (October 31, 2019), https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/.
Proposition 22 was recently ruled unconstitutional by Superior Court Judge Frank Roesch as part of a lawsuit filed by the Service Employees International Union against the state of California. The argument’s premise relied on the logic that Proposition 22 regulations have infringed on the power explicitly granted to the California Legislature to regulate worker’s compensation. While the merits of Proposition 22 and the associated constitutionality will not be addressed in this article, it is important to understand that no employment classification test or proposed legislation has yet resolved the misclassification issues in the gig-economy world, and Proposition 22 makes this reality explicit. With Proposition 22, the ABC Test could not be applied to rideshare app drivers. Thus, this article seeks to bring a reformed classification test that will be tailored to the needs of the gig-economy and will abide by the California Labor Code and legislative regulations.

III. Proof of Claim

The current scenario in California illustrates that no employment test has been successful in adequately classifying gig-economy drivers. Even with the rise of Dynamex, the ABC Test has been an important, albeit incomplete tool in determining employment classification. Misclassification incurs a direct relationship between employer liability and workers’ protection. Additionally, misclassification of workers as independent contractors has been a crucial reason “in the erosion of the middle class and the rise in income inequality.” A UC Berkeley study showed that Uber and Lyft have accumulated over $413,000,000 by not paying into California’s unemployment fund from 2015-2020. As employer liability

48 S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). The Borello test has shown similar efficiency and results, however, it is not the focus of this article.
diminishes, so does employee protection. The present article focuses on the consequences of this relationship by promoting the claim that California’s employment classification test, known as the ABC Test, should be reformed and tailored to address the specific demands of gig-economy workers and companies alike.

The purpose of this proposed alteration to the ABC Test is not to prescribe or incentivize Uber or any rideshare app to change its business models in an operational way. The flexibility and extra income that these technological platforms provide persist as fundamental innovations and offer efficiencies for drivers and consumers alike. In fact, when Uber drivers were asked whether they preferred to be classified as independent contractors or employees, many still opted for an independent contractor classification, since it would not bring change to the flexibility that many search for when working for Uber.\textsuperscript{51} In a scenario where the population fully understood their rights, the outcome of a reformer test would not be necessary. Perhaps, AB-5 would have been celebrated by all rideshare app drivers. After one of the rideshare companies, Lyft, threatened to discontinue operations in California upon hearing that they were required to comply with the AB-5,\textsuperscript{52} it was clear that the drivers would face harsher consequences than their multi-billion-dollar employers. In order to survive, both sides must be appeased.

Gig-economy classification issues will only be settled if both sides have a symbiotic relationship. This article puts forth a fairer test for employment classification that suggests a mutually beneficial relationship between companies and drivers. However, this test may require some procedural changes according to the companies’ discretion if they would like to resume the independent contractor classification to fit a reformed ABC Test.


\textsuperscript{52} Kate Conger, \textit{Reprieve for Uber and Lyft After Threat to Shut Down}, \textsc{N.Y. Times}, Aug. 21, 2020, at B-5.
A. Opposition to AB-5

According to the California Labor Code, the rise of AB-5 meant that employers would be responsible for ensuring that their employees were compensated per minimum wage and overtime requirements. When speaking about AB-5, Uber’s Chief Legal Officer Tony West stated that Uber would still pass the test and prove that their drivers were in fact independent contractors.\(^53\) In the same declaration, West made it clear that Uber would not file for an exemption from AB-5, but that it would target their efforts to overturn the bill and fight for more driver-based policies. Uber indeed followed through on West’s statement and pushed for Proposition 22, an app driver based legislation that created a third employment classification which guaranteed that drivers would receive benefits as independent contractors.\(^54\)

With AB-5 in effect, Uber has incorporated a new function in its app that supports its argument that it is a technology-based company. Through this new feature, drivers may connect with open gigs such as bartending, cleaning, and warehouse work.\(^55\) This promotes the idea that Uber’s central business is the software rather than the ride service. It could also be used as a strong counterargument to whether their drivers are truly employees.

The main reason AB-5 might not be beneficial takes root in that Uber and Lyft have made threats to cease operations in California if they were legally obligated to comply with AB-5. Even though this is a calculated strategy to gain public endorsement against AB-5,\(^56\) the

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\(^{53}\) Tony West, *Update on AB5*, Uber Newsroom, Sep. 12, 2019.


economic loss would be more financially crippling to drivers than to Uber.

Many critics of AB-5 argue that a bill of this nature should not be celebrated but feared, since the government is interfering with how businesses are conducted. While this puts forth a valid argument, the intention of AB-5 has always been to protect independent contractors that are misclassified as employees. Unfortunately, AB-5 has been used as a double-edged sword that protects drivers’ rights but threatens their employment.

In addition to arguments for and against AB-5, the Courts should consider adding the following factors that are not found in the ABC Test:

1) Potential remedies for employment misclassification through the reformer six factor test provided by this article;
2) A clear provision for enforcement of the test; and
3) Application of the California Code Sections 226.8 which addresses drivers’ rights and reimbursement processes for the misclassification of employment in addition to minimum wage violations, overtime, mealtime, and premiums claims as a measure for penalties.

B. Proposition 22

The ballot initiative known as Proposition 22 was put forth in 2019 by app-based businesses including Uber, Lyft, and DoorDash as a response to the passage of AB-5. In order to receive support from the local population, those rideshare companies used advertisements on TV, social media, and their drivers as a way to convince people that Proposition 22 would improve rather than restrict drivers’ benefits. This is exemplified by a poll of California voters that revealed that 40% of “yes” voters believed that they were improving the work


conditions of the gig-economy workers. Others claimed that they were unaware that they were choosing between “an arbitrary set of supplemental benefits... designed by the gig companies.” Proposition 22 officially classifies drivers as independent contractors and gives space for loopholes that deny nearly all employee rights under state law to workers who use ride-hailing and food-delivery apps, including the right to a minimum wage, time-and-a-half for overtime, expense reimbursement, unemployment insurance, and state workers’ compensation. As previously stated, this article does not seek to address the constitutionality of Proposition 22. However, the enforcement of this legislation validates the relevance of a proper employment classification. According to Alameda County Superior Court Judge Frank Roesch:

A prohibition on legislation authorizing collective bargaining by app-based drivers does not promote the right to work as an independent contractor, nor does it protect work flexibility, nor does it provide minimum workplace safety and pay standards for those workers. It appears only to protect the economic interests of the network companies in having a divided, un-unionized workforce, which is not a stated goal of the legislation.

C. Necessary Measures: Full-time employees, part-time independent contractors

In addition to a new employment test, another approach to settle the misclassification issues would be having full-time employees and part-time independent contractors within the rideshare app companies.


60 Id.

California full-time employee status implies that the company exercises control over a person’s business hours. Rideshare apps should include in their contract the option to work full-time or part-time as a driver. When opening up this possibility to the gig-economy, Uber drivers who would become employees would receive all the protections under the California Labor Code or become a part-time independent contractor.

Employees would be entitled to protections under the California Labor Code. If Uber does not comply with the benefits entitled to this classification, they will be held responsible for paying all future claims for unpaid wages, minimum wage, overtime, meal period, rest period premiums, expense reimbursements, according to the California Labor Code section 203.\(^{62}\)

Independent contractors should have the similar rights and obligations required by a part-time employee. They should work less than 40 hours a week but be entitled to receive minimum wage. To prevent drivers from using the platform as a full-time driver when they have indicated their preference for the part-time option, rideshare apps should adjust their software to limit the number of hours for part-time drivers. Another functional modification that Uber would enact includes lifting the limitations that are put forth by its algorithms such as indirect penalties for not accepting three rides in a row, discriminatory bonuses, and so forth.\(^{63}\) In the current scenario, the flexibility that is advertised is not solely adopted.\(^{64}\) The algorithm discriminatorily gives bonuses to drivers that can work

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\(^{62}\) California Lab. Code §203

\(^{63}\) “Uber drivers are managed by semi-automated systems that track their acceptance rates, time on trips, speed, ratings from customers and makes determinations, such as whether a driver’s account should be deactivated, based on this information.” Lawrence Mishel, Uber Drivers are Not Entrepreneurs, ECON. POL’Y INST., Sept. 20, 2019, at 1, https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1345&context=bjcfcl

“when and where” the company needs them, since Uber has features that allow passengers to schedule rides on-demand.

The attempt to settle this issue by having full-time employees and part-time independent contractors would benefit drivers and Uber alike: drivers who committed to Uber due to its full-time promises would have the chance of becoming employees and receiving all the benefits and protections previously discussed. For Uber, the constantly advertised opportunities for full-time employment on their website would be fulfilled, and the arguments that they are misclassifying their drivers would be undermined. Additionally, it is advantageous for Uber from a tax perspective. For the IRS, it is not about the number of part-time employees that a company has that determines tax payout—it is the number of hours that they work that is taken into consideration. If Uber has “part-time independent contractors,” they omit this obligation. Summarizing the reasons for full-time drivers to become employees is as follows:

1) Uber would have the control, or the possibility of control, of most of a driver’s business hours
2) The full-time driver’s work would consist of Uber’s principal source of revenue, which is consistent with an employer and employee relationship.
3) Full-time drivers would ensure that the company’s duties would be fulfilled as there would be a guarantee that a certain number of drivers would be available for 40 hours a week.
4) The driver would be accepting the implied offer of full-time work, and Uber would be their main source of income.

D. The Reformed Six Factor ABC Test

In undertaking employment classification tailored to the gig-economy’s rideshare apps, the following six factors can serve as a
basis for courts to determine whether a driver is an independent contractor or an employee:66

1) whether the driver is providing service to the business entity for less than 40 hours per week
2) whether the driver needs to make significant alterations and/or purchases for the tools of work to satisfy the job demands
3) whether the platform is scrupulously exercising control over the work
4) whether the driver’s primary source of income comes from their gig-economy employment
5) whether the company is only composed of independent contractors solely to perform the company’s duties
6) whether the parties believe they are creating the relation of employer and employee.67

Each of these factors will be addressed below in sequential order.

1) Whether the driver is providing service to the business entity for less than 40 hours per week

If a driver is providing services for the business entity, in this case the rideshare app, for less than 40 hours per week, the driver is working part-time according to California labor law.68 For drivers who work 40 hours per week, once it is established that they are working full-time for a consecutive period of time, customarily 90

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66 Some of the factors below were inspired by the Borello test but adjusted to the needs of the gig-economy. For more information, see Borello under background.


68 California Lab. Code Section 515(c)
days, this driver must be considered a full-time worker and receive all the benefits entitled to this classification.

2) Whether the driver needs to make significant purchases and/or alterations for the tools of work to satisfy the job demands

Conventionally, Uber requires precise specifications in the vehicles that are their service. For instance, in Orange County, CA, Uber requires a 15-year-old or newer 4-door vehicle with no cosmetic damage, commercial branding, taxi-style paint, or permanent stains. Additionally, they require the same color for hoods and doors. While this consists of a target specific to the classification of employees, not placing any guidelines for vehicle specifications would be unacceptable since Uber provides service to the public. Therefore, Uber should provide a stipend to its full-time employees to guarantee standardized vehicle practices. Part-time independent contractors should only be hired if they already possess a compliant vehicle, and they should not be provided a stipend.

3) Whether the platform is scrupulously exercising control over the work

As determined in the ABC Test, employers are entitled to supervise and direct employees’ work. The control over one’s work is a pivotal factor in defining employment relationships and perhaps the main factor that courts take into consideration when making an employment classification decision. In Uber’s case, the extent to which the company can exercise control over drivers is fairly ambiguous. Uber alleges that their main product is the technology that connects drivers to passengers, not the rides per se. Additionally, they

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69 Most companies have a 90-day probationary period before hiring their employees. The same policy could be used by Uber in determining if a driver should become an employee.

70 For more information regarding part time v. full time employees, please refer to Proof of Claim: B) Proposition 22.

71 O’Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1138 (N.D. Cal. 2015).

72 Id.
do not control or own drivers’ schedules and cannot define the routes or require drivers to wear a uniform.\textsuperscript{73} While this is an accurate description of Uber’s practices according to the original ABC Test,\textsuperscript{74} to claim that Uber lacks control over the drivers is a misconception.\textsuperscript{75} Becoming an independent contractor for Uber Technologies requires that a driver completes an onboarding process, interview, and a test.\textsuperscript{76} Once this process is complete, Uber drivers can access the software where they agree to Uber’s terms of service, connect with passengers, check for ride fare, and receive evaluation through Uber’s rating system. The execution of these procedural actions, according to the traditional ABC Test, reclassifies Uber independent contractors as employees since Uber is exercising an amount of control specific to an employer-employee relationship.

When considering the control that the platform exercises over its drivers, this reformed test focuses not on the control that a rideshare app has over its drivers but in the manner that this control affects its drivers. In the case of Uber and several other rideshare apps, it seems imprudent that the platform would exercise no control. To an extent, drivers need supervision due to the nature of their work. They are connected to the people with whom they have no association other than through Uber.

To avoid exercising unfair control over drivers’ works, for independent contractors, rideshare platforms should not prevent drivers from working due to the onboarding process. Rather, they should focus on a driver’s ability to perform the task. Another way that Uber controls drivers’ work is through their platform. Adjusting the platform

\textsuperscript{73} Although Uber has features such as a shared driver profile, sharing live route, or schedule a ride as extra features, those are intended only for passenger protection.

\textsuperscript{74} Dynamex Operations W., Inc. v. Superior Ct., 4 Cal.5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018).


\textsuperscript{76} O’Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1136 (N.D. Cal. 2015).
algorithm to not penalize drivers for not accepting three rides in a row if the fare is not desired, would prevent the unintended control. Finally, Uber should not terminate drivers through their respective rating system without additional investigation. By following these three propositions, Uber would have the right to classify their drivers as independent contractors, even though they are exercising some control in the employment process. Any opposed action would be an expression on employer-employee relationship which entitles drivers to be employees instead.

4) Whether the driver’s primary source of income comes from their gig-economy employment

In the point above, the discussed conditions were solely in the control of the rideshare apps. It is acknowledged that whether or not the driver’s primary source of income originates from their gig-economy job is not in the control of the companies, but it is a driver’s personal decision. However, Uber directly advertises that those “looking for a full-time driver job” should “give Uber a try.” That claim may cause drivers to rely on the promises of a main income through the platform, since conventionally a full-time job is linked to a full-time income. The advertisement proves that Uber recognizes that many of its drivers’ derive their primary source of income from the rideshare company. Therefore, the solution to the income factor must be linked to the part-time and full-time condition.

Those who would choose a full-time option should be classified as employees and abide by Uber’s non-solicitation clause that prohibits a driver from contacting any passenger and making arrangements to provide services outside of the platform. Those who would choose a part-time option should be freed from the non-solicitation clause as

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78 Please refer to Proof of Claim, 2) Proposition 22

a sign that drivers are able to have a source of income through the solicitation\(^80\) that is beyond software usage.\(^81\)

By allowing drivers to make a statement of their decision of employment status, their income dependence would be delineated. It would be clear to courts that a driver whose primary income comes from their gig-economy occupation is an *employee* and is entitled to all the rights pertaining to this classification.

5) Whether the company’s source of revenue is only composed of independent contractors to perform the company’s duties

Major rideshare apps claim that their product is the *technology* that they use to connect drivers to passengers. However, these companies’ source of revenue comes directly from the work that the drivers perform and not through the sale of the technology. This creates an employer-employee relationship. This alone should be considered by the courts as a factor to classify all the drivers as employees. Making this assumption in the context of the gig-economy model, however, would drastically change companies’ business models. This article is not calling for a complete overhaul of Uber’s business model but rather the incorporation of minor, feasible and procedural changes. Therefore, Uber’s main source of revenue could come from a proposed fee that drivers pay to use Uber’s *technology*, such as a subscription, rather than deriving revenue based on ride fares. A subscription service format is conditioned to the independent contractor classification.

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80 Uber Legal, *Uber Community Guidelines*, Uber (Oct 20, 2021). https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=general-community-guidelines. This should not overrule Uber’s “post-trip” contact guidelines. As Uber asserts, “Unwanted contact can be seen as harassment and includes, for example, texting, calling, social media contact, visiting, or trying to visit someone in person after a trip or delivery has been completed.” What it refers to is the capacity that drivers must conduct a similar type of business after completing a ride as an Uber passenger. Uber Community Guidelines,

81 Id.
6) Whether the parties believe they are creating the relation of employer and employee\textsuperscript{82}

As the Borello test exemplified, a person’s understanding of the employment relationship can be a significant factor in determining the correct classification. However, there is little evidence suggesting that gig-economy workers fully understand what is required for their classification. They see the flexibility of work, the supplemental income, and the limited autonomy as a pretext for the lack of benefits, support, and rights. It is only when they feel “wronged” by Uber from having their account deactivated that they realize the disadvantages associated with their independent classification. Uber’s terms of service asserts that the individual driver is “an independent company in the business or providing transportation” and an “independent contractor.” In regards to the relationship of the parties, Uber says that is “solely that of independent contracting parties.”\textsuperscript{83} Uber makes the expectation that drivers should have regarding the employment relationship clear, but they do not make it clear what their classification entails. Drivers should have a better understanding and a listing of independent contractor duties that both parties are subjected to. The following must be made clear to drivers: tax obligations (they must understand that a 1099 form will be generated, and the burden of filing taxes is theirs), freedom of schedule, algorithm explanation, and Uber support’s limitations. Currently drivers and passengers alike understand that as soon as they are utilizing the Uber app, the driver is an Uber representative and not an independent driver.\textsuperscript{84}


\textsuperscript{83} Uber Terms of Serv. 13.1, RAISER, LLC (November 10, 2014), https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%202010%202014.pdf

E. The Need for Federal Enactment of the Reformed ABC

The misclassification issue in the gig economy world is popular in many states in addition to California. A similar scenario was seen in Massachusetts, New Jersey, and Florida. For instance, the New Jersey’s Department of Labor taxed Uber 650 million dollars for misclassification charges.\(^{85}\) The fact that many states are initiating new systems, legislations, and lawsuits warrants the federal government’s action. A beneficial course of action would involve bringing the independent contractor and employee definitions to a federal level. This would disable checking the local economy in regard to the definition.\(^{86}\) In the past, the IRS had the task to classify workers as employees or independent contractors through their twenty-factor test. This test is no longer in use and was replaced by common law.\(^{87}\) It would instead standardize the definitions, protections, rights, and obligations of companies around the U.S., thus eliminating possible threats of discontinuous operations from the gig companies in specific states.

IV. Conclusion

The purpose of the law is to maintain order and protect liberties and rights. This is an unachievable goal if, in the gig-economy context, drivers do not receive an accurate employment classification. Conventional employment classification tests, like Borello, are obsolete and cannot properly be used in terms of the gig-economy world. While AB-5 seemed to settle the misclassification issue, it resulted in the unintended approval of Proposition 22. Proposition 22 is simply not favorable for drivers. Solving the misclassification


\(^{86}\) Brian A. Brown II, Your Uber Driver is Here, but Their Benefits are Not: The ABC Test, Assembly Bill 5, and Regul. Gig Economy Emps., 15 BROOKLYN J. OF CORP., FIN. & COM. L. 183 (2021).

\(^{87}\) INTERNAL REVENUE SERV., 20 FACTOR TEST—INDEPENDENT CONTRACTOR OR EMP. (1977).
issue requires a symbiotic relationship between rideshare companies and drivers alike. This article has presented a reformed test that is better equipped to handle the innovative work model that rideshare apps are bringing to gig-economy markets. This test consists of six new propositions that address the ambiguity in the misclassification definitions. It includes classifying full-time drivers as employees, analyzing whether drivers’ primary income comes from the platform, addressing the requirements for the tools of work, directs the limitations to the extent of control of work, recognizing the role drivers play in Uber’s income stream, and the relationship that drivers believe exist with the rideshare company.

The misclassification issue is a countrywide controversy. Courts around the country do not seem to draw the same conclusions towards employee and independent contractor definitions. For this reason, this issue should be brought to a federal level to have a standardized system around the country. California Courts should consider the proposed reform and pioneering employment classification as a means to encourage nationwide reform. After all, Uber Technologies originated in California, and nothing would be more suitable than applying the reformed classification test where the gig-economy commenced.
IS HISTORY REPEATING ITSELF? THE ROLE OF THE SUPREME COURT IN PROTECTING MINORITY RIGHTS

Alyssa Fox and Annabelle Crawford

I. INTRODUCTION

While state and federal governments have shared power and authority throughout the history of the United States, the United States Supreme Court significantly influences this power dynamic by determining how the Constitution applies to the protection of individual rights. The Constitution itself provides little direction regarding the roles of the Supreme Court; therefore, the scope and authority of the Court is highly contested. Similarly, political theorists and the American public alike have argued that the Supreme Court is inadequately executing its prescribed responsibilities, sometimes overstepping its authority and, at other times, neglecting

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its duties. Though the Supreme Court is responsible for upholding the ideals of the Constitution and adapting to changing times, it has often supported laws that increase state sovereignty at the expense of the rights of minorities. Minorities and historically marginalized groups lack protection from the majority-dominated legislative and executive branches, leaving this responsibility to the courts. Today, the Supreme Court directly influences the protection of individual rights and is beginning to neglect its responsibility to protect the interests of various minority groups, as seen in recent decisions. When the state or federal governments fail to protect minority interests and individual rights, the Supreme Court must assert its constitutional authority and regularly intervene on behalf of vulnerable minority populations.

II. BACKGROUND

A. Constitutional Origins and Expansion of Federalism

Federalism is a system of government wherein power and authority to govern is shared by a central government and regional governments. Under the Articles of Confederation, the first government system of the United States, the American experiment seemed on the verge of failure. The weak central government struggled to pass laws and govern a nation of independent states. The solution that the framers of the new Constitution arrived at was a relatively untried system of government known as federalism, under which

the several states and the central government shared the power and
authority to govern.

Article III of the United States Constitution declares that “the
judicial Power of the United States shall be vested in one supreme
Court.”3 However, it is vague regarding the Supreme Court’s role.4
Under the new system of federalism, it was unclear what the author-
ity of this “Supreme Court” would be and the extent of its power over
the affairs of the several states. The debate over this question can be
seen in the Federalist Papers and the responding remarks from “Bru-
tus” during ratification.5 Alexander Hamilton wrote in Federalist 78
about what he perceived the role of the Supreme Court to be. While
emphasizing that the Court would be the “least dangerous” branch,
he also noted the importance of an independent judiciary with pow-
ers and authorities not outlined in the Constitution.6 This view was
shared by those aligned with the Federalist Party, who advocated for
a stronger central government.

In line with the assertion that the Supreme Court is a non-dan-
gerous branch, the federal government as a whole was described
as not imposing on state governments, only reaffirming the rights
included in the Articles of Confederation and creating a feasible way
of implementing them. James Madison describes this in Federalist

3 U.S. Const. art. III, § 1.
4 See Tracey E. George, Judicial Independence and the Ambiguity of Ar-
5 The Anti-Federalists were worried that under the new Constitution, the
national government would be too strong and would threaten individual
liberties. In response to the Federalist Papers, written by James Madison,
John Jay, and Alexander Hamilton, the Anti-Federalists published a series
of papers written under pseudonyms. The most famous of these are the
Brutus papers, likely written by Robert Yates. These papers brought to
light concerns about the federal court system, the powers of the president,
and the domination of the national government over the states, among
other worries (see Mitzi Ramos, ANTI-FEDERALISTS THE FIRST AMENDMENT
ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1175/
anti-federalists (last visited Feb 5, 2023).
6 THE FEDERALIST NO. 78 (Alexander Hamilton).
45 and Amendment 10. Madison explains that federal powers are “few and defined” in contrast with the “numerous and indefinite” state powers. Despite these regulatory measures, the power of the federal government, and with it, the judiciary, has grown immensely.

The Supreme Court largely stayed out of the public eye until the early 1800s when a dispute arose between the Adams and Jefferson Administrations. In the landmark decision *Marbury v. Madison* (1803), John Marshall claimed the authority of judicial review for the Supreme Court, asserting for the first time that the Court possessed the power to declare laws unconstitutional. This responsibility, not specifically afforded to the Judiciary, marks the start of the Supreme Court’s expansion of power and influence.

**B. Dual Federalism in the Courts**

In the years leading up to the Civil War, dual federalism was adopted by the legislative and judicial branches. Dual federalism is a political philosophy that federal and state governments both retain

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7 "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" (U.S. Const. amend. X.).

8 The Federalist No. 45 (James Madison).


10 John Marshall was the nation’s fourth Chief Justice and is widely considered to be the most influential individual to fill that role. He served in the Revolutionary War. He later worked as a lawyer and served on the Virginia Legislature. He served as Secretary of State under President John Adams before President Adams nominated him to serve as Chief Justice. Under the Marshall Court, the power and prestige of the judiciary branch expanded. Marshall interpreted the Constitution “in ways that significantly enhanced the powers of the federal government” (see John Marshall, the great chief justice, William & Mary Law School, https://law.wm.edu/about/ourhistory/John%20Marshall,%20the%20Great%20Chief%20Justice.php (last visited Feb 5, 2023)).
sovereignty over their jurisdiction. During the ideological division preceding the Civil War, the Supreme Court tried to placate the Southern States by giving them more autonomy to prevent their secession. In doing so, the Court neglected the individual rights of African Americans in the South. This failure to protect is evident in cases such as Dred Scott v. Sanford, in which the Supreme Court ruled that enslaved people were property and thus did not enjoy essential rights.

During the Reconstruction era following the Civil War, new amendments were passed to ensure the rights of historically disenfranchised individuals, in particular, the rights of African Americans. The 13th, 14th, and 15th Amendments, known today as the Civil Rights Amendments, prohibit slavery, protect privacy rights and allow all citizens the right to vote. These amendments provided the Court explicit authority to protect individual rights from state and federal legislation. Despite these provisions, the Supreme Court often failed to preserve these rights. In one of the most controversial Supreme Court decisions, the Supreme Court asserted in Plessy v. Ferguson that segregation was permissible if facilities and accommodations were “separate, but equal.” This case established a doctrine that allowed the majority to discriminate against the minority on the basis of race. This decision indicates that the Court is not infallible and often makes decisions that we now recognize as wrong.


Dred Scott v. Sandford, 60 U.S. 393 (1856).

U.S. Const. amends. XIII, § 1, XIV, § 1-4, XV, §1.


Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
C. Cooperative Federalism

The rise of cooperative federalism marked an end to the distinctly different nature of state and federal governments. Though states and the federal government continued to share power, the federal government became much more involved in state affairs. With this increased involvement came increased intervention by the Supreme Court into state laws as the Court began to better protect individual and minority rights.

The Warren Court marked a time in American judicial history when the Supreme Court actively supported the liberty of minorities. The Court frequently struck down laws that infringed upon the rights of the people. One such example is Brown v. Kansas Board of Education (1954), a landmark Supreme Court decision that abolished the “separate but equal” doctrine mandated by Plessy v. Ferguson and marked a key victory for the Civil Rights Movement. The Warren Court similarly protected individual rights by protecting the right to privacy in the cases of Griswold v. Connecticut and Loving v. Virginia. In this instance, the Court upheld the rights of the minority population and prioritized them over state interests. These cases established the precedent that the Fourteenth Amendment protects individual rights to privacy and promises equal protection. Based on this precedent, the Supreme Court asserted in Roe v. Wade (1973) that the Constitution protects people’s right to an abortion, overturning state laws to the contrary.

D. Modern Federalism

“New Federalism” is the political philosophy that the federal government has accumulated too much power and pur-
ports to return “rightful” power to the state governments. New Federalism began in earnest in the 1980s and continues to be a guiding judicial philosophy for many Supreme Court justices today. This prevalence is apparent in *Printz v. United States*, 21

Before a federal system was established to conduct background checks, the Brady Handgun Violence Prevention Act (Brady Bill) required “local chief law enforcement officers” to perform background checks on prospective handgun buyers in their respective locales. Two separate county sheriffs—Jay Printz and Richard Mack—challenged the constitutionality of this act on behalf of Montana and Arizona, respectively. District courts ruled that because the mandatory background checks were severable from the rest of the act, voluntary background checks were permissible. The Supreme court accepted the petition on appeal from the Ninth Circuit Court and consolidated the cases. The question before the court was whether or not the Necessary and Proper Clause empowers Congress to require states to regulate handgun purchases by performing duties required by the Brady Bill’s handgun applicant background checks. In a 5-4 decision, the Court determined that Congress did not possess the power to require background checks under the commerce clause because the Necessary and Proper clause does not empower the federal government to fulfill its federal tasks for it, even temporarily. The Court determined that the Federal government could not impose its duties on the states, giving them more discretion to perform duties not yet organized by the federal government (*Printz v. United States*, 521 U.S. 898 (1997)).
United States v. Lopez\(^{22}\), and Dobbs v. Jackson.\(^{23}\) These cases shifted decision-making power back to the states at the expense of already established individual rights.

Despite the recent, significant losses to independent rights in the modern era, there have been some advancements for civil rights today upheld by the Supreme Court. These decisions point to the Supreme Court’s ability to continue to promote individual well-being when state laws do not uphold such essential rights. For example, in both Lawrence v. Texas\(^{24}\) and Obergefell v. Hodges,\(^{25}\) the Supreme Court overturned state law in order to maintain the protection of people in the LGBTQ+ community.

\(^{22}\) A 12th-grade student in San Antonio, Texas, brought a concealed firearm into his high school and was charged under Texas law with possession of a firearm on school premises. State charges were dropped the following day after federal charges were filed for violating a federal criminal statute, the Gun-Free School Zones Act of 1990. The statute forbids “any individual knowingly to possess a firearm at a place that [he] knows...is a school zone.” Lopez was found guilty at a bench trial and sentenced to 6 months imprisonment and two years of supervised release following a bench trial. Lopez petitioned the United States Supreme Court on the basis of the constitutionality of the federal statute. The question before the Court is whether or not the Gun-Free School Zones Act of 1990 exceeds the powers afforded to the federal government by the Commerce Clause. In a 5–4 decision, the Court ruled that this federal act was unconstitutional because it overtly oversteps the power afforded to the federal government by the Commerce clause of the Constitution specifically because the criminal statute has nothing to do with commerce, let alone interstate commerce. The Court gave greater power to the States to regulate criminal activity within their borders, minimizing the federal government’s power (United States v. Lopez, 514 U.S. 549 (1995)).


III. Proof of Claim

A. The Ambiguity and Adaptation of the Constitution

The Constitution’s language is ambiguous. Many issues regarding the formation of government were not fully addressed in the text of the Constitution—one of the reasons Anti-Federalists pushed for the Bill of Rights. The Constitution lacked explicit instructions on forming and establishing the judicial branch of government. Article III left the establishment of the Courts primarily up to Congressional discretion, as it had only three sections—in comparison to the ten establishing the legislative branch. The Bill of Rights also limited federal powers to only those enumerated with the Tenth Amendment to the Constitution, explicitly stating that “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.”

This distinction provides the states the power to regulate education, local government, welfare, and health and explicitly prevents federal impositions in these areas. These regulations on federal power decreased the influence of the federal government as a whole and, subsequently, the Federal Judiciary.

Since the ratification of the Constitution, individuals and scholars have debated whether it is appropriate to interpret the Constitution according to the letter of the document or whether it is meant to be adapted as the country evolves. This argument is specifically articulated in the Federalist and Anti-Federalist Papers written by members of the Constitutional Convention of 1787.

In Federalist 78, Alexander Hamilton argued for the importance of a federal judiciary. He describes the justices of the Supreme Court as “the bulwarks of a limited Constitution against legislative encroachments.” Hamilton argued that the role of the judiciary, as defined by the Constitution, was “to guard the Constitution and the rights of individuals,” which often are imposed upon by “serious

26 U.S. Const. amend. X.
27 THE FEDERALIST NO. 78 (Alexander Hamilton).
oppressions of the minor party.”28 This branch of government was an essential protection of the minority but was also the “weakest of the three departments of power.”29

Federalist 45, authored by James Madison, explains that the United States Constitution was not attempting to expand the powers afforded to the federal government but only “substitute a more effectual mode of administering them.”30 The principle highlighted by Madison is explicit in the Tenth Amendment of the Constitution, which specifically allocates discretion for unenumerated powers to the state.31 This increased the ambiguity regarding federal courts because the Constitution established them but left the organization and procedures to Congressional discretion.

The ambiguity of the Constitution allows for different interpretations regarding the role of the Supreme Court, which have evolved throughout the history of the United States. Supreme Court cases have interpreted the words of the Constitution—and its amendments—since the establishment of judicial review. It is seen in these decisions that often, the justices themselves do not agree

28 *Id.*
29 *Id.*
30 *The Federalist No. 45* (James Madison).
31 *U.S. Const.* amend. X
on the interpretation of the law because the justices understand the Supreme Court’s role in different ways.\textsuperscript{32}

Controversies arise because citizens and governments in the modern era face circumstances and problems that the founders could never have imagined. Thomas Jefferson himself recognized the need for laws and statutes to change to address the problems that would inherently arise, saying, “Every constitution then, and every law, naturally expires at the end of 19 years.”\textsuperscript{33} Though the Constitution has never been replaced as Jefferson suggests, it is nevertheless essential to adapt it to today, as the world is vastly different than it was when the Constitution was ratified.

\textit{Through the Lens of History}

\textbf{B. During the Era of Dual Federalism}

Consider, for example, \textit{Dred Scott v. Sanford} decided in 1859. Dred Scott was an enslaved person who lived in Missouri but resided

\begin{quote}
\textsuperscript{32} Judicial Philosophers–including Supreme Court Justices–are often sorted into two categories: those who believe in a living constitution and those who argue the Constitution is a ‘dead’ document. Proponents of a dead constitution are sometimes referred to as Textualists or Originalists because of their view that the Judiciary—specifically the Supreme Court—should interpret the Constitution based on the text and the meaning of the text at the time it was adopted. Justice Antonin Scalia was a self-proclaimed textualist and interpreted the Constitution as such, which can be seen through his many dissents (See Justice Antonin Scalia, Constitutional Interpretation the Old Fashioned Way (March 14, 2005) (transcript available on the Boston College Website)). On the other hand, those who possess the living Constitution philosophy claim that the Constitution was initially ‘defective’ and as society betters itself, the Constitution must follow suit (See Thurgood Marshall, The Constitution: A Living Document, 30 HOWARD L.J. 915 (1987)). Justice Thurgood Marshall explains the need for the evolution of the Constitution using the question of slavery and African American rights, explaining the importance of recognizing the defects of the Constitution and the changes necessary to resolve the flaws in the original document (See Thurgood Marshall, The Constitution: A Living Document, 30 HOWARD L.J. 915 (1987)).
\end{quote}

\begin{quote}
\textsuperscript{33} Thomas Jefferson, To James Madison from Thomas Jefferson (Sept. 6, 1789), reprinted by FOUNDERS ONLINE, NAT’L ARCHIVES, https://founders.archives.gov/documents/Madison/01-12-02-0248.
\end{quote}
in Illinois for several years.\textsuperscript{34} When he returned to Missouri, he sued for freedom because his residence in Illinois, a free state, made him a free man. In a 7-2 decision, the Court ruled that Dred Scott was not a citizen and, thus, was not allowed to file suits. The Court also ruled that Congress could not free enslaved people in federal territories claiming that enslaved people were property. Thus, it was unconstitutional to deprive enslavers of their property under the Fifth Amendment. In this instance, due process of law was erroneously applied to the majority, white enslavers, rather than to the vulnerable minority of free black individuals and enslaved people. This case represents a debate about who is entitled to civil rights under the Constitution. In \textit{Dred Scott}, the justices took a highly restrained view of the Constitution, utilizing history to justify continued institutional racism—persecuting the minority to benefit the majority. In a sentiment often echoed in the intervening years, the Court stated, “it is not the province of the Court to decide upon the justice or injustice, the policy or impolicy of these laws.”\textsuperscript{35} The Court also employed an originalist lens of what was permissible under the Constitution, as it questioned which groups were considered citizens when the Constitution was ratified. It claimed that the provisions of the Constitution apply only to individuals who were descendants of citizens at the time the Constitution was adopted. The Court reasoned that African Americans “have never been regarded as part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure.”\textsuperscript{36}

In this era of dual federalism, the Court was often concerned with returning rights to the states—and in the case of \textit{Dred Scott}, federal territories—even at the expense of individual or minority rights. The Court egregiously claimed, in a manner that is strikingly similar to the statements of the Court today, that “no one…supposes that any change in public opinion or feeling, in relation to this unfortunate race… should induce the Court to give to the words of the

\textsuperscript{34} Dred Scott, 60 U.S. 393 (1856).

\textsuperscript{35} \textit{Id.} at 405.

\textsuperscript{36} \textit{Id.} at 412.
Constitution a more liberal construction their favor than they were intended to bear when the instrument was framed and adopted."

The judgment in this case, plainly wrong and founded on the notion of white supremacy, indicates that the Court of this era had no inclination to advance the rights of historically marginalized groups. This faulty holding argues that even if the legislatures overturn the fundamental rights to life, liberty, and property, the Courts do not possess the power to repeal state authority. However, these rights were protected at the time of *Dred Scott* under the Fifth Amendment and are further protected today by the Fourteenth Amendment. As Justice McLean wrote in his dissent of *Dred Scott*, the case indicates that if a court could so flagrantly fail to protect individual rights “on a question involving the liberty of a human being,” the law affords little protection.

In *Plessy v. Ferguson*, the Supreme Court erroneously adopted the principle of stare decisis, maintaining the precedent established in *Dred Scott v. Sanford*. It asserted that segregation based on race was permissible if treatment was “separate but equal.” The majority claimed that while the object of the Fourteenth Amendment was to “enforce absolute equality of the two races before the law”, it was impossible that it could have been intended to “abolish distinctions based upon color, or to enforce social … equality, or a commingling of the two races upon terms unsatisfactory to either.” Like *Dred Scott* before it, *Plessy* relied on the dual federalism notion that all rights not explicitly given to the federal government were to be regulated by state governments, as outlined in the Tenth Amendment. This indicates the Court’s deference to state governments regarding issues not explicitly outlined in the Constitution, especially in regard to the fundamental rights of minority groups. The Court claimed that any “badge of inferiority” placed on “the colored race” exists

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37 *Id.* at 426.
38 *Id.* at 564.
39 *Id.*
40 *Plessy*, 163 U.S. 537 (1896).
41 *Id.* at 544.
“solely because the colored race chooses to put that construction upon it” and argued that “social prejudices” could not be “overcome by legislation.” The Court presupposed that legislation could not eradicate racism, failing to recognize that racism is much harder to overcome if minority and majority groups are not already on an equal basis before the law. The case argues that if a minority group has been treated inequitably, it was the responsibility of the minority group to overcome obstacles placed on them by other individuals. This erroneous thinking was severely detrimental to the equity and equal rights of African Americans. It is an instance in which the Court should have instead intervened to protect this historically-marginalized group.

Similarly, in the case of Abrams v. United States, the Court upheld the suppression of a minority group’s opinion by affirming the conviction of several Russian immigrants who opposed World War I. The fundamental right of free speech for a minority group was impeded. Conservative Justice Holmes (joined by Justice Brandeis) argued that affirming this conviction was expanding the power of the federal government too far in its regulation of speech, saying, “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.” In this circumstance, the Court failed to protect the minority’s freedom of speech and trampled upon the rights of these Russian immigrants.

C. Cooperative Federalism and the Warren Court

Today’s Court has employed the philosophy of judicial constructionism, reestablishing that the Constitution protects fundamental individual rights. During the Warren Court era of cooperative federalism, the Supreme Court was more willing to intervene against laws that undermined individual rights. The Court prioritized an expansion of rights for historically marginalized groups under the due process clause and equal protection clause of the Fourteenth Amendment. One such case is Brown v. Kansas Board of Education, which held

42 Id. at 551.
43 250 US 616, 630 (1919) (Holmes, J., dissenting).
that the “separate but equal” doctrine espoused in *Plessy* was inherently unequal because segregation has a “detrimental effect upon” African American children, giving them “a sense of inferiority.” In this case, the Court recognized that segregation on the basis of race is in opposition to liberty and thus violates the Fourteenth Amendment. The Court highlights that, while it is important to acknowledge history when deciding a case, it is more important to apply the promises of individual liberty guaranteed by the Constitution. The Court held that “the question presented in these cases must be determined, not based on conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education in the present place in American life throughout the nation.”

As the Court has held in many significant decisions since *Brown*, the questions presented in recent cases cannot be determined on the basis of conditions that existed when the Fourteenth Amendment was adopted, but rather, how they relate to current American life and principles.

In *Griswold v. Connecticut*, the Court affirmed that married couples have a right to contraception under the implicit right to privacy guaranteed in the penumbra of rights afforded by the First Amendment. The concurring opinion in *Griswold* argues that under the Ninth Amendment, rights that are not explicitly mentioned in the Constitution are still retained by the people. This opinion serves as a significant argument favoring ratified amendments to protect implicit (though not unenumerated) rights in the Constitution. *Griswold* enables women, a politically underrepresented and historically marginalized group, to obtain a greater dimension of freedom than was possible before this case was decided. The binding precedent established in *Brown v. Board* and reaffirmed in *Griswold* demonstrates that the Court has a responsibility to ensure that the Constitution is interpreted in the context of contemporary American ideas about what a right to “life, liberty, and property” truly means.

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45 *Id.* at 483.
46 *Griswold*, 381 U.S. 479 (1965).
Perhaps the quintessential example highlighting the importance of applying the provisions of the Constitution to contemporary issues is *Loving v. Virginia*, which held that a Virginia statute that criminalized interracial marriage was unconstitutional under the equal protection clause of the Fourteenth Amendment, holding that “the mere equal application of a statute containing racial classifications” is not enough to “remove the classifications” of racial discriminations.\(^47\) It also held that in some cases, the equal application is equivalent to equal protection, indicating that in cases not involving a distinction on the basis of race or another inherent characteristic, equal application of the law is enough to determine if there is a rational basis for the discrimination. However, the Court noted in *Loving* that “the fact of equal application does not immunize the statute from the weighty burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”\(^48\) This critical constitutional principle indicates that a law that discriminates on the basis of race has a higher burden of due process than a statute that does not involve this characteristic. The Court has a responsibility to apply this higher burden of due process to other historically marginalized groups.

**D. Modern Federalism in the Court**

In recent years, the Court has wavered between judicial restraint and judicial activism. For example, the Rehnquist Court of 1986-2005 was reluctant to strike down unconstitutional state laws burdening vulnerable minority populations, choosing instead to preserve the precedent of previous Court decisions, thereby showing judicial restraint.\(^49\) In the years since *Roe v. Wade* was decided in 1973, the Court has at times fulfilled its obligation to protect minorities who are

\(^47\) Loving, 388 U.S. 1, 8 (1967).

\(^48\) *Id.* at 9.

discriminated against under unconstitutional laws. At other times, the Court adhered to principles of Neo-federalism that protect “sovereign immunity” — a judicial philosophy that constitutional scholar Akhil Reed Amar notes “allows [state and federal governments] to violate citizens; federal constitutional rights...even if such immunity means that the [government’s] wrongdoing will go partially or wholly unremedied.”

In *Bowers v. Hardwick (1986)*, the Court held that there is no constitutional protection for homosexuals to engage in sodomy. The decision in Bowers perpetuated discrimination against LGBTQ+ individuals and failed to protect a right available to other intimate couples. The Court neglected its responsibility to apply a higher burden of scrutiny to cases involving discrimination against minority groups. As the Court of Appeals for the Eleventh Circuit held before the case was brought to the Supreme Court, “homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.” The Court should have validated this decision, but instead, it failed to protect the minority group’s right to privacy that was afforded to majority groups.

That is not to say that the Court has always failed to fulfill its constitutional obligation to protect minorities and historically disadvantaged groups. Two such examples are *Lawrence v. Texas (2003)* — which overturned the Bowers decision — and *Obergefell v. Hodges (2015)*, both of which ensure that members of the LGBTQ+ community enjoy the same protection under the law as other consenting individuals. *Obergefell* held that same-sex couples are entitled to the same right to marry that heterosexual couples enjoy. Interestingly,

53 *Id.* at 189.
54 Lawrence, 539 U.S. 558 (2003).
the Court held that while “history and tradition guide and discipline the inquiry into whether a right is so fundamental that the State must accord them its respect,” such a study of history does not “set [the inquiry’s] outer boundaries.” 56 The Court noted that history is an important consideration when determining whether a right is fundamental or not. However, it reaffirmed that history could be, and often is, wrong. Thus, it cannot be the only consideration when deciding if a right is fundamental. History informs, but should never decide, the rights we are privileged to enjoy today because history was not always fair and equitable to historically powerless groups.

Additionally, the Court notes that “the nature of injustice is that we may not always see it in our times” and that the framers of the Bill of Rights and Fourteenth Amendment “did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” 57 This is a vital principle of constitutional scholarship, highlighting that while the Constitution is indeed intentionally ambiguous, it is the responsibility of each generation to learn the meaning of liberty. Like the Court did in Brown 58 when it highlighted segregation’s ill effects on school children, the Court notes in Obergefell the instability and stigma that same-sex couples and their families endure. 59 The Court notes that if “rights were determined by those who exercised them in the past, then received practices could serve as their continued justification, and new groups could not invoke rights once denied.” 60

History demonstrates that when faced with a majority group undermining minority rights, the appropriate decision is that the Court adopt a more robust activist philosophy. However, this paper does not contest that it is challenging to strike the appropriate balance between a philosophy of judicial restraint and a philosophy of

liberal protection for minority groups. Yet, the Court has often held that it has a heightened responsibility to protect minority rights, so it must do better at maintaining and protecting said rights.\textsuperscript{61} When the Court employs a philosophy of liberal protection, it is not, as opponents say, subverting the democratic process and undermining the lawmaking power of legislatures. Instead, it is applying the United States Constitution, an inherently ambiguous document, to the challenges of the contemporary world. It protects those individuals who would otherwise be overlooked by what James Madison called “the superior force of an interested and overbearing majority.”\textsuperscript{62}

\textit{E. Due Process and Strict Scrutiny}

Since the ratification of the Fourteenth Amendment in 1868, legal scholars and Supreme Court justices have debated how to apply the Due Process Clause to constitutional issues and whether there are legitimate grounds to rule laws unconstitutional that fail to meet substantive due process. The Fourteenth Amendment states that no State shall “deprive any person of life, liberty, or happiness, without due process of law.”\textsuperscript{63} For one hundred fifty years, scholars and justices have debated what constitutes due process of law.

It is evident that the Court should not always take a pro-individual stance. Nor is it true that the Court can create rights. Rather it determines what constitutes an implied right under the current constitution. Cases, such as the now infamous \textit{Lochner v. New York}, demonstrate that the Court has in the past overstepped its constitutional authority at times when it purported to protect rights under

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} \textit{The Federalist} No. 10 (James Madison).
\item \textsuperscript{63} U.S. Const. amend. XIV, § 1.
\end{itemize}
\end{footnotesize}
the Fourteenth Amendment.\textsuperscript{64} However, the Court should expand its requirements for strict scrutiny and consider potential biases against marginalized groups.

One case in which the Court appropriately considered potential bias is the previously discussed \textit{Loving v. Virginia}, in which Chief Justice Warren noted that racial classifications, “must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”\textsuperscript{65} This protection must be applied to other historically marginalized groups, as the Supreme Court is responsible for the protection of minorities.

In \textit{Griswold v. Connecticut}, the Court held that though it does not “determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions,” it does have the right to intervene when legislatures infringe upon intimate rights

\textsuperscript{64} In 1905, the defendant (Lochner) was accused of violating Section 110 of the labor law of the State of New York which states that no employee should be required or permitted to work more than sixty hours a week or ten hours a day. Having been previously convicted of a violation of the same act—which he did not appeal—the court determined that this was his second offense and convicted him accordingly. Lochner appealed the decision to the Appellate Division of the Supreme Court, Fourth Department, where the judgment of conviction was affirmed. Lochner then petitioned the United States Supreme Court. The question before the Court was, does the New York State Labor law violate the liberty—right to contract—protected by the Due Process Clause of the Fourteenth Amendment? The Court held that the New York Labor Law was a violation of the right to contract protected by the Fourteenth Amendment’s due process clause. The Court reversed the decision of the Appellate Court. The Court determined first that the due process clause of the Fourteenth Amendment protected the right to purchase or sell labor. The Court further explained that States possess police powers that relate to the safety, health, morals, and general welfare of the public. The State thus possesses the power to prevent certain contracts from being made if the State possesses the legitimate exercise of its police power. The Court determined that the State did not possess legitimate police powers in this case and thus overstepped the bounds of its power and violated the Fourteenth Amendment and, subsequently, the Federal Constitution. Lochner v. New York, 198 U.S. 45 (1905).

\textsuperscript{65} Loving, 388 U.S. 1, 11 (1967).
to privacy guaranteed under the Fourteenth Amendment.\textsuperscript{66} This holding indicates that the Court is authorized to apply strict scrutiny to laws that have the potential to undermine the fundamental individual rights that every citizen of the United States is entitled to.

As was held in \textit{Reno v. Flores}, the Fourteenth Amendment “forbids the government to infringe... [on] ‘fundamental liberty’ interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”\textsuperscript{67} As a matter of precedent, this case notes that a state may not infringe upon fundamental rights, and should they do so, the Supreme Court is compelled to intervene. The Court has been reluctant to expand this authority to the application of strict scrutiny beyond fundamental rights and issues regarding race to include other historically marginalized groups. However, when they have done so, the Courts are viewed as being on the right side of history.

More recently, in \textit{Obergefell v. Hodges}, the Court held that “the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.”\textsuperscript{68} This decision highlighted that legislative statutes are subject to higher, stricter scrutiny when they involve fundamental rights. In \textit{Obergefell}, the dissent wrote that “allowing unelected federal judges to select which unenumerated rights rank as ‘fundamental’—and to strike down state laws based on that determination”\textsuperscript{69} Though perhaps a legitimate concern, it is mitigated by the doctrine of strict scrutiny utilized by the Court. The more significant concern at this moment in history is the tendency to deny minorities and historically disadvantaged groups the civil rights they are entitled to. Thus, the Court should err on protecting individual rights rather than on a strict constructionist view of the Court’s role.

\textsuperscript{66} Griswold, 381 U.S. 479, 482 (1965).
\textsuperscript{68} Obergefell, 576 U.S. ____, 24 (2015).
F. Changing World and Political Shifts/Implications Today and in the Future

The debate between loose and strict constructionism is of particular relevance today, as the Court appears poised to position itself as strictly restrained and thus strictly in opposition to its responsibility to protect the rights of historically disadvantaged groups.

The Court has a responsibility to protect and advocate for minority rights. In the case of Dobbs\textsuperscript{70}, the Court overturned a long-established principle that, like Griswold, gave women more autonomy.\textsuperscript{71} The majority’s departure from stare decisis held that “the Court short-circuited the democratic process by closing it to [a] large number of Americans who disagreed with Roe,”\textsuperscript{72} failing to consider that many Americans disagreed with the unanimous decision in Brown v. Board of Education.\textsuperscript{73} Many disagreed with the decision made in Griswold v. Connecticut.\textsuperscript{74} Many disagreed with the decision made in Loving.\textsuperscript{75} If the Supreme Court had failed in each of those instances to do its duty to protect fundamental individual rights and instead waited for legislators and the majority to support these fundamental minority rights, we would perhaps still be waiting for those momentous changes to occur. The Supreme Court is the branch of government best positioned to support minority rights, as it is less politically accountable—they do not rely on the majority for reelection--than the legislative and executive branches and many state supreme courts; each state has a different appointment method.

Even if it is impossible to draw a sharp line in the sand when the Supreme Court is overstepping its authority, it is clear that the Court must do more to protect historically disadvantaged groups. Dobbs,\textsuperscript{76}

\begin{enumerate}
\item Dobbs, 597 U.S. ___ (2022).
\item Griswold, 381 U.S. 479 (1965).
\item Dobbs, 597 U.S. ___ at 5 (2022).
\item Brown, 347 U.S. at 483 (1954).
\item Griswold, 381 U.S. 479 (1965).
\item Loving, 388 U.S. 1 (1967).
\item Dobbs, 597 U.S. ___ (2022).
\end{enumerate}
on its face, claims to reverse a broad overstep in authority perpetuated by the Court. However, it diminishes the rights of women, who, as a group, are a historically disadvantaged political minority.

As the branch responsible for upholding the U.S. Constitution, and in a system that regularly undermines the rights of historically disadvantaged groups, the Court must step in more regularly to protect all the nation’s people. It has the authority to do so under the Fifth, Ninth, and Fourteenth Amendments, and it remains the best safeguard against a majority that could look upon minorities unfavorably. The Court must do more to protect the disenfranchised and politically alienated. Under the guise of judicial restraint, the Court appears poised to neglect this responsibility. Thus, some level of reform must occur to protect individual and minority rights.

In *Dobbs v. Jackson*, the dissent argued that “applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents.” Contrary to what many believe today, adopting the Constitution to fit a modern view of liberty and its place in the world does not undermine the Constitution but rather strengthens it. It has expanded “the sphere of protected liberty” and brought in “individuals formerly excluded.” This view of the Constitution has made our republic more democratic and fairer, not less. To argue otherwise is to minimize the grand tradition of American equality and diminish the equality of marginalized individuals today. As Chief Justice John Marshall said, the Constitution is “intended to endure for ages to come” and thus must adapt to a future “seen dimly.”

### IV. Possible Solutions

There are many possibilities to expand the power and reach of the Supreme Court regarding the protection of minority rights.

77 U.S. Const. amends. V, IX, XIV.


79 Id. at 22-23.

80 McCulloch v. Maryland, 17 U.S. 316, 415 (1819).
A. Legislative Change at State and Federal Levels

If the Supreme Court fails to support the rights of minorities, then state and federal legislatures are responsible for protecting these fundamental rights. The federal and state legislatures could potentially pass laws that better support minority and individual rights. However, this solution has drawbacks. The Supreme Court could overrule this solution through the principle of judicial review. Federal and state legislatures are subject to the Supreme Court. If the Supreme Court is determined to neglect its responsibility to protect minority rights by expanding strict scrutiny, it matters little what legislation is passed. Relying on the legislatures also presupposes that legislators will be willing to work across the aisle and compromise to promote equitable laws, which seems unlikely in an increasingly polarized political climate.

The executive and legislative branches are elected by the majority, often leaving the minority underrepresented. In a two-party political system, this poses a significant threat to minority groups. In the Federalist Papers, James Madison explains that factions—in this case, synonymous with political parties—directly threaten the public good and minority interests. He explains, “when a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”81 Under majority control, the rights and interests of the minority can and often are ignored in place of majority interests. As the Supreme Court has a responsibility to protect minority rights, this potential solution may be counterintuitive. By allowing the majority to influence the Supreme Court, the minority would lose the support of the sole branch of government best suited to protect its rights; thus, it would be ultimately counterproductive.

81 The Federalist No. 10 (James Madison).
B. Supreme Court Reform

Another potential solution to the Supreme Court’s insufficient protection of minority rights is encouraging the Supreme Court to reform to promote a more modernized Court. As seen above, the legislative and executive branches influence the Supreme Court, and they could change the organization of the Supreme Court to reflect modern judicial philosophy. Despite the promise of this solution, each area of possible reform has significant drawbacks.

Judicial Philosophy has significantly changed over the years just as political beliefs and ideologies shift. One solution to maintain the consistency between the judicial philosophy of the Supreme Court and that of the country is to impose term limits for Supreme Court Justices. This solution has several drawbacks, including the previously articulated problem of majority domination. Imposing term limits on the Supreme Court could potentially result in a Court more in line with the general public’s views—sharing a similar judicial philosophy—but could also contribute to the politicization of the Court, which could be detrimental to its legitimacy. A Court that does not maintain precedent when there is little reason not to do so becomes unreliable and fickle.

Writing in Federalist 78, Alexander Hamilton emphasized the importance of stare decisis. To “avoid an arbitrary discretion in the courts, it is indispensable” that federal judges “should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”

A Supreme Court that flips at nearly every election, similar to the legislature, could easily overrule previously established precedent, making the Court unreliable and allowing for arbitrary decisions and biases to be incorporated into decisions. This unreliability will directly undermine the legitimacy of the Court making it more challenging to enforce decisions made by them.

Another solution to ensure the Supreme Court continues to protect minority rights is employing the threat of impeachment—and actual impeachment. The legislative branch does have a method
of recourse to protect against Supreme Court injustice. Though impeachment is technically feasible to remove a Supreme Court Justice, the ambiguity in the Constitution as to what constitutes “good” and “bad” behavior makes this an unlikely solution. The longevity of this solution is in question, mainly because it would be detrimental to the Court’s legitimacy and stability if a Justice who opposed the party in power could be easily impeached by a Senate that disagreed with them. Additionally, removal by impeachment has never been done before. Although one Justice, Samuel Chase, was impeached by the House of Representatives in 1804, he was acquitted by the Senate and retained his position. 83

C. Constitutional Amendment

It is theoretically feasible to pass a constitutional amendment that would more explicitly protect the rights of minorities and individuals. The Supreme Court is bound to protect and uphold the Constitution, which includes all amendments. By passing a federal constitutional amendment, the legislature—through the ratification process—would force the Court to uphold and protect the rights of minority groups. Implicit rights included in the penumbra provided by the Fourteenth Amendment could be explicitly listed, meaning that arguments over the protection of specific rights would have no standing—the Constitution would directly protect them. Alternatively, the federal legislature could pass a constitutional amendment to further define the role of the United States Supreme Court, ultimately giving it more authority to liberally protect minority groups.

Passing a constitutional amendment is incredibly difficult, as there are many barriers to successfully ratifying a constitutional amendment. The text of the Constitution explicitly states the process of ratification in Article V:

The Congress, whenever two-thirds of both houses shall deem it necessary shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-

thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.\textsuperscript{84}

Constitutional amendments are challenging to pass because of the requirement to obtain widespread approval. For an amendment to be proposed, two-thirds of the legislature or the states must agree on the necessity. This requirement means that to propose an amendment, 33 states, or about 180 members of the legislature, would have to agree on the existence of a problem. Furthermore, to achieve ratification, three-fourths of the states or the legislature must approve of the language and content of the amendment.

Following the ratification, ambiguous wording can perpetuate the problem of explicit rights. Some constitutional provisions and amendments are vague and open to various interpretations. In one sense, this is valuable, as it allows interpretation to shift and evolve as the country changes. Nevertheless, it enables individuals in power to twist the constitutional provisions to support their goals. Despite these drawbacks, ratifying constitutional amendments is still a viable option to better ensure the Supreme Court protects minority rights because the Constitution and its amendments bind the Supreme Court.

Unfortunately, there is not a clear and simple solution to the problem of the Supreme Court failing to uphold the rights of minority groups. All proposed solutions have significant drawbacks that, in some cases, render their benefits useless. Holding the judiciary accountable remains difficult for the people in America, as they must rely on the legislative and executive branches to work together and accurately represent their interests. As of now, the most viable option to ensure the maintenance of minority rights is a constitutional amendment that explicitly defines the role of the Supreme Court as

\textsuperscript{84} U.S. Const. art. 5.
being the branch responsible for the protection of the minority from an “overbearing majority.”

V. CONCLUSION

The controversy surrounding the role of the Supreme Court is complex, and it is difficult to maintain an appropriate balance between judicial restraint and adapting the Constitution to contemporary issues. However, the current Court has failed to find an appropriate balance. As the branch of government most immune to the political system and the branch of government tasked with upholding the Constitution, the Supreme Court is in the best position to protect minorities from inequitable laws and policies. When the Court fails to do so, it is detrimental to fundamental rights. The Court has proved in the past that it can be a bulwark against injustice, but it has also demonstrated that it can perpetuate and enable injustice. The Supreme Court is now at a historical moment where it must decide whether the current Court will be considered one which fulfilled its responsibility as a protector of historically disenfranchised groups. Cases like Perez v. Sturgis Public Schools, et al., a case about the rights of disabled individuals in the public school system, and Merrill v. Milligan, a case about racial discrimination that is claimed to violate the Voting Rights Act, serve as an opportunity for the Court to re-establish its role as protector of minority groups. Alternatively, this Court could be considered a Court that trampled fundamental rights under the guise of returning power to state governments and promoting limited government, as in the case of Dobbs v. Jackson.

If the Court continues on its current path, its decisions could be incalculably harmful to groups of marginalized people. Today, this Court must prioritize equity for all individuals. At this crossroads

85 The Federalist No. 10 (James Madison).


moment, the Supreme Court must choose to uphold its constitutional authority and protect the rights of individuals and minorities when state and federal governments infringe upon those rights.
The Junk Food Problem: Why the Law Allows Advertising to Kids and How to Implement Change

MaKenna Hardy

I. Introduction

The prevalence of childhood obesity is a statistic that continues to bloat in the United States, surpassing prior records almost annually since the late 1900s. Scholars and health experts are currently pursuing possible methods to reduce this trend, as obesity will follow 80% of these children into adulthood and add to the staggering 40%
of the adult population already classified as obese. This scientific and academic pursuit has resulted in scientists and scholars linking societal health degradation with junk food advertising. Researchers have drawn correlations between junk food advertising and higher body mass indexes (BMI) and the immediate consumption of increased calories – the accumulation of which has led to high enough obesity rates to be considered an epidemic. Though many factors impact obesity, government officials from both major parties see junk food advertising as concerning enough to need legislation to combat it. Regulations have been put forth by the government such as restricting all advertising to very young children (under 8) or restricting junk food advertising to older children, but they have failed to make it into the official code of law.

Despite the push for restricting children’s exposure to advertisements, completely new, stringent legislation barring advertising to children under technological and even most physical mediums is largely unfeasible due to current Supreme Court precedent regarding

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3 Llewellyn A. ET AL., Predicting adult obesity from childhood obesity: a systematic review and meta-analysis, PubMed (Dec. 23, 2015), https://pubmed.ncbi.nlm.nih.gov/26696565/. * Although current BMI calculations prove to be an imperfect measurement for individual health and body fat measurement, for representative, population wide studies, the BMI scale remains a useful and accessible way to estimate risk of various health outcomes. Thus, for a United States population wide study on measuring obesity, the BMI is still a productive tool and helpful indicator for excess fat estimation throughout the country. See Mark Green, Do we need to think beyond BMI for estimating population-level health risks?, Journal of Public Health, Jan. 2015.

4 Frederick J. Zimmerman, Janice F. Bell, Associations of Television Content Type and Obesity in Children, American Journal of Public Health 100, 334-340 (February 1, 2010).


commercial free speech. We will analyze the pertinent case law and advertisement restrictions regarding junk food advertising to children that have defined important commercial speech precedents. Furthermore, we will investigate the current and potential methods of the Federal Trade Commission (FTC) and United States Department of Agriculture (USDA) in regulating children’s exposure to commercial speech within the boundaries of existing law.

II. BACKGROUND

The rapid expansion of technology has spurred governmental agencies like the FTC to determine how these advancements target children and what can be done to combat the negative effects. In an October hearing in 2022, the FTC sought to determine what regulations were already in place for the sake of children, the state of advertising to younger audiences, and how to limit the spread of harmful advertising content. Advertisements targeting children include, but are not limited to, marketing on platforms with a predominantly young audience (such as games like Roblox or self-declared children’s channels on YouTube), using colors and shapes to appeal to children, and using cartoons or other youth to promote products. As government and private agencies explore the dangers of increasingly pervasive and personalized advertising towards children, an analysis of landmark commercial speech cases will demonstrate the established First Amendment lines which must be adhered to.


9 Id. at 17, 54

10 Id. at 5.

11 Id. at 16.
A. Capital Broadcasting Company v. Mitchell (1971)

In an effort to regulate the mass advertisement of tobacco products, Congress passed the Public Health Cigarette Smoking Act of 1969. Six radio station corporations challenged the constitutionality of this act which banned all cigarette advertising across technology platforms under the scope of the Federal Communications Commission (FCC). This scope has remained limited to television and radio, since internet regulation has never been under the FCC’s purview. These six companies argued that the law was in direct violation of their First Amendment right to advertise legally-exchanged goods. The US District Court for the District of Columbia sustained precedent, granting product advertising less protection than other forms of speech. The Court even went so far as to say “Congress has the power to prohibit the advertising of cigarettes in any media,” supporting the stance of allowing Congress a “supervisory role over the federal regulatory agencies ... [and] interstate commerce.”

As a direct result of this case, the room for advertising restrictions on junk food over electronic mediums dilated. The Court outlined that Congress had the right to ban advertising when it considered it beneficial to do so. At this time, stringent legislation regarding what food and beverage companies could advertise over tv and radio would have been feasible, as commercial speech had almost no protection.


A licensed Virginia pharmacist challenged the constitutionality of a Virginia statute asserting the illegality of promoting prescription

drug prices “in any manner whatsoever.” The state’s defined interest in enacting this code was to maintain an air of professionalism for its licensed pharmacists. The Court found that the state’s interest in requiring professional standards from its pharmacists was justified, but that they may not do so by “keeping the public in ignorance of the lawful terms that competing pharmacists are offering.” This case revolutionized how the law interpreted the purpose and value of commercial free speech in a society of free-flowing ideas. The Courts lifted the defined level of interest in it to that of other forms of established protected speech (i.e. political, religious) by comparing the curiosity of a consumer for knowledge on subjects of commercialization as equal to, if not greater than, the curiosity to learn of “the day’s most urgent political debate.” Thus, a new shell of protection was granted to speech with no other purpose than to inform the public of commercial goods, directly reversing the decision made in Capital Broadcasting v. Mitchell. The possibility for restrictions on junk food, legal goods sold in American markets, declined immensely as the power of Congress to restrict advertising diminished.

C. FCC v. Pacifica Foundation

A father complained to the Federal Communications Commission after inadvertently overhearing an afternoon radio-broadcasted monologue titled “Filthy Words” which played while his son was in the car. Because of the growing number of protests about indecent broadcasts, the FCC used this particular objection as a catalyst for “clarify[ing] the standards which [would] be utilized in considering” how complaints against indecent radio broadcasts were addressed. After the case, the FCC was given power to regulate radio communications that were deemed obscene, indecent, or profane. Because

16 Id.
18 Id.
20 Id.
“Filthy Words” was played in the afternoon “when children [were] undoubtedly in the audience,” the broadcast was labeled indecent.\textsuperscript{21} This case provided legal validation for arguing that the government’s protection of children is a state interest and that communication over broadcast media does not have unlimited speech protection.

\textit{D. KidVid (1978)}

Backed with pressure from both the FDA and various health promoting agencies, the FTC attempted to implement regulations in the sphere of advertising to children. The petitions from these agencies included banning televised “candy” advertising directed towards children and banning high sugar snack advertising on television at times where audiences were composed of at least 50\% children.\textsuperscript{22} In brief, the commission proposed blocking all advertisements to children under 8 years old, and heavily restricting junk food advertising geared towards older children.\textsuperscript{23} KidVid, a proposal to limit candy ads, was proposed at a time when protection over commercial free speech was starting to bloom. After three years of deliberation, the proposal was shut down. The relationship between advertising and child safety was deemed a substantial concern, but the FTC determined that the proposed restrictions to advertising were not legally feasible at that time.\textsuperscript{24} The scope of government restriction on advertising and the rights of both advertisers and consumers were clarified by this proposal’s unfortunate but educational failure. If it were possible to restrict potentially dangerous advertising from only the eyes of susceptible children, the law may have passed. However, the audiences of television programs were and remain heterogeneous groups of people of all ages. It was determined that the rights of


\textsuperscript{22} \textit{Id} at 726.


\textsuperscript{24} \textit{Id}.
adults would be infringed upon if advertisements were restricted from their eyes in pursuit of protecting their children.


During New York State’s fuel supply shortage in the 1970s, the Public Service Commission ordered a ban on all advertising that encouraged electricity usage. Three years after the shortage was averted, the Commission kept the ban, and extended it to include all promotional utility advertising to further the nation’s agenda of energy conservation. 25 Central Hudson Gas & Electric Corp. challenged the law on First Amendment grounds. The Court’s analysis of the constitutionality of the ban resulted in the synthesis of four core criteria with the express purpose of deciding whether advertising restrictions were warranted. The four criteria are as follows: One, whether or not the speech in question was both legal and non-misleading; Two, whether the State’s proposed interest in restricting the speech was substantial; Three, determining if the advertising restriction directly advanced the State’s interest; Four, whether the restricted speech was no more prohibitive than necessary to accomplish the stated goal. 26 The Court found that the Commission’s desired restriction on promotional utility advertising passed the first three prongs of this test. The restriction not only addressed legal, non-misleading speech, but also met the State’s interest in furthering the nation’s goal of energy conservation. 27 Nonetheless, the order failed the fourth criterion. The Court found that the ban was overly broad in prohibiting all promotional advertising, unsuccessfully differentiating between products or services that would or would not have a net impact on energy usage in the state. 28 The Court did not

25 FTC Final Staff Report and Recommendation (“Final Staff Report”), Mar. 31, 1981.
27 Id. at 566, 568, & 557.
28 Id. at 557.
deny that the state’s interest in energy conservation was laudable and still left the possibility of advertising bans in the utility sector open for future legislation. The fatal flaw of the Commission’s order was failing to tailor the language narrowly enough to pertain only to companies which contributed to the state’s overall energy usage.

F. Lorillard Tobacco Company v. Reilly (2001)

After the Massachusetts Attorney General created a series of regulations against tobacco advertising, including outdoor advertising and indoor advertising visible from outdoors, tobacco manufacturers claimed these regulations violated the First Amendment. After the case circulated through the District Court and the Fifth Circuit Court of Appeals, the case went to the Supreme Court, where it was later decided that, while some of the regulations could remain, other aspects of the regulations violated the tobacco companies’ rights to free speech. For example, limiting advertising of tobacco products within 1000 feet of schools was found, under the four-prong test and least restrictive means test, to be unconstitutional. In the final opinions, Justice Thomas called for increased protection for commercial speech, even more so than had been determined by previous cases. He asserted that there is “no basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.” He noted his concern that restrictions on tobacco could potentially be applied to food advertising in the future.


When the Communications Decency Act (CDA) required that television channels transmitting sexually explicit content must either do so between the hours of 10pm and 6am, or fully block those channels, Playboy Entertainment Group filed a lawsuit claiming that

29   *Id.* at 572.
31   *Id.*
32   *Id.* at 525.
these regulations violated the First Amendment, as they were “too restrictive in nature and therefore unconstitutional.” The Court sided with Playboy, noting that the protection of children was important, but the rule was indeed too restrictive. The Court cited the least restrictive means rule, which is a general principle stating that, when limiting civil liberties, those limitations must be enforced in the least restrictive way possible. According to the Court, there was a less restrictive way to regulate sexually explicit content than the current standard. Though this case reaffirmed the government’s interest in protecting children, it indicated that protecting children could not take precedence if the law was not narrowly tailored in the least restrictive way possible.

III. Proof of Claim

To determine if or how advertising towards children can be restricted constitutionally, it is necessary to extract and analyze the variance between accepted commercial speech and full First Amendment protection. With Va. Pharmacy Bd. v. Va. Consumer Council, the Court reversed its decision from Valentine v. Chrestensen, determining communication expressing a commercial transaction as not “wholly outside the protection of the First Amendment.”

As commercial speech is considered constitutionally protected, the standard required to restrict the content of advertisements rises considerably. Unprotected speech in advertising consists of that which is false, misleading, or obscene. However, attempts at restriction for constitutionally protected speech rises to the standard of strict scrutiny, meaning the government must have a compelling interest and the restriction must be narrowly drawn to serve

33 Id. at 575.


35 Id.

36 Id. at 813.

that interest. The likelihood of this standard being reached is highlighted in Playboy, as the Court remarked “It is rare that a regulation restricting speech because of its content will ever be permissible.”

However, this verbiage implies there is a realm of commercial speech that is still vulnerable to government regulation. The extent of this realm was explored under Central Hudson Gas & Electric Corp. v Public Service Commission and developed into a four-part test. Consequently, any hypothetical legislation regarding child-targeted advertising that might limit the rights of commercial speech must pass the scrutiny of this test.

A. Part One

Firstly, the type of content being advertised must be legal and showcased in a non-misleading manner. If not, this means the content has no First Amendment protection and additional legislation would be unnecessary and redundant. As junk food is currently a legally sold product for all ages, hypothetical legislation in this arena would pass the first part of this criteria. However, the scope of what defines misleading content creates ambiguity in regard to which regulations could pass. It should be noted that the Supreme Court has clarified that commercial speech is generally deserving of First Amendment protection as far as the advertising is informational. Consequently, bans may be granted for advertising that is “more likely to deceive the public than to inform it.” Even then, the Court holds that it would much rather prescribe mandated warnings

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42 *Id.* at 564.
43 *Virginia State Pharmacy Board*, 425 U.S. at 748.
or additional informative speech to counteract deceitful marketing than take away a person’s right to speech altogether.\footnote{Central Hudson Gas & Electric Corp., 447 U.S. at 557.} \footnote{Thompson v. Western States Medical Center, 535 U.S. 357 (2002).}

Scholars, health experts, and government agencies have argued that any advertisement could be argued as deceitful if it is directed towards a child, as children have less understanding of the purpose of advertisements. Additionally, researchers argue that the misleading nature of these advertisements is partially to blame for the obesity epidemic of modern society.\footnote{Zauderer v. Office of Disc. Counsel, 471 U.S. 626 (1985).} \footnote{Matthew A Lapierre ET AL., The Effect of Advertising on Children and Adolescents, 140 American Academy of Pediatrics (2017).} \footnote{Food Marketing to Children and Adolescents, Federal Trade Commission (Apr. 7, 2014), https://www.ftc.gov/food-marketing-to-children-and-adolescents.} \footnote{Rita-Marie Cain Reid, Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach, 51 Wiley Online Library (2014).} \footnote{Mary Story, Food Advertising and Marketing Directed at Children and Adolescents in the US, 1 International Journal of Behavioral Nutrition and Physical Activity (2004).} The government has addressed this interpretation of misleading within advertising, but only to a certain extent. The FTC, the government’s prime advertising regulatory agency, judges deceitful advertising based on a commercial’s intended audience. Thus, the agency has restricted marketing that promotes toys with seemingly non-misleading exaggerations from an adult perspective, but which may be more confusing and deceitful to the target child audience.\footnote{Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order). See also Mattel, Inc., 79 F.T.C. 667 (1971) (consent order) \footnote{Friedman v. Rogers, 440 U.S. 1 (1979).}}

However, this is a more in depth interpretation of the word misleading than has been laid out by the Court. It has defined the term as using false names in professional practice with the intention to deceive\footnote{Friedman v. Rogers, 440 U.S. 1 (1979).} or being unclear on the full cost of a service,\footnote{Friedman v. Rogers, 440 U.S. 1 (1979).} both in regard to the impact on paying customers (generally adult/
teenage audiences). Specific applications to misleading advertising in regards to a younger audience or those with undeveloped skepticism and discernment has not been explored by the Court.

As KidVid earlier exemplified, the FTC toes a careful line between its definition of misleading in regards to advertisements for children and what the Court has explicitly stated is constitutional. Even with the FTC’s more progressive rulings, it still does not have the capability to restrict advertisements that have no dishonest claims. The Court has not established if an advertisement that does not technically lie about the ingredients or capabilities of a product, but alludes to fit, healthy children (falsely) being the prime consumers of junk food, is considered misleading.

B. Part Two

The second Central Hudson qualification is whether the stated government interest in restricting the advertising is significant.\textsuperscript{53} Let’s Move,\textsuperscript{54} Safe Routes to School,\textsuperscript{55} and Head Start\textsuperscript{56} are all government initiatives that have been implemented with the goal to improve childhood health and prevent obesity from a young age. Clearly, there is a substantial government interest in improving the health of children. However, the question at hand is not necessarily whether the government has an interest in preventing obesity, but if the government has an interest in preventing content from reaching children that may increase obesity.

When considering the goal of protecting children from harmful media in general, governmental interest is splintered. In terms of child protection from public broadcast media over television and radio, the government has defined its interest as present. In the majority opinion of FCC v Pacifica, the Court highlighted that certain speech can

\textsuperscript{54} Central Hudson Gas & Electric Corp. 447 U.S. at 568.
trigger a more negative impact in a child than an adult. Even the dissent emphasizes that “the government unquestionably has a special interest in the wellbeing of children.” However, in other forms of media, the government holds fast in allowing virtually all speech outside of the obscene to be accessed by children. Even intense violence and depictions of sexual assault in video games are protected.

This is a stark contrast from its position on broadcast media, which gives the FCC power to restrict what is deemed obscene, indecent, or profane. In terms of the law, obscenity is defined as content that appeals “to an average person’s prurient interest”, “depict[s] or describe[s] sexual conduct in a ‘patently offensive’ way”, and “as a whole, lack[s] serious literary, artistic, political scientific value.” Indecency is defined as content that “portrays sexual” subjects “in a way that is patently offensive” but does not fulfill the requirements to be obscene. Profanity consists of “grossly offensive language that is considered a public nuisance.” With these definitions taken into account, it is clear that in order to restrict speech in broadcast media, there is a much lower bar to reach than restricting speech in other kinds of media such as cable or satellite tv and radio. The FTC gives broad guidelines prohibiting misleading or unsubstantiated claims over the internet, but as elaborated upon earlier, what is defined as misleading has not been made clear by the Supreme Court. More in depth regulation is controlled by the private sector such as social media companies, but the constitutionality of these regulations is often a contentious topic. This is why concrete case law around advertising in more modern technologies would be necessary to predict which advertising regulations are truly constitutional.

58 Pacifica Foundation, 438 U.S at 758.
61 Id.
62 Id.
Broadcast media skirts around full First Amendment regulations for multiple reasons, two of which are outlined by the Pacifica Court. The Court first explains that “the broadcast media [has] established a uniquely pervasive presence in the lives of all Americans,” and second, that it is “uniquely accessible to children,” even those who are too young to read.63 The Court further explains this pervasiveness when discussing how broadcasts are randomly tuned in and out of, which prevents adequate warnings, causing indecent content to be unleashed without a user even knowing what they will be tuning into before it is too late.64 The reasons given to restrain broadcast media more heavily are the very same reasons that could be applied to the internet and ads on social media. There is no way to guarantee what a user may see without warning when opening a social media app. Additionally, media outlets are easily accessible, and with the omnipresence of handheld devices, children are frequently tuning into these outlets and webpages with little supervision. In this instance it is important to note that the Pacifica decision, in which this differentiation of protection relies on, was supported by only five out of the nine justices. Again, in 2012, the Court determined that the FCC’s regulatory rights were indeed constitutional but in another 5-4 split.65 Clearly, the Court has a difficult time determining the constitutionally supported extent of speech regulation and defining which speech repeals are unbiasedly beneficial for children and/or the general public.

Ultimately, the Court is firm in holding that the rights of children shall not be put above those of the adult. The Pacifica Court refers to the following reasoning in Butler v Michigan for repealing speech restriction geared to protect children: it unconstitutionally diminishes adult media exposure to a level that is only “fit for children.”66 A predominant, if not the prime, reason for the failure of the FTC’s proposed KidVid legislation abides by similar logic. By reducing

63 *Pacifica Foundation*, 438 U.S at 749.
64 *Id*.
television commercials (to audiences with broad age ranges) to avoid
junk food promotion for the sake of impressionable children, adults
would be subjected to the same standards deemed permissible for
children. The commercial speech doctrine, first established by Vir-
ginia State Pharmacy Board v Virginia Citizens CC, provides adver-
tisers the right to advertise to consumers and gives consumers the
right to hear from advertisers.67 Ultimately, although the government
has an interest in lowering obesity rates and protecting children, it
will not do so at the expense of First Amendment values.

C. Part Three

Third, the asserted restriction must markedly and directly
advance the government’s interest.68 In this scenario, the govern-
ment’s interest is to reduce childhood obesity. While there is repu-
table research correlating junk food advertising to increased rates
of obesity, the data and information is limited. A direct, causal link
between the two is not widely accepted as there are many other fac-
tors to consider, such as socioeconomic status, genetics, family life,
etc. Additionally, research exploring the impact of specifically online
advertisements is sparse and difficult to execute. With an increase
of tailored advertisements (curated for individual users based on
third party data collection) and blurred advertisements (promo-
tion of products disguised as normal entertainment or educational
content),69 there are even more confounding variables to account for
in any scientific study. Trying to assess ad content or frequency and
the resulting impact on children’s obesity rates is overly variable
as each child is being served curated content. Thus, the standard
of scientific research that hypothetical advertisement restrictions
must have to prove capable of “markedly and directly”70 carrying

67 Virginia State Board of Pharmacy et al. v. 425 U.S. at 748.
68 Central Hudson Gas & Electric Corp. 447 U.S. at 557.
69 Blurred Lines: Advertising or Content?, Federal Trade Commission
(December 4, 2013), https://www.ftc.gov/news-events/events/2013/12/
blurred-lines-advertising-or-content-ftc-workshop-native-advertising.
70 Central Hudson Gas & Electric Corp. 447 U.S. at 568.
out the government’s interest is crucial to define. Brown v Entertainment Merchants Assn. gives insight into how this standard has been applied. In this case, the Court concluded that California had failed to “draw a direct causal link between violent video games and harm to minors.”\textsuperscript{71} As the Court examined the research to prove such a link, it concluded that only a correlation between violent video games and aggressive behavior could be drawn. One of these dismissed studies is surprisingly similar to an oft-cited research paper tying junk food advertising to obesity. This junk food advertising analysis draws from multiple experiments and concludes that, on average, children eat 30 more calories minutes after viewing a junk food advertisement than children who do not. This study also demonstrates that usually these dietary choices are of lower nutritional value, but admits that the evidence is low to moderate at best.\textsuperscript{72} In Brown, a study involved children acting slightly more aggressive or loud in the few minutes after playing a violent video game compared to a nonviolent one.\textsuperscript{73} If this sort of study has been dismissed by the Supreme Court before, it will likely be dismissed again.

Without adequate research to prove a causal relationship, a proposed law will not pass this third requirement. While previously ads were curated to display similar content to everyone, recent advertisement techniques have focused on individual users, making studies in this realm increasingly difficult to execute. This, combined with the plethora of other factors that contribute to obesity, suggests the Court would interpret restrictions on this area of advertising as excessively broad.


\textsuperscript{72} B. Sadeghirad, T. Duhaney, et. al, Influence of unhealthy food and beverage marketing on children’s dietary intake and preference, 17 Obesity Reviews, 945-959, (October 2016).

\textsuperscript{73} Brown, 564 U.S. at 800.
D. Part Four

The fourth Central Hudson test, and the most consistently failed prong, is whether or not the advertising restriction is sufficiently tailored to bring about the asserted interest.\(^\text{74}\) The Supreme Court has perpetually strengthened its position on First Amendment protection, asserting that adults have a right to information even at the expense of children having improper exposure. In US v Playboy, the decision was made that if “a plausible, less restrictive alternative” is available for “a content-based speech restriction,” it must be proved that the more restrictive option is necessary to achieve the asserted interest. Advertising today is so pervasive in all forms of media that to prevent children’s exposure to junk food ads, marketing would have to be restricted on every medium.

The debate over what defines a sufficient tailoring has been unclear, with split opinions on the issue. No matter how noble the cause the government chooses to carry forth, if the legislation is more restrictive than deemed necessary, the regulation will fail. As in Playboy, the interest at hand of protecting children is overshadowed by the declared, overbearing means of achieving this goal. The case dealt with the Telecommunications Act of 1996 and was analyzed for its section 505—requiring a ban of sexually oriented programming from outside the hours of 10pm to 6am. This section was deemed unconstitutional, as its section 504 requiring a scrambling of this programming for non-subscribers was seen as just as effective and less restrictive.

A ban restricting all advertising geared towards children is undoubtedly more restrictive than the Court has deemed necessary, as it would inevitably restrict the amount of content-based speech that would reach adult consumers. Thus, neither a narrowly tailored law nor an all encompassing law would be able to both substantially and directly carry out the government’s interest in slowing the childhood obesity rate through advertising law.
E. Cigarettes

The outlined four-part test above is a theoretical framework for Courts to follow but does not, understandably so, give a concrete or comprehensive list of exact situations that allow for advertising limitations. Understanding which products have received the kinds, or similar kinds, of restrictions proposed towards junk food is important, then. In this commercial speech arena, notably only one type of legal good has actually faced the kinds of restrictions that junk food has been threatened with: tobacco. Analyzing the Court’s stance on commercial speech protection at the times of these restrictions and what similarities there may be between the two categories of product is necessary.

After the passage of the Public Health Cigarette Smoking Act in 1972 and the subsequent lawsuit of Capital Broadcasting Company v. Mitchell, Congress was provided an expansive blanket of authority to “prohibit the advertising of cigarettes in any media.”75 The case was appealed but failed to reach the Supreme Court as it was denied certiorari. The Federal District Court underlined the type of speech protected by the First Amendment at the time, explaining that the radio companies in the case had not lost their right to express their opinions over whether or not cigarette smoking was bad, and thus, the company’s “speech [was] not at issue.”76 Staying consistent with the logic of this ruling, restrictions on junk food advertising, or food advertising in general, would have easily passed. Seven years later, the Supreme Court provided more clarity on the protection of commercial speech in Virginia State Pharmacy Board v Virginia Citizens Consumer Council. Commercial speech was finally distinguished as valuable as the perceived consumer’s interest in commercial information was seen as “keen, if not keener by far, than his interest in the day’s more urgent political debate.”77

76 Id.
77 Va. Pharmacy Bd. 425 U.S.at 748.
Although the constitutionality of the decision from Capital Broadcasting has not been tried after this standard of protection was established, a decision in 1998 solidified the restrictions that resulted from the case and expanded upon the restrictions that tobacco companies must adhere to. This decision, known as the Master Settlement Agreement (MSA), was not carried forth by law but by a settlement between 46 US states and the largest tobacco companies of the time. The companies were no longer able to target youth in advertising of tobacco products by product placement in cartoons, concerts, sports games, sport team endorsements, events with large youth audiences, and billboards. They were also unable to receive any payment for promotion in tv, theater, music, and video games.

These companies also give repeated payments to the states to counteract the massive medical cost burden associated with tobacco-related disease. The likelihood of these restrictions and mandates passing constitutional scrutiny is unlikely. For example, banning tobacco billboard advertisements was included in the MSA. However, in Lorillard, the Supreme Court explicitly stated billboard restrictions on tobacco were unconstitutional even when considering the stated goal of protecting children.

In 2009, the Obama administration passed the Family Smoking Prevention and Control Act (FSPCA). This act disallowed tobacco sponsorships, free sampling of tobacco, branding of non-tobacco merchandise, billboard advertising, and the use of colors outside of black and white on packaging. The billboard restriction was almost immediately overturned in a Kentucky District Court case as comparisons were drawn between the new law and what was


79 Lorillard Tobacco Co. 533 U.S.

outlined in Lorillard.\textsuperscript{81} On appeal, the Sixth Circuit upheld most of the restrictions on tobacco that the Kentucky Court affirmed.\textsuperscript{82} On a separate appeal, the plaintiffs chose to only challenge the FSPCA’s mandate of graphic images being displayed outside of tobacco boxes (these images included victims of tobacco addiction and the physical repercussions).\textsuperscript{83} Thus, the rest of the restrictions weren’t subject to further constitutional scrutiny. At face value it might seem that a court would allow certain restrictions on junk food advertising such as banning branding on non-junk food merchandise (i.e. on toys or clothes) if these restrictions have been deemed permissible for tobacco. Upon closer inspection, the two circumstances in which tobacco and junk food advertising restrictions have and would come to pass are very different. The constitutionality of the restrictions was never tried by the Supreme Court (besides the billboard bans) which means the case law is less binding. Secondly, children are legally allowed to eat junk food but smoking cigarettes at that age is not permitted. Thirdly, the MSA has already established many of these restrictions so it is less shocking for tobacco companies to implement many of these regulations. The MSA already outlines similar bans to the FSPCA such as disallowing tobacco product placement in various contexts. The same is not true for junk food. The sudden restriction of junk food advertising would be more shocking for these companies as they have yet to face the same kinds of regulations tobacco has. It is likely, then, that even more vigorous measures would be taken by these companies than have been seen from tobacco companies to assess the constitutionality of this advertising legislation. In the future, junk food advertising might face similar restrictions as tobacco advertising has, but for the stated reasons, compiled with the Supreme Court’s opinion in Lorillard, it does not seem likely. In Lorillard, Justice Thomas


\textsuperscript{82} Disc. Tobacco City & Lottery, Inc. v. United States, No. 10-5235 (6th Cir. 2012).

\textsuperscript{83} R.J. Reynolds Tobacco Co., et al. v. FDA, et al., No. 11-5332 (D.C. Cir. 2012).
even expressed his concern over this exact scenario, citing how the increase of tobacco advertising restrictions might bleed into other spheres such as junk food advertising.\footnote{Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) at 589, 590.}

Overall, many of the restrictions facing tobacco are either outside of the Supreme Court’s jurisdiction or have not been subject to Supreme Court review. In order for more secure change in the suppression of junk food advertising, efforts should not be targeted at creating new interpretations for the constitutionality of such regulations, but at evolving what has already been deemed constitutional in existing law and case law.

IV. Solutions

Though a Supreme Court ruling might be the most widespread and binding way to pass protective laws regarding children and advertising, current precedent indicates that federal law largely in favor of children at the expense of older audiences will fail to pass. However, there are other methods that may be successful alternatives to a Supreme Court ruling: increased restrictions within constitutionally deemed laws and more emphasis on vending machine regulations. The following outlines include potentially viable solutions moving forward that work in tandem with existent law.

A. COPPA and Existing Law: Increasing Protection

The Courts have made it clear that restricting free speech should be a last resort. Therefore, one of the most compelling reasons not to establish new advertising law standards or precedent is because there are still pursuable alternatives, such as enhancing existing measures within the Children’s Online Privacy Protection Act (COPPA) or mandating informational speech to combat deceit.

COPPA, passed by Congress in 1998, gives the FTC responsibility to impose “requirements on operators of websites or online
Services”85 to prevent the collection of data from children or those who are under thirteen years old. If data is collected, parental consent must be given, and the information must remain completely confidential. However, parental consent can easily be falsified, particularly on social media accounts, where both ads and children are increasingly present.

The rise of social media and platform advertising has skyrocketed from the time COPPA took effect. However, while tech accounts have found themselves in hot water over not taking children’s privacy laws seriously enough (in 2019 TikTok was ordered to pay $5,700,00086 in violations, and Youtube was fined $170,000,00087 on similar accounts), it is still far too simple to bypass platform age verification and privacy measures. Checkboxes affirming parental consent and scroll boxes seeking a birthdate are easily manipulated.

Facing scrutiny and recognizing the flaws with their own systems, companies like Meta announced in 2022 that they’re looking into new ways to verify age.88 These solutions include uploading ID, recording a video selfie, and asking 3 mutual adult friends to verify age. However, one of the main drawbacks to these measures is that they are only implemented for existing users trying to edit their date of birth on the platform. Upwards of 40% of kids under thirteen use


social media, so a better way to curb any rise in these numbers is to implement these new verification measures before users join a platform. Similarly, other social media platforms such as Yubo are taking ID verification a step further by implementing age-identification methods that can fairly accurately determine the age of a user based on facial recognition software.

In order for age verification measures to be standard across all platforms and to give reason for smaller companies (without the same level of public pressure to change compared to larger companies like Meta) to implement these measures, it would be most productive for updated age verification regulations to come from an addendum or alteration to COPPA. Despite the declared intentions of media companies to increase children’s data protection, we have seen companies such as YouTube/Google try to ignore their knowledge of illegal collections of children’s data to ultimately gain a profit. The wording of COPPA requires that companies have “actual knowledge” of threats to children’s privacy to be held liable, which encourages platforms to turn a blind eye to issues within their systems. If COPPA was updated to address these issues while still retaining the original goal of the legislation (to protect the privacy of children online) and without violating the rights of the platforms, this adjustment would be a major step forward for the rights and protections of children in the online world.

In 2021, a new bill titled the “Children and Teens’ Online Privacy Protection Act” was introduced to Congress by Senators Edward J. Markey and Bill Cassidy. The purpose of this legislation is to increase the protections outlined by COPPA by banning data collection on online users 16 and under (up from 12) without consent, allowing

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89 Katie Canales, 40% of kids under 13 already use Instagram and some are experiencing abuse and sexual solicitation, a report finds, as the tech giant considers building an Instagram app for kids, (May 13, 2021), https://www.businessinsider.com/kids-under-13-use-facebook-instagram-2021-5.


91 Gaynor, supra note 82.

92 Children’s Online Privacy Protection Rule (“COPPA”), supra note 80.
for an erasure of previous data collected from a child or teen and establishing a new division for “Youth Privacy and Marketing” at the FTC. Although these would be steps toward progress, revisions to COPPA expanding the ages of youth whose data rights are protected is futile without additional revisions specifying improved methods for determining how old these users are in the first place.

President Joe Biden proclaimed in his 2022 State of the Union address that targeted advertising to children should be outlawed, and the collection of children’s personal data by tech companies should be banned. With this call to action, the FTC has taken measures to determine what legally can be done to protect children from the onslaught of advertising today. The agency recently held an event titled “Protecting Kids from Stealth Advertisements in Digital Media.”

During the course of this event, various speakers suggested a few novel ways to implement mandated speech that would work within what the Supreme Court has already deemed as constitutional. One of these suggestions was provided by Eva A. Van Reijmersdal, an Associate Professor of Persuasive Communication at the University of Amsterdam. She explains that “sometimes kids don’t understand that sponsoring could be a bad thing.” Many children cannot understand how sponsorships might be misleading or negative because these children say they “also do sponsorship in school where [their] parents sponsor [them] to raise money for [a] charity.” This note highlights the idea that even if advertisements are clearly labeled and easily identifiable, children may still be misled about the purpose of such advertisements. She suggests a way to combat this is

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96 Id. at 12.
by curating “one icon” for all platforms, content types, nationalities, and countries that would function as a flag for both children and adults, indicating content is being advertised. Over time, this icon could help make all ages of users more aware when they are being marketed to in an age where even adults have difficulty discerning between candid reviews and paid sponsorships.

The federal government has already determined that mandated nutritional food labels are constitutional as they require food manufacturers to be honest about the product they are putting forward into the market.97 A mandated icon requiring advertisers and influencers to be honest about the product they are promoting to the world falls under this same sort of logic. Although mandated icons would not bring about advertising restrictions, they may increase the ability for children to distinguish between normal and advertising content.

B. Vending Machines: A Closer Look

Vending machines can be an effective form of advertising, and they have a heavy presence within public schools, where they contain energy-dense, high-fat foods. The easy access children have to these machines is arguably a contributor to growing obesity levels in kids.98 While vending machines may be disruptive to health, the fact that children’s main access to them comes from schools is actually beneficial for creating legislation. Public schools do not have the same First Amendment freedoms as commercial speech agencies99—this means that restrictions for food advertisements within schools would likely not have to undergo the four prong test, and, therefore, the regulations would be easier to pass.


99 supra note 82.
In the case *Hazelwood School District v Kuhlmeier*, precedent was set that ensures speech restrictions in schools are considered reasonable so long as the policy is consistent with the school’s purpose – educating students. Furthermore, any regulation must be reasonable and viewpoint neutral. Arguably, “a policy will likely be considered reasonable if it promotes a school environment focused on learning rather than commercial activity and protects and promotes student health and welfare by excluding advertising that is inconsistent with the district’s wellness policy,” a position which upholds the idea of increasing vending machine regulations in schools.

One of the first national restrictions regarding public-school vending machines came in 2016, when the USDA established a rule that food and beverages could not be promoted in schools, unless those products met the USDA Smart Snacks in School nutrition standards. There have also been many other initiatives passed to promote healthy nutrition in schools, such as the Healthy, Hungry Free Kids Act. However, these programs focus on school breakfasts and lunches and only require that vending machines be turned off during these periods. For the rest of the day, vending machines are left on.

A research study in Florida in 2010 analyzed children’s behavior regarding vending machines in middle schools. The study found that even when vending machines offered healthy options, so long as there were unhealthier options, children consistently chose items that had negative health influences. Furthermore, another research study on this topic was conducted in 2020. This study also followed middle-school aged children, but this time, it followed them across 40 states and for 3 years. The results of the research found that

101 *supra* note 82.
stronger vending machine restrictions correlated with a decrease in child obesity.103

These studies suggest that increasing vending machine regulations would be beneficial. Vending machines are advertisements that dangle enticing, unhealthy food right in front of children, who are growing ever more susceptible to obesity issues. Vending machine regulations would be particularly helpful, especially because they would help protect older children in schools as well, who are still susceptible to advertising and obesity, but who are left out of other protection measures, such as COPPA.

V. CONCLUSION

The vast swaths of information that are transferred to the public population today are leagues ahead of the capabilities of speech dissemination when the Constitution was originally written. Consequently, the law has been forced to enroll in a race between its own growth and technological advancement. As explored, growth of the advertising industry has been met with backlash from scholars and health experts, due to its negative correlative effect on child development and health, evidenced by ever-increasing obesity rates. However, precedent under the First Amendment regarding consumer and advertiser protection often supersedes the desire for increased child protection in this realm. In order to combat these legal obstacles, regulations preventing junk food advertising from reaching children should be focused less on modifying Supreme Court case law and more on strengthening existing laws and exploring viable protections within what the Court has already deemed constitutional.

The Fourth Amendment in a Digital Age: Defining Boundaries in Law Enforcement Surveillance of the Home

Josh Hoffman¹ and Jared Xia²

I. Introduction

In 2013, federal agents surveilled the home of Travis Tuggle for 18 months as part of an ongoing investigation of a methamphetamine distribution conspiracy. Officers fixed three video cameras on poles in public property that captured around-the-clock footage of the exterior of Tuggle’s home. Using this footage as evidence, the government secured a search warrant and indicted Tuggle for possessing and distributing methamphetamines. Tuggle sought to suppress this video evidence by claiming that this long-term, secret video surveillance of his home constituted a warrantless search that violated his rights protected by the Fourth Amendment. Tuggle appealed in the 7th Circuit on the basis that the camera recordings amounted to an illegal search and, therefore, a breach of his Fourth Amendment rights. His appeal was denied.³

The issues that motivated the establishment of the Fourth Amendment can be traced back to the colonial era, when the casual

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and extensive usage of general “writs of assistance” granted English authorities access into any home to search for prohibited goods. In response, the Founders sought to establish clear boundaries to protect citizens’ freedom from unusual searches and seizures. Intending to protect “all the comforts of society” and to make “every man’s house his castle,” the Founders instated the key clause of the Fourth Amendment that protected citizens’ “rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, [which] shall not be violated by warrants issued without probable cause.”

The various interpretations of the language of this amendment have raised questions as to what constitutes a search. In Olmstead v. US (1928), the Supreme Court deemed that fourth amendment rights could only be infringed upon by a physical intrusion into one’s home or the seizure of physical items. However, the Supreme Court’s interpretation of a search changed in Katz v US (1967) when the Court held that when a person has a reasonable expectation of privacy, even eavesdropping on conversations could constitute an unreasonable search. As part of their ruling, the Court created the Reasonable Expectation of Privacy (REP) test, a two-part test that defines an illegal search as having occurred when (1) a person “has exhibited an actual (subjective) expectation of privacy”

4 95 Eng. Rep. 817, 818 (1705)
5 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (2d ed. 1871)
6 U.S. Const. amend. IV
7 Olmstead v. United States, 277 U.S. 438 (1928)—In this case, the defendant’s call was surreptitiously recorded and used as evidence against him. In their opinion, the Supreme Court stated that the Fourth Amendment should not be stretched to forbid hearing and sight as well.
8 Katz v. United States, 389 U.S. 347 (1967)—In this case, Katz was convicted of transmitting wagering information across state lines via telephone. Although the Court of Appeals ruled that the call recorded by the government did not constitute a search (there was no physical breach of privacy), the Supreme Court overruled their decision and created the REP test in the process.
and when (2) society is prepared to recognize that this expectation is (objectively) reasonable.\textsuperscript{9}

As our country enters a new digital age when personal information is easily shared with and accessed by outside parties, Fourth Amendment interpretation has been reevaluated. Where surveillance was once limited to the physical capacity of police officers and other personnel, cameras can monitor 24/7 without need for rest or reprieve. Likewise, new technologies such as thermal imaging now allow law enforcement to extend through the walls of previously shielded homes, threatening privacy more than ever before.\textsuperscript{10} Officers can also easily get a hold of one’s cell phone history and use its location features to track its user’s movements.\textsuperscript{11} Because of technology’s ever-expanding encroachment on American private life, Fourth Amendment rights in this digital age have become increasingly important.

When dealing with privacy issues similar to those in Tuggle’s case, courts across the nation have come to differing conclusions about the constitutionality of using surveillance and tracking technologies while conducting criminal investigations. This stems from fundamental differences in court opinions over how to apply the REP test and whether the duration of law enforcement surveillance plays a role in that test.\textsuperscript{12} Without a reevaluation of what a “search” is in a digital age, the eighteenth-century diction of the Constitution will not provide the needed clarity to tackle twenty-first century privacy issues.

\textsuperscript{9} Id.
\textsuperscript{10} Kyllo v. United States, 533 U.S. 27, 32 (2001)
\textsuperscript{11} Carpenter v. United States, 138 S. Ct. 2206 (2018)
\textsuperscript{12} Petition for Writ of Certiorari, Tuggle v. United States (2021), (No. 21-541) In their cert petition, Williams & Connolly LLP cite the First, Sixth and Seventh Circuits as concluding that long-term, hidden video surveillance of a private residence does not violate the Constitution. The Fifth Circuit and some state supreme courts have declared such a search unconstitutional. This paper will later address some of these decisions.
II. Claim

Travis Tuggle’s case is a prime example of this clash of developing technology and constitutional rights. As law enforcement gets greater access to increasingly intrusive technology, questions have inevitably been raised as to what the limits are when it comes to government surveillance of the home. Without Supreme Court precedent on the issue of law enforcement’s usage of this kind of long-term video surveillance, courts remain divided about the constitutionality of this practice. However, by analyzing the original Founders’ intent when writing the Fourth Amendment and applying logic used by the Supreme Court in cases of similar nature, this paper seeks to support that hidden, long-term video surveillance of a private residence is a violation of the Constitution and constitutes an illegal search.

III. Courts Are Divided

In trying to provide an answer about the limits for government technology usage in surveillance of the home, courts of various levels have reached different conclusions. For example, in determining the constitutionality of using long-term, secret home surveillance via pole-cam, the Fourth, Sixth, and Tenth circuits ruled in favor of the usage of the cameras on poles for secret surveillance.13 Some of these decisions were made because the specific perspective of the camera was about equivalent to what any nearby neighbor or passerby could observe. In another instance, the courts ruled in favor of the usage of surveillance both outside and within one’s apartment because it didn’t collect the entirety of a defendant’s actions

13 United States v. Vankesteren, 553 F.3d 286, 287 (4th Cir. 2009)—“a hidden, fixed-range, motion-activated video camera placed in the [defendant’s] open fields” was not in violation of Fourth Amendment. See Also, United States v. Trice, 966 F.3d 506, 516 (6th Cir. 2020)—government surveillance from pole camera on public property of a defendant’s home over 10 weeks was not in violation of Fourth Amendment. See Also, United States v. Jackson, 213 F.3d 1269, 1282 (10th Cir.)—audio recordings made under FBI cars and video from telephone poles are not in violation of the Fourth Amendment
throughout the day.\textsuperscript{14} As a result of many of these rulings made by federal courts, some state courts have also decided to rule in favor of the usage of pole cameras in searches.\textsuperscript{15}

On the other hand, other state supreme and regional appellate courts have ruled that the usage of pole cameras is in violation of the Fourth Amendment. The Fifth Circuit ruled in \textit{United States v. Cuevas-Sanchez} that its pole camera surveillance was unconstitutional because it gave the government an otherwise unavailable view into the defendant’s backyard, which was surrounded by a fence.\textsuperscript{16} The South Dakota Supreme Court ruled that law enforcement’s usage of video surveillance gave them access to information that wasn’t attainable by traditional surveillance tactics, such as stakeouts.\textsuperscript{17} The Colorado Supreme Court ruled in \textit{People v. Tafoya} that the surveillance ‘involved a degree of intrusion that a reasonable person would not have anticipated.’\textsuperscript{18} Other courts ruled against the constitutionality of this secret surveillance due to its long duration and continuous nature.\textsuperscript{19} In light of these disagreements between courts, it will be important to take a closer look at the processes determining the constitutionality of a search in order to make a decision pertaining to the constitutionality of long-term, secret video surveillance.

\begin{itemize}
\item \textsuperscript{14} \textit{United States v. Harris}, No. 17-CR-175, 2021 WL 268322 (E.D. Wis. Jan. 27, 2021)
\item \textsuperscript{15} \textit{State v. Duvernay}, 2017-Ohio-4219, 92 N.E.3d 262, 269–70, at ¶ 25 (3d Dist.)—Ruled that law enforcement’s usage of cameras outside a residence for 9 days did not violate 4th Amendment.
\item \textsuperscript{16} \textit{Cuevas-Sanchez}, 821 F. 2d 248 (5th Cir. 1987).
\item \textsuperscript{17} \textit{State v. Jones}, 903 N.W.2d 101 (S.D. 2017)—In this case, a camera continuously recorded and uploaded videos of a suspect’s residence over the span of two months.
\item \textsuperscript{18} \textit{People v. Tafoya}, 494 P.3d 613 (Colo. 2021)—In this case, a video camera was mounted on a utility pole by law enforcement and aimed at Tafoya’s property. The camera captured constant footage of both Tafoya’s house and backyard, which was covered by a six-foot-tall fence.
\item \textsuperscript{19} \textit{State v. Jones}, 903 N.W.2d 101 (S.D. 2017)—An example in which the court referenced the ability of a camera to collect an “aggregate” of a person’s movements in and around their home.
\end{itemize}
IV. PROOF OF CLAIM

A. The Applications of the REP Test

The Fourth Amendment protects against “unreasonable searches and seizures”.\footnote{U.S. Const. amend. IV.} Since 1967, courts have relied on the implementation of the “REP test” to analyze whether a search or seizure was conducted unreasonably. This test originated in the Supreme Court case \textit{Katz v. United States}, in which the petitioner was convicted of transmitting wage information across state lines via telephone. The Court ruled in favor of Katz and, in the process, created the “REP test” to define what constitutes an unlawful search.\footnote{\textit{Katz v. United States}, 389 U.S. 347 (1967)}

Under the two aforementioned guidelines of the REP test, once an individual has demonstrated an expectation of privacy that society recognizes as reasonable, any search or seizure conducted in that sphere should be classified as unreasonable and a breach of Fourth Amendment rights. Despite the differing court opinions about how the expectation of privacy is determined, this paper posits that individuals should be able to expect privacy in and around the confines of their homes, a place which has long been regarded by the Court as a sacred sphere of human life.\footnote{\textit{Boyd v. United States}, 116 U.S. 616 (1886)—Quotation from the Court opinion on this case: “… they apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”} This expectation is also one that society is prepared to recognize as reasonable.\footnote{Michael Allen Fox, Why is home so important to us?, Oxford University Press (February 14, 2023), https://blog.oup.com/2016/12/home-place-environment/}

In the case of Tuggle v. United States, the Seventh Circuit’s decision rests on the fact that Tuggle exhibited no “actual…expectation of privacy”. This decision would limit the Fourth Amendment’s protection of the home to only those individuals with the time and means to erect a fence or barrier around their property. Yet the
home is the only location singled out in the Fourth Amendment (“The right of the people to be secure in their persons, houses...”).

This fundamental protection of the home does not rely upon any stipulation of “an individual’s ability to afford to install fortifications and a moat around his castle.”

The Court has also previously held that “what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” Thus, even an individual’s yard may be considered protected under the Fourth Amendment if it can be argued that it is a place the individual has exhibited an expectation of privacy in. Yet, as stated previously, courts are divided as to what showing a reasonable expectation of privacy should be when it comes to one’s own home. The issue of whether the curtilage itself is accessible to the public is not in question so much as the intent of the homeowner.

Where once homeowners could rely on the fact that police forces had neither the time nor resources to surreptitiously monitor their homes around the clock, technology has eliminated that reassurance. Under the current status quo, police forces can continually adopt ever more invasive technology practices, so long as society has accepted that their privacy will shrink in sectors involving said technology. When interpreting Fourth Amendment rights, the Court has often referred to the original intent of the writers of the Constitution. Yet without intervention from the Court, rights meant to be protected by the Fourth Amendment are quickly vanishing under ubiquitous law enforcement surveillance.

The ability of pole cameras to capture constant footage of the daily habits and rituals of families inside and around their homes can give law enforcement unprecedented access to the details of their private lives. This access is even more permeating when a pole

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24 U.S. Const. amend. IV

25 Mora, 150 N.E.3d at 366-67—In this case, mounted cameras monitored the homes of two people and led to the indictment of three. The Massachusetts Supreme Court ruled that long term, hidden video surveillance of a private residence constituted a search and was unconstitutional.

camera is pointed over a fence or at any place that isn’t typically visible to a passerby. Although it is reasonable to expect your house to be open to the view of any person on the street, a pole camera’s range of view and clandestine nature breaches the privacy many people enjoy in their homes.

The Supreme Court has also implied that the length of surveillance greatly impacts the constitutionality of the action.²⁷ Where one might understand that they’ll be noticed going to and from their home, no one expects to have their movements dogged and recorded day in and day out. Long-term utility pole cameras monitoring a private residence violate the REP test because no one expects to be watched by an unblinking police force that needs no sleep, rest, or break.²⁸ Individuals can expect privacy in the sum aggregate of their movements in and around their home, even if they may not be able to reasonably suspect that all their movements in their curtilage go undetected.

B. The Applications of Mosaic Theory

In order to provide a clearer definition of what constitutes an unlawful search, the Supreme Court has decided to employ “mosaic theory” in their ruling for US v Jones, which dealt with the use of a GPS to track the movements of a suspected drug trafficker over a wide span of time and geography.²⁹ The mosaic theory presents the idea that more can be learned from a collection of information that provides a broader context than from singular pieces of information. As such, in US v Jones, the Supreme Court decided that, due to the cumulative nature of information obtained by the government over time, this constituted a search and was thus in violation

²⁸ State v. Jones, 903 N.W.2d 101 (S.D. 2017)—In their opinion, the South Dakota Supreme Court said this regarding the uploading of footage via pole camera surveillance: “More importantly, this type of surveillance does not grow weary, or blink, or have family, friends, or other duties to draw its attention”
of rights protected by the Fourth Amendment. This ruling set a key precedent in determining whether the principle of defining a search lies in the means of its conduction or its duration.

In another case, United States v. Maynard, the Supreme Court ruled that the collection of one’s location through a cellular device uncovered ‘an intimate window into a person’s life.’\textsuperscript{30} The cumulative nature of this collection of information violated the person’s expectation of privacy because it gave access to “the whole of a person’s movements over the course of a month,” revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’ By applying mosaic theory, the Supreme Court concluded that the likelihood that a stranger could gather all this information would be “essentially nil.”

Although the Supreme Court has used the mosaic theory in many of its key decisions pertaining to the Fourth Amendment, “the Supreme Court has not bound lower courts to apply the mosaic theory.”\textsuperscript{31} This is because many experts in the Fourth Amendment have questioned whether the constitutionality of an action should depend on its duration. As a result, many of the decisions of the lower courts have been made primarily on their perceived invasion of an individual’s privacy rather than the length of surveillance. Because of these conflicting opinions, decisions reached by different jurisdictions adhere to inconsistent standards of judgment. While the logic of US v. Maynard pertaining to the low likelihood of someone observing the entirety of the surveillance data over a long-term period could still apply in many cases, some lower courts maintain that the means of these long-term searches fall within constitutional bounds.

In Travis Tuggle’s case, he appealed that the long-term 18-month surveillance of his home without a warrant constituted an unlawful search under the Fourth Amendment. However, the Seventh Circuit decided that, although the cameras were able to capture many important pieces of Travis Tuggle’s everyday life outside

\textsuperscript{30} United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

\textsuperscript{31} Petition for Writ of Certiorari, Tuggle v. United States (2021), (No. 21-541).
his home, it didn’t reach the level of comprehensively in which the Supreme Court applied the mosaic theory. They also argued that there were key differences in the nature of the technology used in Tuggle’s case versus other cases in which the mosaic theory was applied. In Tuggle’s case, law enforcement only posted cameras after suspicion of Tuggle’s dealings was raised; they did not access any log of pre-recorded footage. However, the 7th Circuit found that—even though law enforcement did not compile a “mosaic” of Tuggle’s movement from pre-existing footage—the duration of the long-term surveillance of Tuggle (18 months), was “concerning, even if permissible.”32 This raises the question of whether there is a threshold of duration that would qualify this type of surveillance as a search under the mosaic theory, a question which is still undecided among courts today.

C. The Application of Originalist Constitutional Interpretation

Modern tools (such as the REP test and mosaic theory) provide a means of analyzing current Fourth Amendment cases, but—in order to best judge the constitutionality of hidden, long-term video surveillance of a private residence—it’s also important to consider the motivation behind and meaning of the Fourth Amendment when penned.

In the case United States v. Di Re, Justice Robert Jackson stated, “but the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance.”33 The original intent of the framers of the Constitution was to reduce the ability of police force to permeate the lives of citizens. Technology has only recently allowed authorities to expand their surveillance abilities. As new technology is introduced, it’s necessary to understand how new tools and practices fit into the vision held by those who penned our civil rights.

In this instance, hidden surveillance cameras allow law enforcement to peer into any home through an open blind or door. This unwavering surveillance goes beyond the powers of traditional law enforcement monitoring. And to those who would say that, theoretically, a police officer placed on a pole for six months could accomplish the same surveillance, the court of appeals in Travis Tuggle’s case stated, “courts should not rely” on impracticalities such as these “to limit the Fourth Amendment’s protections.”

Tuggle’s case proves that the American Judicial System—as it grapples with new technology—has failed in its prerogative to uphold those original intentions.

As part of his analysis of the Fourth Amendment in Morgan v. Fairfield Cty., Ohio, Justice Tharbad stated, “the ordinary meaning of ‘search’ has remained unchanged since the people ratified the Fourth Amendment over two hundred years ago. To search is ‘to look into or over carefully or thoroughly in an effort to find something.’”

Under this definition, officers conduct a search whenever they engage in an intentional investigative act. With Katz v. United States and the creation of the REP test, the Supreme Court has shifted the focus away from whether a search occurred. The REP test fails to address whether a search occurred in the first place. Instead, courts currently center their focus on whether law enforcement violated a person’s “(subjective) expectation of privacy” that “society is prepared to recognize as reasonable.” This approach offers far less protection than the Fourth Amendment was originally intended to provide. By returning their focus to the original meaning and intention of the Fourth Amendment, courts wouldn’t need to determine whether a person has a “reasonable expectation of privacy.”

This shift would remove the ambiguity often associated with weighing the validity of a person’s expectation of privacy,

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37 Id.
resulting in more consistent protection of Fourth Amendment rights. Placing a greater emphasis on the principles that guided the creation of the Fourth Amendment would provide boundaries to the acceptable practices available to investigating authorities without the need for judicial conjecture on a person’s expectation of privacy.

V. IMPLICATIONS OF UNITED STATES v. TUGGLE RULING

According to the 7th Circuit’s ruling, the use of hidden surveillance cameras to monitor a household for up to 18 months is permissible. Rulings such as this will continue to push police surveillance towards an Orwellian state, one in which law enforcement power far outreaches the original authority granted in the Constitution.

The REP test, although once an effective proof to determine whether a search has occurred, is becoming incapable of protecting basic Fourth Amendment rights. The REP test relies too heavily on the perception of the public; any technology deemed commonplace will—by definition of the REP test—be legitimized as a component of police surveillance activities. When a new piece of technology becomes commonplace (such as door cameras, social media, or CCTV), the public’s ability to expect privacy in that sector diminishes. To maintain privacy rights in an increasingly digital age, the Supreme Court should eliminate the REP test and return the focus of Fourth Amendment application to determining the occurrence of a search. By doing so, the Supreme Court will better protect the fundamental rights guaranteed in the Fourth Amendment.

With more of life documented through footage (such as sophisticated satellites, security cameras, police body cameras, door cameras, etc.), what was once considered private is now becoming increasingly accessible to the public. Although sacrificing privacy at work, stores, and municipalities is deemed, by most, acceptable, the home stands apart. People form their most intimate relationships at home, raise their children at home, and have the right to

38 Morgan v. Fairfield Cty, No. 17-4027 (6th Cir. May 2, 2018): “And the ordinary meaning of “search” has remained unchanged since the people ratified the Fourth Amendment over two hundred years ago.” (Quotation taken from Justice Thapar’s decision).
expect privacy in those pursuits. Those rights have traditionally been the most fiercely protected by the Supreme Court. Yet, cases like Tuggle’s show that without Supreme Court intervention (ruling against the use of long-term, hidden video surveillance of the home and eliminating the REP test to focus on determining the occurrence of a search), courts will continue to grant overreach to investigating authorities.

VI. CONCLUSION

By analyzing the original meaning of “search” when the Fourth Amendment was written and by applying logic used by the Supreme Court in cases of similar nature, this paper seeks to support that hidden, long-term video surveillance of a private residence is a violation of the Constitution and an illegal search under the Fourth Amendment. Although the REP test is helpful in analyzing Tuggle’s case and others of a similar nature, it is becoming increasingly ineffective at protecting Fourth Amendment rights. Societal expectations of privacy have proven to fall below the rights granted in the Fourth Amendment and offered by our Founding Fathers.

In order to protect Fourth Amendment rights while moving into a digital age, the Supreme Court should remove the REP test and focus instead on determining the occurrence of a search. By re-evaluating the guidelines used to apply the Fourth Amendment, the Court will provide clarity on an issue fundamental to one of our most sacred rights.

39 Miller v. United States, 357 U.S. 301 (1958)—In their opinion, the Court writes, “Such action invades the precious interest of privacy summed up in the ancient adage that a man’s house is his castle”
INTERNET CENSORSHIP IN THE TIME OF A GLOBAL PANDEMIC: A PROPOSAL FOR REVISIONS TO SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Braxton Johnson¹ and Alex Dewsnup²

I. INTRODUCTION

The indefinite Twitter ban in 2020 on the President of the United States, Donald J. Trump, catalyzed the debate on the amount of power that social media companies should be allowed to wield concerning censorship and content moderation.³ In contrast, Elon Musk’s more recent purchase of Twitter has been coupled with promises of looser content-moderation policies allowing for more controversial content to remain on the platform and the reinstatement of various users that had been banned or censored under Twitter’s previous ownership.⁴ This discussion has not been left unacknowledged by the Supreme Court; in the 2021 Biden v. Knight case surrounding

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President Trump’s removal from Twitter, Justice Clarence Thomas stated, “We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”

The role of social media today has led to unprecedented levels of technological advancements, instant communication, and global connectivity. Consequently, social media companies’ capability to monitor posts, influence feeds using algorithms, and censor content has drawn scrutiny; these globally used platforms, with millions of worldwide users, are tied to the First Amendment and the rights of individual users in the United States.

Recently, this discussion has revolved around how social media companies operate, how state legislation affects their operation, and how these companies influence world events. Per Justice Thomas’ view, this paper argues that Section 230 of the Communications Decency Act, which governs how the relationship between content moderation and liability for social media corporations, must be amended and revised to increase the liability of social media corporations. As it currently stands, Section 230 allows social media corporations to circumvent the First Amendment rights of American citizens. Furthermore, this article proposes that high-profile social media accounts be classified into categories, such as government or business accounts, so that common carrier law and principles from Section 230 can properly outline the relationship between corporate liability and pure free speech.

II. BACKGROUND

Two opposing decisions regarding state bills brought forth in 2021 escalated the debate over the future relationship between the First Amendment and social media platforms. In Texas, legislation known as House Bill 20 was passed by the state legislature and later


upheld by the Fifth Circuit Court of Appeals deeming social media platforms as common carriers, consequently limiting a platform’s ability to moderate content based on an individual’s viewpoints. The case, *NetChoice, LLC v. Paxton*, was brought forth against the Texas legislature for passing H.B. 20. Although the Supreme Court lifted the preliminary injunction made by the Fifth Circuit, NetChoice has still chosen to appeal the constitutionality of the Bill. The Fifth Circuit upheld the bill and, as a result, upheld the bill’s classification of social media as common carriers. Consequently, this classification forces social media companies to enact nondiscrimination policies. The Court also asserted that platforms do not have editorial discretion over the content their users publish.

Around the same time as the actions taken towards H.B. 20, in 2022 Florida’s legislature attempted to pass a similar bill, Senate Bill 7072. This legislation primarily attempted to prohibit account bans and suspensions of Floridian political candidates and “journalistic enterprises” from their platforms. In addition, the legislation required platforms to allow users to opt out of algorithmic displays of content and required platforms to provide a written justification for every suspended account. Most notably, though, S.B. 7072 attempted to create a common carrier classification for social media companies. Immediately, S.B. 7072 was stalled by a preliminary injunction that deemed it to be in violation of the First Amendment. Florida state officials appealed the injunction and on May 23, 2022, Eleventh Circuit Judge Kevin C. Newsom held that social media platforms were not common carriers, stating that the ability to suspend or ban political candidates was within their First Amendment rights. The ruling also stated that requiring social media platforms to allow users to opt out of their algorithms violated the First Amendment.

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8 *NetChoice, LLC v. Paxton*, No. 21-51178 (5th Cir. 2022).
and that justifying each action related to content moderation was unduly onerous and impossible for the companies to comply with.\textsuperscript{11}

Florida Attorney General Ashley Moody filed a petition in September 2022 for the Supreme Court to act on the issue after the two federal appeals courts issued contradictory rulings in Texas and Florida. Now, these opposing decisions will almost certainly be settled by the Supreme Court, though the timing of the Court’s decision is not yet certain.\textsuperscript{12}

Two additional cases currently on the Supreme Court docket offer an understanding as to why the discussion between legal doctrines and social media is at a pivotal point. First, \textit{Gonzalez v. Google} will be argued before the Supreme Court in 2023 and will take on Section 230 of the Communications Decency Act to decide if Section 230 unduly protects social media platforms against disseminating harmful content.\textsuperscript{13} In 2015, Nohemi Gonzalez, a U.S. citizen, was killed in a terrorist attack in Paris, France. Subsequently, ISIS claimed responsibility for the attack through a written statement and YouTube video. The father of Nohemi Gonzalez alleges that Google “aided and abetted international terrorism by allowing ISIS to use its platform.”\textsuperscript{14}

The second case, \textit{Twitter v. Taamneh}, will be argued before the Supreme Court and is based on the same facts as \textit{Gonzalez v. Google}. Specifically, this case will answer if an internet platform “knowingly” provides substantial assistance in aiding international terrorism when it could have taken more action to prevent such terrorism, and if an internet platform can be responsible for aiding international terrorism under 18 U.S.C. § 2333 even if the platform’s


\textsuperscript{13} \textit{Gonzalez v. Google, LLC}, No. 18-16700 (9th Cir. 2021).

\textsuperscript{14} \textit{Gonzalez v. Google LLC}, Oyez, (Jan 31, 2023, 3:00 PM), https://www.oyez.org/cases/2022/21-1333.
services had no connection to the alleged terrorism. Put simply, the case will seek to answer if a social media platform aids international terrorism by not taking considerable action to remove harmful content from its platforms. These two cases will challenge the interplay between First Amendment doctrines and the powers of social media companies, drawing heavily on Section 230, an outdated provision that helped shape the creation of the internet as it is known today.

III. KEY TERMS

Section 230 of the Communications Decency Act

Section 230 of the Communications Decency Act was enacted in 1996 and aims at protecting speech by immunizing social media platforms from speech posted by users. It states:

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” These words have often been coined as the “words that made the modern internet.” Essentially, Section 230 puts the liability on the users for their own actions rather than social media platforms for simply carrying the speech. Furthermore, Section 230 permits operators of social networks to moderate content as they see fit. This provision is consistent with First Amendment publisher protections. Also, this provision aims at incentivizing users to exercise speech in online communities and platforms where their viewpoints are most accepted.
Common and Private Carriers

A common carrier is defined as “a person or a commercial enterprise that transports passengers or goods for a fee and establishes that their service is open to the general public.”\(^{18}\) Typical examples of common carriers include a shipowner, railroad, airline, taxi service, etc. In contrast, a private carrier is a person or a commercial enterprise that only agrees in particular circumstances to transport passengers or goods. Private carriers differ from common carriers because they do not establish that their service is open to the general public. In other words, private carriers enter a contract with each customer without the assumption that a similar contract will be available to the next customer.\(^{19}\) Currently, social media corporations are private carriers. While common carriers are governed by the Federal Communications Provisions, private carriers, or private corporations are run by individuals.

Censorship

Censorship occurs when individuals impose personal, political, or moral values on others through the means of suppression of words, images, or ideas.\(^{20}\) Censorship can be carried out by public as well as private groups, and the label of “censorship” has often been attributed to social media platforms’ removal of posts that impose values or ideas deemed offensive, dangerous, or violence-inducing. In H.B. 20 (Texas), censorship is conveyed as a form of conduct, and according to this bill, if a social media platform were to remove a user’s post, that act of censorship could be deemed illegal, depending on the content of the post. While this behavior on the part of


social media companies has not necessarily been deemed illegal nationwide, the argument will be made that the current composition of social media corporations reflects that of a common carrier (as explained in the following section, Public v. Private Corporations), and should therefore be deemed illegal as H.B. 20 would support.

IV. PROOF OF CLAIM

A. Damages to American Freedom

Social media corporations’ power over content moderation ultimately damages American freedom. The foundational legal doctrine governing free speech is the First Amendment of the United States Constitution, which affirms that “Congress shall make no law… abridging the freedom of speech, or of the press.”[^21] Part of the First Amendment’s original intent was to protect U.S. citizens from the U.S. government creating legislation that had the potential to restrict an individual’s freedom of speech.[^22] Paradoxically, Americans have witnessed social media companies exercising their ability and legal right to censor the speech of anyone, even government officials, based on viewpoints that are deemed inflammatory or offensive by the standards of the day. The rights that social media companies often draw upon relate to two sets of legal precedents. First, Section 230 of the Communications Decency Act grants immunity to platforms to moderate content under the identity that platforms act as publishers. This article takes the stance that social media platforms are not publishers; rather, they have evolved to mimic a “public


square.” 23 Second, social media corporations are private entities that allow them certain rights, including censorship, as opposed to public companies. This article takes the position, however, that social media corporations have outgrown the original intent behind the rights given to private corporations and now pose potential threats to communication-related to politics as well as the First Amendment rights of individuals. Social media corporations, acting under outdated Section 230 provisions, damage American freedom in three aspects of American life: politics, business, and fundamental human rights.

First, opposing legislation passed in Texas and Florida indicate potential damages to American politics. While Texas H.B. 20 aims at making social media companies liable for unlawful content moderation, Florida S.B. 7072 explicitly deems the prohibition of content moderation of Floridian political candidates as unconstitutional. It is important to note that these opposing laws resulted in a submission of a writ of certiorari before the Supreme Court, indicating the growing concern about social media corporations’ power and how the American people are responding to that power. While this discussion is resurfacing, the discussion between the interplay of freedom of speech and the mediums that produce speech is long-standing.

Social media corporations currently damage American businesses in several ways. High barriers to entry exist in the social media market, as evidenced by the story of Parler. In 2018, this social media company showed that it is possible to get past the barriers to entry in the social media market, by gaining a sizable number of users in a short time in part due to the endorsements by political actors. However, access to Parler’s servers was quickly shut down by Amazon shortly after its initial successful entry into the market. The application was then removed from the various online app stores such as Google and Apple, rendering it extremely difficult to download onto the average person’s mobile phone. Parler only made a return to places such as the Google store after the creators

of Parler were forced to find their own servers. In the words of Richard Samuelson, professor of government at Hillsdale College’s Van Andel Graduate School of Statesmanship, “...what was done to shut down Parler was the equivalent of telling someone to find another printer to publish their piece back in an age when printing presses were scarce.”

Put simply, the dominant market shareholders must allow free and open discourse that is necessary for true discussions and debates to take place.

Third, Section 230 of the Communications Decency Act has potentially damaged fundamental human rights, specifically the right to life. In the Declaration of Independence Thomas Jefferson penned: “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.” Related to these famous lines, Gonzalez v. Google and Twitter v. Taamneh are two cases dealing with the loss of life as a result of an ISIS terrorist attack coordinated through YouTube. If social media platforms have capabilities protected under Section 230 to moderate and curate content, in which they actively participate, it is outrageous that videos from one of the most dangerous terrorist groups in the world were allowed to be posted long enough for coordinated, dangerous action to take place. When President Trump’s various accounts were immediately banned after his infamous January 6th posts, surely social media corporations could have also censored activity by ISIS on their platform happening around the same time.

In this instance, Section 230 failed to protect against dangerous online content, which in turn affected the family’s fundamental right to life. Many applauded how efficiently contentious political content was censored, though little was said about the failure to censor dangerous, life-threatening content.


In 2023, the Supreme Court will determine the scope of Section 230’s immunities it grants to social media corporations and the content they host. While this article does not deem Section 230 obsolete, the case can be made for restricting Section 230’s scope. A revision to this statute should require social media corporations to moderate content when it directly affects someone’s life and impose punishments if they fail to do so. Furthermore, Section 230 should not permit content moderation based on the user’s viewpoint.

B. Modern Reforms to Section 230

Section 230 of the Communications Decency Act is built upon outdated precedent and reforms should be passed to match a modern context of the reality of social platforms. Section 230 has two fundamental principles. First, it immunizes social media platforms from content posted by users. On this point, the main argument in *Gonzalez v. Google* is whether immunity from user-generated content also protects the algorithmic recommendations made by social media platforms to those users, particularly when the algorithm suggests something potentially offensive or dangerous. 26 This poses the question: can algorithmic recommendations be classified as direct speech from the social media company? Second, Section 230 permits social media platforms to moderate user-generated content. For example, in *Zeran v. America Online, Inc.*, a federal appeals court said that Section 230(c)(1) bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter the content.” 27 Along this line of thinking, Section 230(c)(2) states that service providers and users may not be held liable for voluntarily acting in good faith to restrict access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material.

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27 *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).
The issue with current interpretations of Section 230 lies in the fact that there is a difference between distributor liability and publisher liability. While publisher liability “attaches to the dissemination of speech in general,” distributor liability “only exists where the distributor knows or should have known that the material he distributes is illegal.”\(^{28}\) Section 230 explicitly protects platforms from publisher liability; however, it does not differentiate distributor liability. Clarification by the Supreme Court of distributor liability’s role in Section 230 would protect the American people and modernize the law to better fit this Internet Age. If social media companies can be held liable for specifically distributing harmful content, then future cases similar to *Twitter v. Taamneh* and *Gonzalez v. Google* will hold social media corporations accountable, and the power of social media platforms will be reduced. As corporations become liable for the content they most, they will be incentivized to only censor content that explicitly makes them liable for a suit.

Furthermore, the provisions in Section 230 are outdated based on several claims. First, Section 230 of the Communications Decency Act was passed by Congress in 1996. Around 1996, 40 million people were using the Internet. By 2019, more than 4 billion people were using the Internet, with 3.5 billion people having accounts on social media platforms.\(^{29}\) Specifically, 70 percent of Americans use at least one social media site to engage with content, share information, or entertain themselves.\(^{30}\) Thus, what once protected a relatively smaller group of Americans has exponentially grown over the years. While Section 230’s initial intent was to help the internet grow, its immunity provision, including provisions to moderate content, currently undermines First Amendment principles of America’s freedom of speech because they give social media corporations an unprecedented amount of power over speech regulation, monitoring, and influencing.

\(^{28}\) *Gonzalez v. Google, LLC*, No. 18-16700 (9th Cir. 2021).


Second, social media corporations can use this power to unduly influence global events. The cases of *Gonzalez v. Google* and *Twitter v. Taamneh*, along with Meta’s announcement of former President Trump’s account reinstatement are examples of current laws allowing social media corporations to influence global events.\(^{31}\) The former will deal with the current legal repercussions of Section 230 while the latter reflects a modern example of the issues with Section 230. Specifically, the decision in *Gonzalez v. Google* will answer if Section 230(c)(1) immunizes social media corporations when they make content recommendations that are targeted to specific users or if they are only granted immunity for basic editorial functions, such as simply displaying content. *Gonzalez v. Google* and *Twitter v. Taamneh* both indicate that if social media corporations have the technological ability to recommend content via an algorithm, then it is reasonable that they can quickly censor content via an algorithm. If social media platforms are capable of quickly moderating other content, such as contentious political content, then these capabilities would surely transfer to censoring an ISIS video. Therefore, social media corporations should be incentivized to remove content related to direct threats by limiting their distributor liability.

By contrast, the reasons given for Donald Trump’s removal from platforms for questionable posts did not blatantly scream illegality; while President Trump was removed from social media platforms expeditiously, many videos posted by ISIS posted at the same time were not removed. The recent, at-will reinstatement of Trump’s social media accounts creates issues for the current legal definition of social media corporations, as this behavior shows how social media corporations act as publishers even though their currently defined, protected role is upheld as mere content distributors. If social media corporations can curate, monitor, influence, censor, and reinstate as they please, Section 230 is giving platforms many privileges affording to publishers, just without the necessary liability that publishers take on. Additionally, while this article argues that

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Section 230 needs limits, it is also important to note that if social media corporations are creating mediums that affect the American people, then they must use their capabilities to follow through with that protection through censoring threats. The pending 2023 Twitter v. Taamneh case will rule if a social media platform could be charged with aiding and abetting terrorism because it could have taken more aggressive action in combating the video ISIS posted. While this case is not directly related to the overall claim of this article, it further demonstrates issues tangential to social media corporations’ unchecked power.

Since over half of the population utilizes social media platforms and the rate of new users is slowing year by year, many agree that the bulk of widespread Internet growth is over.32 This is another compelling element that helps show how Section 230, and the reasons for its original creation, is outdated. If social media corporations are protected from publisher liability, they should not be curating content, censoring political free speech, and reinstating presidents long after their office has changed hands. Thus, Section 230 should not be able to “edit” users’ posts unless they are illegal, because they are not liable for those posts. In a logical sense, the mere fact that they choose to censor posts indicates they disagree with those posts.

C. Common Carriers

Social media’s immense growth over the past decade suggests that platforms should be classified as common carriers. In the United States, common carriers have long been defined as any entity that provides transportation or communication services to the public on a nondiscriminatory basis.33 Some examples of common carriers include telephone companies (landlines), postal services, cable companies, and internet service providers. Currently, the common

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carrier legal framework is not best suited for social media platforms for several reasons such as the nature of broad and complex services that social media provides; content moderation could be prohibited; a common carrier classification could reduce their ability to generate revenue; and social media corporations are already subject to regulations.

While this briefly describes why social media corporations would not fit under current common carrier law, the benefits of social media corporations being classified as common carriers outweigh the costs. If social media platforms were classified as common carriers, they would be non-discriminatory, transparency would increase, and most importantly they would be subject to government oversight and enforcement. While current common carrier law may not be suitable for social media corporations, this article argues that similar legislation must be created to define social media entities as common carriers.

Social media corporations should be classified as common carriers based on historical precedent, legal precedent, and logic. The United States is no stranger to developments in technology; the fundamental principle behind common carriers is to provide services for the public without discrimination. In legal history, common carriers were initially transportation services and have evolved to also include communication services. Regulation of communication services as common carriers was formalized with the Communications Act of 1934, which ultimately established the Federal Communications Commission and gave it the power to regulate communication services as common carriers. Additionally, communication services evolved into cable television and the Internet. Consequently, the Telecommunications Act of 1996 codified the classification of these communication services as common carriers through a federal legal framework. Thus, as technology has evolved, the historical precedent has shown that the law also evolves to best provide for the American community.

Common carrier legal precedent also indicates that social media platforms should be classified as common carriers. *AT&T Corp. v. Iowa Utilities Board* dealt with the constitutionality of state regulations that required AT&T to share its network with other companies to promote competition. The Supreme Court ultimately found that state regulation of the telecommunications industry was permitted, so long as the regulation was non-discriminatory.\(^{35}\) This ruling is important because it sets precedent for telecommunications companies to be regulated by the government, instead of privately regulated. Although social media corporations are not technically defined as telecommunications companies, their functions are virtually identical. Both allow users to communicate with each other in several forms, but social media corporations offer more functions to users, such as direct messaging, WIFI calling, video calling, and live video events. Therefore, if users of social media platforms have more freedom than telecommunication providers, such as AT&T, but their conduct is ultimately controlled by the platform, then it would make sense that the U.S. can also regulate social media corporations as common carriers with an appropriate framework. For example, while common carriers are non-discriminatory by nature, platforms would need some discretion to moderate content that inherently creates harm or is blatantly unlawful. Similar to this proposal, both Texas H.B. 20 and Florida S.B. 7072 called for this common carrier classification in conjunction with the ability to moderate content that is unlawful according to current guidelines.

Other legal precedent includes the First Amendment precedent that should apply to include social media corporations. Inherently, social media corporations are mediums for distributing speech but are not expressing speech themselves. However, their ability to curate content, and alter political realms, implies that social media platforms are expressing speech. As such, social media platforms should be able to curate content when the content creates situations like *Gonzalez v. Google* but should not curate content when the viewpoint is not of popular opinion.

\(^{35}\) *AT&T Corporation v. Iowa Utilities Board*, No. 97-826 (8th Cir. 1999).
Last, there are also logical arguments to be made about the functional aspect of social media in today's world and consequently in the legal and political realm. Essentially, social media is evolving into a public square. The main function of a common carrier is to create an accessible public utility. Subsequently, the concept of a public square is backed by the idea that it is available to all the public and governed by the laws of the land. Extending this analogy, it would be likely that private firms also operate in this public square. If what is said within a public square by an owner of one of the businesses is provocative, that is within his First Amendment rights. If what is said within a business by a common person is provocative, then the business owner could remove the person from his premise. However, the business could be affected due to negative perceptions surrounding the person’s removal from the premise. Similarly, social media corporations have public and private aspects that cannot be ignored. They are public in the sense that public officials use social media platforms to campaign and distribute important information. They are private in the sense that businesses, including individuals, use social media platforms for monetization. In essence, this public and private interplay within social media resembles a public square in virtually all respects.

Given this relationship between social media and the public square, it may be worthwhile to adopt legislation that would allow current laws to match the landscape of social media. For example, Florida S.B. 7072 intended to stop censorship of Florida government officials. The idea of censorship in any sense is negative. However, some aspects of social media, such as government accounts, may need to be designated as “official government accounts” and be governed by non-discriminatory aspects of common carrier law. This would allow government accounts to operate as government officials normally would under the U.S. Constitution, without the fear of being censored and cut off from the digital world. In contrast, business accounts may also need to be designated as “official business accounts” and continue to fall under private corporate law. This is a realistic model because social media interactions are reflections of tangible interactions, which are governed by certain laws depending on where the tangible interaction occurred.
Thus, there is logic behind the idea that digital platforms reflect the tangible world. As previously mentioned, the First Amendment serves to protect American citizens from being censored by the government. Furthermore, when public and private entities conjoin on a social platform the platforms are given powers over those entities’ accounts, including government accounts. Thus, if social media accounts acted like a public square, where individuals, businesses, and government physically coexist, then these entities would need to be designated respectively in order to digitally coexist. This restructuring would not be difficult, as social media corporations such as Meta and Twitter already have processes in place to verify that accounts are who they say they are. Overall, this will create clarity about appropriate censorship ultimately determined by the classification of the account.

V. CONCLUSION

The influence that social media corporations have on free speech has been scrutinized through news outlets, state legislation, and current Supreme Court cases. Through several world events and imminent Supreme Court cases, this article has shown that social media corporations have become too powerful and are ultimately circumventing the First Amendment of the United States Constitution. These corporations have effectively risen above the power of the government and control America’s political landscape through content moderation and censorship. As technology continues to advance and connect the world, further discussion between the rights of corporations and the right to free speech of individuals will be necessary.

To combat these damages to American freedom, this article has proposed two solutions. First, Section 230 of the Communication Decency Act should be amended to better reflect the modern age of the Internet. Specifically, given social media platforms’ behavior in moderating and recommending content through algorithms, these platforms should have increased liability for what they allow to be posted on their website and what they decide to censor. This increased liability will result in less censorship as corporations will be required to spend more time filtering potentially harmful content,
rather than controversial political content. Second, social media platforms should adopt certain characteristics of common carrier law to better reflect how they behave as an entity within the United States. This article has argued that social media is analogous to a public square, where the government must interact with private businesses. To mirror this concept of a public square within the realm of social media, high-profile accounts, such as government and business accounts, should be classified as separate entities governed by the same laws that government officials and private businesses are governed by.

In conclusion, in the decision of *NetChoice v. Moody*, Judge Newson declared that social media platforms are not “dumb pipes,” referring to the fact that they are not common carriers. Social media platforms are not “dumb pipes,” but rather complex and constantly changing organisms; however, because social media platforms are reflections of the tangible world, it is unfair to classify them as an entity that does not share many of the traits of common carriers. Therefore, laws that effectively and separately govern business and government entities should also apply to their respective social media accounts to better align with the U.S. Constitution and follow the First Amendment.

CHECKING THE PRESIDENT’S SANCTIONING POWER IN THE NEW AGE OF ECONOMIC WARFARE

Jaden McQuivey

I. INTRODUCTION

On February 24, 2022, Russia snapped the long-standing tension with Ukraine through a full-scale invasion. The United States immediately retaliated against Russia by imposing its first round of sanctions, self-proclaimed by the White House as “unprecedented” and “devastating.” These sanctions involved blacklisting Russia’s top banks, cutting imports and exports, and freezing $300 billion of Russian assets in allied countries. These measures targeted Russia’s economy and, according to the Secretary of the Treasury, intended to deliver “swift and severe consequences to the Kremlin.” United States sanctions, along with similar measures imposed by other

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countries, quickly produced detrimental economic consequences.\textsuperscript{4} In just a few months\textsuperscript{5}, Western sanctions amplified inflation in Russia; decreased the ruble exchange rate; and halved Russia’s gains from energy, which constitute the majority of the country’s revenue.\textsuperscript{6} From this perspective, US sanctions were successful and fulfilled their designed purpose.

However, attacking Russia’s economy would also inevitably affect its citizens—not only President Vladimir Putin and the Russian government. But, the effects of sanctions spread further than the United States might have predicted, and many unintended outcomes quickly surfaced for neighboring countries, Russian citizens, and many businesses. By summer 2022, nearly 1,000 American companies restricted operations in Russia. Curtailing the operations of these companies, which constituted a large portion of Russia’s GDP, generated a $600 billion loss for the country\textsuperscript{7} and, more significantly, triggered financial downturn and massive layoffs for the five million Russian employees who work for these companies. As a result, unemployment rates in Moscow skyrocketed while consumer spending plummeted. Local businesses lost money, and more than half a million citizens fled the country.\textsuperscript{8} In large part due to American sanctions, neighboring European Union (EU) countries also suffered drastically. Europe saw its highest inflation rates ever\textsuperscript{9} and watched its energy crisis worsen. Although Russia’s behavior reasonably justified a strict response from the United States, this example serves as a case study of the major unintended consequences United States sanctions can have on the world.


\textsuperscript{5} \textit{Id.}

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} Sonnenfeld, J. \textit{et al.}, Supra note 4.

\textsuperscript{8} \textit{Id.}

\textsuperscript{9} \textit{European Union inflation rate}. Available at: https://ycharts.com/indicators/europe_inflation_rate.
Considering the strength of United States sanctions, it is shocking that just one person—the President—has total control over them. With a GDP of $23 trillion making it the largest economy in the world, the United States, at the simple nod of its President, can unleash economic warfare with consequences as lethal as its military. Although traditional warfare is truly incomparable in tragedy, magnitude, and impact, unilateral sanctions programs can, over time, produce effects that stretch far beyond the fiscal sector and can only be aptly described as warlike. Sanctions can ruin a country for decades by devastating public health, welfare, living conditions, mortality rate, and overall quality of life. These effects will be outlined later with several case studies from United States history. Because of the expansive and warlike effects of economic sanctions, this paper will argue that unilateral sanctions should be legally considered a legitimate form of economic warfare, not merely a tool of negotiation or diplomacy.

Although the president’s authority over sanctions is firmly established by over a century of Supreme Court holdings, the Constitution’s text, and historical precedent as old as the nation itself, this authority morphed into virtually unlimited sanctioning power through a number of 18th-century congressional acts, decisions from the Court, and power abuse by United States presidents. This

12 This paper does not attempt to downsize the effects of traditional warfare; that would be completely inappropriate and naive. Although even the strongest unilateral sanctions programs may not exact the death and destruction produced from history’s wars, certainly, at the very least, their effects merit a legal classification that is closer to war than diplomacy.
paper agrees with presidential deference in the realm of sanctions, but does not condone unchecked presidential sanctioning power. The major unintended consequences of sanctions, coupled with the immense economic power of the United States, gives overwhelming justification to impose a legislative check on unilateral sanctions. This can best be accomplished by amending the International Emergency Economic Powers Act (IEEPA) to mimic the congressional checks on wartime powers provided in the War Powers Resolution (WPR) of 1973, namely by creating a 60-day window for Congress to approve sanctions issued by the President.

II. BACKGROUND

A. Unilateral Sanctions

Unilateral sanctions are coercive economic restrictions or punishments imposed by one country on another. These measures target an entire country, not only the belligerent government. The goal is usually to change the policies of another state, punish actions deemed as unacceptable, or symbolically demonstrate opposition. The United States is notorious for its aggressive and narrow-sighted use of unilateral sanctions, which commonly include “embargoes…export and import limitations, asset freezes, tariff increases…visa denials…and credit, financing, and investment prohibitions.” These kinds of sanctions heavily strain (and if the United States is involved, destroy) the targeted country’s economy, public health, and infrastructure while often failing to gain compliance with the government under siege. In contrast, so-called “smart sanctions” directly pressure national policy-makers and aim to avoid causing


widespread humanitarian damage.\textsuperscript{18} Moreover, unilateral sanctions are especially dangerous because of their unpredictable side effects. Regardless of presidential motive, the far-reaching impact of sanctions is difficult to foresee. Even righteous intentions are insufficient to control the effects.

B. Presidential Authority to Sanction

1) Constitution

From the beginning, the United States’ power to levy economic sanctions has fallen under the wide, legal umbrella of foreign policy and diplomacy. Although the Constitution grants power over foreign relations to both the legislative and executive branches, over time, the authority to sanction transitioned nearly exclusively to the president. One reason for this is the Constitution’s brevity on the subject. Although a few shared powers are well-defined in this document, the president is granted many others that the Constitution describes only vaguely.

In Article II Section 1, the Constitution gives the president “executive power” and delegates him as “Commander-in-Chief.”\textsuperscript{19} In Article II Section 2, the president receives power to “make Treaties,” and “appoint Ambassadors” and “other public Ministers and Consuls.”\textsuperscript{20} The Constitution’s terse declaration of foreign presidential powers caused “the authority of a President [to be] largely determined by the President himself.”\textsuperscript{21} This means presidents can choose between two camps: to either only exercise power expressly granted, or exercise power until expressly restricted. Thus, the Con-


\textsuperscript{19} U.S. Const. art. II § 1.

\textsuperscript{20} U.S. Const. art. II § 2.

stitution allows the President to define his own power, which means that “emergency powers are not solely derived from legal sources.”

2) Historical Precedent

In 1793, President George Washington tested his ambiguous foreign relations powers. Washington issued a Neutrality Proclamation in response to France’s declaration of war on Great Britain, which included strict rules about international commerce that resembled legislation. The modern era would view these measures as economic sanctions. Later that year, Congress codified Washington’s regulations, thus establishing the precedent of presidential deference in foreign policy. This precedent still stands today.

In 1936, the Supreme Court spoke definitively regarding sanctions in *United States v. Curtiss-Wright Export Corporation*. The Court’s 7-1 majority firmly held that “the President is the sole organ of the nation in its external relations.” This case solidified the growing precedent that the judicial and legislative branches would give extreme deference to the executive branch’s use of international powers. For decades afterwards, presidents primarily donned this mantle of power with selectivity and prudence. However, World War I (WWI) marked the beginning of an era of “sanctioning madness” for the United States, which is in full force today.

3) Trading With the Enemy Act

In 1917, during the height of WWI, Congress passed the Trading With the Enemy Act (TWEA). This act allowed the president to “investigate, regulate, or prohibit” any foreign financial transaction during times of war; practically, this gave the president unchecked power to sanction during wartime. A suspicious amendment several years later expanded this power to also apply during times of war.

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22 Halchin, Supra note 21.
23 Foreign relations powers granted by the Constitution.
25 50 U.S.C. §§ 4301-4341 (1917) - “Trading With the Enemy”.
26 12 U.S. Code § 227 - “Banking Act of 1933”. 

peace, as long as the country was in a state of national emergency, which the president could declare for any reason.

4) National Emergencies & Emergency Powers

Declaring a national emergency is the primary way that presidents have justified imposing economic sanctions on other countries. When the United States is in a state of national emergency, the President can draw upon special emergency powers,\(^\text{27}\) including those outlined in TWEA. Invoking these powers would normally be unconstitutional, but their conditioned availability enables presidents to address major crises adequately. However, presidents have not always acted prudently in these situations.

Following TWEA, significant events such as both World Wars; the Korean, Vietnam, and Cold Wars; and the Great Depression led Congress to cede an aggregate of 470 special emergency powers to the President.\(^\text{28}\) Since Presidents ensured the United States was in a constant state of emergency\(^\text{29}\) throughout the twentieth century, Congress passed the National Emergencies Act (NEA) in 1976 to suppress the president’s ability to manipulate emergency powers. Before then, the President could declare emergencies with limitless scope and duration. Congress was also unable to overturn a national emergency, thus allowing the President to impose sanctions without check.\(^\text{30}\) NEA ended every state of national emergency, quartered the


29 Id.

President’s emergency powers, and allowed for a legislative veto (accomplished via a concurrent resolution) to override the President’s declaration of any national emergency. Instead of automatically carrying over for indefinite periods of time, national emergencies also needed to be renewed annually by the President.


The following year, Congress passed the International Emergency Economic Powers Act (IEEPA) in conjunction with NEA. Although IEEPA reaffirmed the President’s “sweeping powers to impose economic sanctions on persons and entities,” this act sought to amend TWEA by adding more restrictions to national emergencies. Congress declared that in order to invoke the powers of IEEPA, the President must declare a national emergency in response to an “unusual and extraordinary threat… to the national security, foreign policy, or economy of the United States” originating “in whole or substantial part outside the United States.” Congress further clarified that “emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems.”

Examples of valid national emergencies declared according to these criteria involved major international issues such as the Gulf

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33 IEEPA retained key language from TWEA’s text, namely by reaffirming the President’s power to “investigate, regulate, or prohibit” economic matters related to foreign countries.

34 See case cited Supra note 30.

35 House, *Trading with the Enemy Act Reform Legislation*, p. 11
War, nuclear threats from North Korea, and foreign interference in United States elections. However, although serious situations such as the H1N1 influenza outbreak and Hurricane Katrina led presidents to declare national emergencies, these were not justified under IEEPA because of their domestic nature.

6) Supreme Court

In 1983, just a few years after IEEPA was enacted, the Supreme Court declared NEA’s legislative veto to be unconstitutional in *Immigration and Naturalization Service v. Chadha*. No longer could Congress draft a concurrent resolution to challenge the President’s declaration of national emergency. This decision completely flipped IEEPA from its original intent, transforming it into a grant of “virtually unlimited sanctioning power.” Paradoxically, presidents have used IEEPA—which intended to rein in the president’s power—to justify more than 16 times the amount of national emergencies than TWEA, which prompted Congress to pass IEEPA in the first place.

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39 Casey, Rennack, Elsea, Supra note 37 (Instead, the Court determined that a joint resolution could still be used to check the President’s declaration of a national emergency. This, however, has proved to be insignificant since joint declarations must also be signed by the President.)

40 Coates, Supra note 13.


42 Casey, Rennack, Elsea, Supra note 37
Supreme Court rulings such as *Curtiss-Wright* and *Chadha* have set precedents for the president’s general foreign relations powers, rightly establishing presidential authority in this realm. However, although *Chadha* abolished the legislative veto in general instances, congressional approval is still required for matters like war. According to the War Powers Resolution of 1973, after 60 days of military action initiated by the president, Congress must give its authorization for the conflict to move forward. The Constitution clearly supports this check as a power and responsibility of Congress.

This paper will argue that sanctions should be legally considered a legitimate form of economic warfare, not merely a tool of negotiation or diplomacy. By viewing sanctions in the same legal vein as war, IEEPA can be amended to include the provisions of congressional approval patterned after the War Powers Resolution. This will reinstate the original intent of IEPPA, create a check on the president’s “dizzying range” of emergency powers, and help temper unintended effects of sanctions.

### III. Proof of Claim

#### A. Presidential Abuse of the Sanctioning Power

Passed in 1917, TWEA clearly serves as the origin of sanctions abuse by United States presidents. Later Senate committees described TWEA’s broad language as “sketchy” and “sleight-of-hand” intended to inflate the president’s power. Originally, this legislation justified nearly any foreign economic measure taken by the president, but it applied exclusively to wartime. However, later presidents significantly stretched and abused this power. The following quote describes the evolution of TWEA:

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44 U.S. Const. art.I § 8
46 Coates, Supra note 40.
What began as an effort to ‘define, regulate, and punish trading with the enemy’ in the context of a congressionally declared war of limited duration has transformed over the decades into a broad writ of executive authority to wage economic warfare against loosely defined enemies virtually anywhere and at any time.47

In 1933, President Franklin Delano Roosevelt became the first to abuse the powers of TWEA—and the power to declare a national emergency. Roosevelt successfully forced Congress to stretch TWEA to apply during any “period of national emergency declared by the President.”48 The first emergency introduced by Roosevelt remained in effect for most of the twentieth century,49 thus allowing six of his successors the legal right to arbitrarily use special, normally unconstitutional emergency powers to address issues far beyond (and often unrelated to) the original exigence they were granted to address.

Although Congress passed IEEPA to remedy further misuse of this power, presidents in fact abused their power at exponentially worse rates. Unbelievably, the first emergency invoking IEEPA—declared by President Jimmy Carter in 1979 vis-à-vis the Iranian hostage crisis—has been ongoing for 44 years and counting.50 This stands in direct contrast with Congress’s instructions regarding IEEPA: “The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in

47 Coates, Supra note 40.
48 Id. (On March 6, 1933, President Franklin Delano Roosevelt (FDR) closed all the banks in the United States for four days, citing TWEA as his authority. The problem was that the United States was not at war, so TWEA did not apply. With a suspiciously fast, 40-minute Senate debate pressed urgently by FDR, Congress passed legislation that approved the President’s actions and stretched TWEA to apply during any “period of national emergency declared by the president.” Since the President had unchecked power to declare national emergencies at the time, TWEA afforded the President boundless power to sanction until the National Emergencies Act was passed in 1976).
49 12 U.S. Code § 227 - “Banking Act of 1933”.
50 Senate Historical Office, Supra note 27.
51 Casey, Rennack, Elsea, Supra note 37.
effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.”52 Despite IEEPA’s restrictive definition of national emergencies and explicit call to make them rare, presidents have used IEEPA to declare an astounding 67 national emergencies since the act was passed in 1977.53 Nearly half of these are still in effect today.54 Research reveals that annually since 1990, “Presidents have issued roughly 4.5 executive orders citing IEEPA and declared 1.5 new national emergencies citing IEEPA.”55 Since the act was passed, there have been an average of 14 ongoing emergencies each year; this number is steadily increasing.56 Additionally, the average length of an emergency invoked by IEEPA is 9 years, and this number is also increasing.57

Surely, to cite the language of IEEPA, not all of those situations currently present “unusual,” “extraordinary,” and “rare” threats.58 Definitely, at least, these issues have not been “brief,”59 perhaps the most important criterion established by the act. Many of the national emergencies still in effect today were declared in the 1990s or early 2000s and issued in response to arcane issues with countries such as Zimbabwe, Colombia, Sudan, and those of the Western Balkans.60

A recent example of power abuse was displayed by President Donald Trump’s administration. In 2019, Trump relied on IEEPA to make severe threats against Mexico. After unsuccessfully siphoning federal funds toward construction of the border wall by declaring a national emergency, Trump threatened to sanction Mexican exports to the US up to 25% unless Mexico “remedied” the number

52 House, Supra note 35.
53 House, Trading with the Enemy Act Reform Legislation, p. 11.
54 Id.
55 Casey, Rennack, Elsea, Supra note 37.
56 Id.
57 Id.
59 Id.
60 Casey, Rennack, Elsea, Supra note 37.
of illegal immigrants fleeing to the US. This move would have been harsh, especially since Mexico did not initiate any kind of warfare against the United States. Although the sanction never took effect, this case reveals the unnerving potential for United States presidents to stretch their sanctioning power to meet their personal agendas.

Even more disturbing is the hypothetical “horrific president.”

Thus far, the abuse of IEEPA has arguably not reached a “horrific” degree, but there is enormous potential for economic sanctions to be used for tyranny, conflict, personal or political agendas, or purely wicked reasons. Because this act operates solely on the basis of trust, IEEPA justifies most foreign economic actions taken by the president without allowing for legitimate congressional oversight.

One round of sanctions could easily destroy relations with scores of countries, thus damaging foreign policy for years or indefinitely. Sanctioning the wrong country at the wrong time could be the spark to commence the next World War. Governments of volatile countries such as China, North Korea, Syria, or even Russia would not likely respond well to harsh, insulting sanctions haughtily imposed by the United States. Besides provoking conflict, US economic sanctions also have the power to completely cripple a nation, as will be later discussed in the cases of Venezuela and Iraq. Though sanctions on Russia may not be surprising, the world would certainly be shocked if the United States sanctioned less provoking countries such as Costa Rica or Denmark.

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63 IEEPA grants the President expansive power under the assumption that he will i) appropriately identify legitimate emergencies (defined as “rare and brief…not to be equated with normal, ongoing problems” and which constitute “unusual and extraordinary threat[s]”) and ii) address such emergencies prudently.
Political and personal disagreements are also potential fuel for a president to impose sanctions on a foreign country. A Democratic president could hypothetically sanction a foreign government solely because of the country’s strong, conservative values. Or a tense relationship with another country’s president could cause retaliatory sanctions that serve no purpose related to the nation’s welfare. This could make an irreparable tear in our extremely polarized society.

B. Unintended Consequences of Sanctions

Forty years ago, the Court outlawed the legislative veto of national emergencies and sanctions in \textit{INS v. Chadha}. However, the world is rapidly changing and not at all what it was in the twentieth century. Since then, the United States has significantly amplified the caliber and frequency of its sanctions since then. As shown in the Department of the Treasury’s (USDT) 2021 Sanctions Review, the United States’ use of sanctions increased 933\% from 2001 to 2021.\footnote{The Treasury, \textit{The Treasury 2021 Sanctions Review} (2021), https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf.} That is an astounding number. Notably, no country has imposed more sanctions than the United States.\footnote{Gary Clyde Hufbauer, \textit{The snake oil of diplomacy: When tensions rise, the US peddles sanctions}, PIIE (2018), https://www.piie.com/commentary/op-eds/snake-oil-diplomacy-when-tensions-rise-us-peddles-sanctions.} USDT also admits that “unanticipated challenges” arise from sanctions.\footnote{Reuters Staff (2021) \textit{Treasury deputy chief says reviewing costs, benefits of U.S. sanctions}, Reuters. Thomson Reuters. Available at: https://www.reuters.com/article/us-usa-treasury-sanctions/treasury-deputy-chief-says-reviewing-costs-benefits-of-u-s-sanctions-idUSKBN2C82W5.} The department also specifically expresses concern about the United States’ ability to effectively levy sanctions in the increasingly complex world.\footnote{Id.} Economists agree that the more severe the sanctions, the more unpredictable the results.\footnote{Gregory T. Chin, \textit{US financial statecraft on China and Hong Kong: Unintended consequences across the asia-pacific}, T.wai (2021), https://www.twai.it/articles/us-financial-statecraft-china-hong-kong/.}
1. United States Sanctions on Russia

a. European Union

The current Russia-Ukraine situation serves as a prime example of the negative consequences that sanctions, even enacted with good intentions, can produce. The European Union (EU) was caught in a crossfire between the United States and Russia and has suffered as a result. Given the United States’ position as a global superpower, NATO allies often follow its strong lead. When the United States imposed expansive sanctions on Russian imports and exports in February 2022, the EU issued a complete import ban on Russian oil by the end of the year.\(^6\) Though implemented with patriotic intentions, these measures were impractical for countries highly dependent on Russian resources and put many of them, and the EU as a whole, in a dangerous situation. Individual countries like Hungary, Slovakia, and Finland will likely struggle to find replacements, and the energy crisis has already dramatically worsened throughout all of Europe. With its sizable economy and large geographical separation from Russia, the United States is capable of sustaining “severe” sanctions on Russia, but most EU countries are not.

Additionally, although the EU was quick to ban oil imports from Russia, the organization left natural gas imports from Russia alone. After all, some European countries are “perilously dependent on Russian gas,”\(^7\) which also constitutes 40% of all natural gas in all

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\(^7\) Statista (2023) *EU dependence on Russian oil by country 2020,* Statista. Statista Research Department. https://www.statista.com/statistics/1298031/dependence-on-russian-oil-in-the-eu-and-uk/. (Slovakia (78%), Lithuania (69%), Poland (67.5%), and Finland (67%) top the list for dependence on Russian oil).


(According to the European Union Agency for the Cooperation of Energy Regulators, Finland is 100% dependent on Russian gas, Latvia is 93%, and Estonia is 79%. Several other countries are more than 50% dependent on Russia for their natural gas).
of Europe. However, in the midst of the EU’s symbolic speech via oil sanctions, Russia answered with its own harsh strike. Beginning in September 2022, Russia severely limited its natural gas exports to EU countries because of fictitious “technological problems” sanctions created for the Nord Stream Pipeline. President Putin said that unless “the west would lift its sanctions on Moscow,” Russia would not be able to deliver the natural gas that some European countries desperately needed. Since US sanctions themselves are a major piece of aggregate measures against Russia and have led other western countries to impose similar sanctions, it can be reasonably concluded that the US has played a large role in Russia’s natural gas retaliation on the EU. As of October 2022, the market share of Russian gas in Europe fell sharply to just 9%—a gap the EU will struggle to replace—which has caused fuel prices to skyrocket and further threatens Europe’s energy crisis.

Moreover, inflation in the EU has significantly worsened since the war began. From February to October 2022, the EU’s inflation rate increased 75% to a record-high level. In addition to the rising cost of fuel, food prices have risen 15% in the last year. Russia and


74 Id.


Ukraine account for one-third\(^78\) of the world’s wheat and are major exporters of corn, barley, and fertilizer. Russia retaliated against Western sanctions by intentionally withholding Ukrainian grain exports to Europe.\(^79\) Instead of responding exclusively with harsh sanctions spearheaded by the United States, negotiations could have mitigated the effects of the war on Europe’s food supply and prevented Russia from potentially starting a global food crisis.

Thus, despite United States sanctions meeting several of the country’s goals—including reducing Russia’s oil and gas exports, oil production, and ability to conduct international business—these comprehensive measures had a negative impact on the EU that greatly superseded the United States’ original intent. This example further shows that unilateral sanctions should be considered war, not negotiation or diplomacy. Diplomacy builds bridges and opens conversations; it does not involve attacks on other countries, whether direct or indirect. “Sanctions that harm the general population can bring about undesired effects, including strengthening the regime, triggering large-scale emigration, and retarding the emergence of a middle class and a civil society.”\(^80\)

b. Global Supply Chain

US sanctions on Russia not only dramatically affected the EU, but posed global threats. The COVID-19 pandemic caused drastic supply chain issues throughout the world, alerting everyone to the visible, real-life effects of hindering an otherwise unseen and seamless process. Heavy US sanctions on Russia added a devastating layer to already-damaged supply chain operations and processes. Almost 70% of US companies admit that US sanctions are negatively affect-

\(^78\) Id.


ing their business. With such drastic changes to import and export restrictions, supply chain processes have been disrupted for all those involved, whether directly or indirectly.

Recent industry research unrelated to the current conflict shows the negative impact economic sanctions can have on entities not directly targeted by sanctions. This phenomenon is explained by the contagion effect, which postulates that a shock to a country or economy spreads and affects others. This research shows that firms not targeted by economic sanctions, but which operate in the same supply chain, perform worse than other companies. Meddling with any supply chain often results in increased prices and damaged economies. Practically, it means that individuals or businesses cannot obtain the products and goods that help their daily lives function. Because of the contagion effect, hefty US sanctions on Russia have exceeded their original target and now affect the world. This is another powerful reason why economic sanctions should be considered warfare.

2. Deprivation of Human Rights

In many cases, sanctions programs can actually cause more devastation than traditional warfare, but go under the radar due to underestimation and lack of sensationalization by news media. The following quote illustrates the impact of economic sanctions on human rights:


[T]o deny a nation the means to purify water or to treat sewage... encourage[s] the spread of disease[.] ...To deny a nation access to antiseptics, antibiotics and other essential medical supplies.... render[s] disease untreatable[.] ...To deny people adequate electricity for hospitals and factories, to deny people — including pregnant women, babies, infants, the sick, the old — sufficient food and clean water is... undeniably a gross violation of humanity.”

Looking to the past reveals several cases where US economic sanctions produced significant human rights violations, including many from the above list. An ongoing example is Venezuela. Since the early 2000s, the United States has enforced major sanctions on Venezuela, including fully blocking “any United States person” from doing business with the country, including major companies that provide necessary goods, such as Chevron. Venezuela has suffered drastically, and its perilous human rights situation grew far worse. Research reveals that United States sanctions directly decreased sanitation and access to clean water, endangered fuel supply, and hindered scientific research.

Venezuela’s vulnerable populations, namely women, children, and those with illnesses or disabilities, were particularly affected.


86 Id.


Another country severely affected by the United States’ war-like sanctions is Iraq. Before United States sanctions, “Iraq’s medical facilities and public health system were well-developed.” The country had invested much in its economic development, and the majority of citizens had access to clean water and health services. However, just one year after sanctions were imposed, Iraq suffered serious food shortages. United States sanctions amplified the effects of the Persian Gulf War by blocking access to food—which the “starving country” desperately needed. This contributed to malnutrition, contaminated water, widespread diseases, “and the collapse of every system necessary to ensure human well-being in a modern society.” Mortality rates tripled for infants and quadrupled for young children. On top of this, sanctions blocked access to necessary child care items such as baby food and incubators.

In Poland, United States sanctions caused threats of population-wide starvation. Economic sanctions on Haiti also caused “severe damage” on the country’s entire population, namely through cutting off financial aid equivalent to Haiti’s annual budget. Following, “prices nearly doubled, unemployment skyrocketed, and the minimum wage fell to three dollars a day...Reductions in spending also made food very expensive, reduced the availability of medicine and medical supplies, stopped garbage collection and the maintenance of sewage treatment plants, and decreased the supply of drinking water.” Undoubtedly, United States sanctions resemble warfare.

In the case of both Venezuela and Iraq, sanctions made it more difficult for citizens to challenge tyrannical governments. “How can one enjoy liberty or free speech, for example, without adequate food or health? … Starving people may find it difficult to exercise their

90 Howlett, Supra note 84.
91 Gordon, Supra note 18.
92 Howlett, Supra note 84.
93 Id.
94 Id.
95 Id.
freedom of speech.” Further, oppression of civilians by tyrannical governments increases when heavy sanctions are imposed on the country. Additional studies reveal that sanctions negatively affect democracy in targeted countries, even though democratization is the reason for most US sanctions. Perhaps the most striking research findings of all declare that sanctions actually increase the likelihood of military conflict. This serves as additional evidence that sanctions are dangerous enough to be considered a form of warfare. Although economic warfare is not identical to military conflict, many of the effects are similar enough to reclassify sanctions in the realm of war, not merely diplomacy.

C. Applying WPR to IEEPA

The underlying problem is the misuse of IEEPA. Although Presidents often ignored these points, Congress clearly intended to prevent abuse of sanctioning power fueled by TWEA, redefine and limit emergencies, and place a check on the President. The latter is strongly evidenced by IEEPA’s provision that “the President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by [IEEPA] and shall consult regularly with the Congress so long as such authorities are exercised.” Perhaps more important is the striking similarity to language from WPR: “The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United

96 Id.
States Armed Forces are no longer engaged in hostilities or have been removed from such situations.” Further, similarly to IEEPA, Congress enacted WPR to prevent the erosion\(^99\) of congressional authority.

Significantly, although the Court’s landmark decision in *INS v. Chadha* made the legislative veto of national emergencies unconstitutional, this ruling did not invalidate WPR, which requires the president’s use of military force to be approved by Congress after 60 days. Congress retained this wartime power in order to “fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”\(^100\)

As this paper has established, there must be greater congressional oversight on the President’s ability to declare national emergencies and impose sanctions. WPR’s language could reasonably be replaced to include “unilateral sanctions programs” instead of references to war. Moreover, sanctions are widely cited as the primary alternative for traditional war, implying that their intent is similar.

Mirroring the original intent of IEEPA, one way to introduce a legislative check is by reinstating Congress’s ability to veto the President’s national emergencies or sanctions. Since *INS v. Chadha* was decided on the basis of separation of powers—and at the expense of checks and balances—one plausible method to restore this form of congressional oversight is by legally reclassifying sanctions in the same realm as war, over which both the Constitution and WPR guarantee the Legislative and Executive Branches joint power.

In his dissenting opinion in *INS v. Chadha*, Justice Byron White spoke on the dangers of removing congressional checks on the presi-
dent’s foreign powers. “I fear it will now be more difficult to ensure that the fundamental policy decisions in our society will be made not by an appointed official, but by the body immediately responsible to the people.”\textsuperscript{101} In other words, Justice White expressed concern that this decision would disallow Congress from performing its constitutional duties. In the Executive Branch, the president alone has power to initiate sanctions against foreign entities. An equally important distinction is that appointed officials—not those elected by the people—in the Treasury and State departments primarily administer, enforce, maintain, develop, and implement economic sanctions suggested by the President.\textsuperscript{102}

\textbf{D. Prescription}

Since the Court’s strong ruling in \textit{INS v. Chadha} may apprehend some from being willing to reconsider Congress’s ability to check national emergencies, this paper will ultimately argue for congressional oversight of sanctions, one primary result of national emergency abuse. The checks outlined in WPR serve as an excellent foundation for a check that inevitably needs to be included in IEEPA. Due to legal and doctrinal obstacles, some conditions need to be slightly altered or clarified. This paper’s proposal to amend IEEPA is as follows:

First of all, Congress should primarily be allowed to check unilateral sanctions programs because of these sanctions’ warlike power.

Equally important, in order for Congress’s check to actually reduce unintended consequences, these sanctions need only be

\textsuperscript{101} See case cited supra note 38.

checked if they are severe,\textsuperscript{103} arbitrary,\textsuperscript{104} or unilateral. Congress should also be aware of potential human rights violations, paying close attention to the often overlooked economic, social, and cultural rights afforded in ICESCR.\textsuperscript{105}

Further, as WPR only applies to presidential actions outside of declared war, congressional authorization of sanctions should also only apply to times when the country is not at war. Otherwise, as stated in WPR, the president’s role as “Commander-in-Chief” takes precedence.

Finally, to mimic direct language from WPR, all eligible sanctions should be authorized by Congress after 60 days in order to continue. In lieu of the 30-day period WPR provides to remove troops, this time will serve as an open negotiation period between Congress and the president to iron out any misunderstandings.

This prescription is a valid solution to a pressing problem. Most importantly, it is consistent with common law. In \textit{Youngstown Sheet \& Tube Company v. Sawyer}, the Court established three tiers to give clarity regarding foreign relations powers shared between the President and Congress. The lowest tier says that “when the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”\textsuperscript{106} This tier additionally

\begin{itemize}
\item \textsuperscript{103} Economists say that more severe sanctions lead to more unintended consequences. Further, the United States’ 2022 sanctions on Russia serve as a good example of what “severe” means.
\item \textsuperscript{104} The example cited earlier about President Donald Trump is a prime example of an attempt to sanction arbitrarily. Desperately seeking a way to acquire the necessary funds to build the border wall with Mexico, he invoked IEEPA and further threatened to sanction Mexico to generate income for this purpose.
\item \textsuperscript{106} \textit{Youngstown Sheet \& Tube Co. v. Sawyer}, 343 U.S. 579 (1952).
\end{itemize}
further this paper’s prescription by supporting the idea of checks and balances.107

Examining the history of WPR reveals additional evidence for this solution. Passed in 1973, this act has been operative for 50 years. Because WPR has stood the test of political change and time, including the sweeping strike imposed in INS v. Chadha, applying its provisions to IEEPA is a sound idea.

Another reason this amendment should be added to IEEPA is deterrence. Although WPR has not stopped past presidents from pursuing some wartime actions—including conflicts in Bosnia, Kosovo, Somalia, Libya, and former Yugoslavia108—the provision of congressional authorization has measurably deterred the radical use of war power and prompts careful consideration by the president. Presidents have shown their compliance with WPR by formally submitting a collective total of 132 reports to Congress regarding potential or ongoing conflicts.109

IV. Conclusion

For the entirety of history, the United States President has possessed nearly unlimited sanctioning power. Although presidential authority over sanctions has been firmly established, the unchecked nature of this power is alarming. From 1917 until the present day, Presidents have gotten away with significant power abuse of both TWEA and IEEPA. Many other pertinent factors raise concern about whether this authority is best left unchecked, including the devastating and unpredictable impact of unilateral sanctions, the increasing complexity of the world, and strong indications from core legislation

107 See case cited Supra note 38, (The Supreme Court’s main reasoning for abolishing the legislative veto afforded in IEEPA was separation of powers. However, this paper believes that emphasizing checks and balances would be better).


109 Id.
such as NEA and IEEPA that Congress intended to check the President in this realm.

Ensuring United States sanctions account for global impact and harmful side effects has never been more critical. The United States’s use of dangerous unilateral sanctions is increasing rapidly, and their effects on the world are starting to show. All the while, the President has the final say regarding these measures, which strongly resemble legislation and far transcend the economic sphere.

Thus, reinstating a legislative check on the President’s ability to invoke emergency powers is of the utmost importance. Unilateral sanctions must be considered a legal form of economic warfare due to their sheer power and worldwide impact. This would allow for the creation of a legislative check that mirrors provisions from WPR, which would check the President’s sanctioning power without diluting nor removing his authority. This would restore the constitutional principle of checks and balances to weighty areas, protect the President, and allow the United States to eschew avoidable disaster and preserve its global integrity into the future.
THE WEAKENING OF THE VOTING RIGHTS ACT: A PROPOSAL TO MODERNIZE PRECLEARANCE

Breannan Perez

I. INTRODUCTION

Exercising the right to vote is often considered to be the foundation of democracy and a fundamental right. However, considering America’s history of disenfranchising minority voters, is voting a fundamental right? Following the end of the Civil War, the South issued legislation, known as Jim Crow laws, that sought to bar African Americans from the right to vote. In an aim to deny this right, the South enacted poll taxes, literacy tests, and voter intimidation to make the process of voting infeasible. However, while such procedures are not in practice today, thanks to the passage of the Fifteenth Amendment and Voting Rights Act (VRA) of 1965, voter suppres-

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sion continues to plague the United States’ system of voting.\(^4\) In fact, many current voting laws and procedures are covert in their attempt to discriminate and to target minority voters, which will later be explained.

Despite these landmark pieces of legislation being passed, the Supreme Court continues to hinder progress made towards restoring and protecting voter rights. Since 2005, the United States Supreme Court has been under the guiding direction of Chief Justice John Roberts.\(^5\) The “Roberts Court” has ushered in an era of judicial restraint, which acknowledges the limited power of the Court.\(^6\) As such, the Court has used a narrow and strict interpretation of the Constitution in making critical decisions. Such an approach has greatly affected the legacy of the Voting Rights Act. The VRA is commended as a pivotal piece of federal legislation, issued during the Civil Rights Movement. Furthermore, it works to outlaw discriminatory voting practices and reinforces the Fifteenth Amendment, which prohibits denying individuals the right to vote based on race or color.\(^7\) Recently, however, such legislation has been at the center of political debate as the Supreme Court has limited the scope and power of the VRA.

Section 5 of the Voting Rights Act requires states with a history of discriminatory practices to receive approval, called “preclearance,” from the U.S. District Court for the District of Columbia or the Attorney General regarding any changes made to their electoral


Preclearance ensures that proposed changes do not deny or curtail the right to vote based on race or color. However, such safeguards were challenged in *Shelby County v. Holder*. The case was presented to the Court, and *Shelby County* argued that Section 5 should be deemed unconstitutional. They stated that Congress exercised inappropriate authority in 2006 when they renewed Section 5 for an additional 25 years. Furthermore, it was also argued that the formula violated the principle of equal sovereignty. However, the Court did not issue an opinion on the constitutionality of Section 5, but they did assert that Section 4(b), which determines which jurisdictions must receive preclearance, was unconstitutional. Former Supreme Court Justice Ruth Bader Ginsburg issued a dissenting opinion, stating that the Court erred in overriding Congress’ previous decision to reauthorize preclearance and its coverage formula in 2006 in which Congress “designed both to catch discrimination before it causes harm, and to guard against a return to old ways.”

The question remains, What is the impact of having no current coverage formula and what should be done to modify the formula? This article argues that the lack of a modernized coverage formula disregards the rights of minority voters and hinders progress towards enfranchising vulnerable voting populations. Since the coverage formula works in tandem with preclearance, this article

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10 *See Jeffrey M. Schmitt, In Defense of Shelby County’s Principle of Equal State Sovereignty*, 68 Okla. L. Rev. 209 (2016). The principle of equal sovereignty is laid out in the Tenth Amendment and states that powers not explicitly delegated to the United States by the Constitution are reserved to the states. However, regarding *Shelby County v. Holder*, Congress can limit a state’s sovereign power if they can “demonstrate that the statute’s limited geographic reach is sufficiently related to the problem the law is addressing.”

proposes the creation of a new coverage formula that meets current voting conditions.

II. BACKGROUND

Curtailing voting discrimination was achieved through 4(b) of the VRA, which outlines a coverage formula for states with a history of discriminatory voting practices. The coverage formula was based on literacy tests, voter registration, and voter turnout in the 1960s and 1970s. If a state met any of the conditions laid out in the formula, it would then be considered a covered jurisdiction. Historically, the coverage formula was extended for years as it was identified that the provision was still necessary based on current conditions. However, this formula was struck down in *Shelby County v. Holder*. It was determined that the formula's “current burdens” did not meet the “current needs,” meaning that the coverage it extended no longer related to the problem it targeted: discrimination. The Court ruled that it met that condition in 1965, but currently, it no longer meets that test due to significant increases in voter registration and turnout numbers.

Section 4(b) is not only necessary because it identifies historically discriminatory areas, it also lays the foundation for Section 5

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12 The coverage formula is comprised of two main elements. The first element is whether the jurisdiction put forth “tests” or “devices” to make the process of voting burdensome. Section 4(b) clearly defines a “test” or “device” as a method in which applicants are required to pass a literacy test, assert whether they are of good moral character, or demand another registered voter to vouch for their identity or qualifications if election information is provided only in English, all while individuals of a single language minority comprise more than five percent of residents who are of voting age. The second element is whether there were less than 50 percent of residents, who are of voting age, who were either registered to vote or who voted in the presidential election.


of the VRA. Section 5 concerns the provision of preclearance, which states that any area identified as a “covered jurisdiction” needs preclearance for any proposed election or any voting law changes, including redistricting maps. However, since the coverage formula is no longer in effect, no determination can be made as to which states are covered. This currently allows for states with a history of discriminatory practices to pass potentially discriminatory laws freely without any oversight. This can further be seen in a report by the American Civil Liberties Union from 2021, where over 400 anti-voter laws and practices were introduced by states that would target and burden voters of color.\textsuperscript{15} Without any safeguards in place, when voting or election laws and redistricting attempts are deemed discriminatory, it is too late and must be addressed after the fact. Such a retrogressive approach to preventing voting discrimination does not hold states accountable.\textsuperscript{16} Thus, not having preventative measures in place could potentially burden the Court as they must address cases that could have been handled before reaching their docket. It is important to note that not only is this a lengthy process, but while cases are being reviewed, the discriminatory law or district map is still in practice and is negatively affecting communities and vulnerable populations. The cost of not having a coverage formula and preclearance is significant, and a lack of such safeguards compromises the legitimacy of democracy and individuals’ guaranteed


\textsuperscript{16} See Durbin Delivers Opening Statement at “Jim Crow 2021” Hearing on Voting Rights in America, U.S. SENATE COMMITTEE ON THE JUDICIARY (Apr. 20, 2021), https://www.judiciary.senate.gov/press/releases/durbin-delivers-opening-statement-at-jim-crow-2021-hearing-on-voting-rights-in-america. Dick Durbin, Senate Majority Whip and Chair of the Senate Judiciary Committee, expressed his concern for proposed legislation that would suppress minority voters, stating “[In 2021], more than 360 bills with restrictive voting provisions have been introduced in 47 states. These new pieces of legislation may not involve literacy tests, or counting the number of jelly beans in a jar, like the original Jim Crow. But make no mistake: they are a deliberate effort to suppress voters of color.”
right to vote; a guarantee that is not currently being upheld or even supported by the Court.

Another key aspect to understanding the significance of Section 4(b) is its relation to the Fifteenth Amendment. Section 1 of the Fifteenth Amendment states that the right to vote cannot be denied on account of race or color. Thus, one must consider the implications of the suspension of preclearance. States who have a history of unjustly burdening communities of color in their ability to vote and who continue to pass strict voting laws are likely to continue this process, considering there is no threat of federal intervention. Furthermore, Section 2 of the Fifteenth Amendment states that Congress has the power to enforce the Fifteenth Amendment through enacting “appropriate legislation.”\(^\text{17}\) Thus, the current weakening of the provisions of the VRA could potentially be remedied through Congressional action. However, due to the polarizing nature of voting and election laws, there has been a standstill in enacting such legislation.

Moreover, the aim of the coverage formula in Section 4(b) is also closely aligned with Section 2. Section 2 prohibits voting procedures, practices, and prerequisites that would deny individuals access to voting on the basis of race or color.\(^\text{18}\) As such, Section 2 also applies to redistricting maps since districts must be representative in nature. This means communities of color should not be thinly spread out amongst districts or even assigned to a single district. Such practices are examples of voter dilution, which Section 2 works to combat. Voter dilution is a form of gerrymandering that weakens the vote of a group, as districts do not reflect their proportion of the community. Thus, without the coverage formula in place to allow for preclearance, states across the country have proposed and enacted restrictive voting laws that have been found to significantly burden minority voters.

Since the striking down of Section 4(b), the Voting Rights Act has remained under attack, being slowly weakened by the Court. The Court has argued that progress has been made in minority voter turnout, and there have been fewer instances of discriminatory

\(^{17}\) U.S. Const. amend. XV, § 2.  
practices. However, this disregards the significant progress made through the VRA and fails to consider that discrimination is still ongoing regardless of the frequency in which it occurs. The findings of this paper demonstrate that the Supreme Court is negligent in its narrow statutory interpretation of the tenets of the Voting Rights Act of 1965, which includes voting laws and redistricting plans. As such, the Court sets no clear precedent for future cases and threatens the integrity of voting for all Americans. A new coverage formula should be enacted to strengthen the VRA and its ability to prevent discriminatory practices.

III. PROOF OF CLAIM

A. The Precedent Set by Shelby County v. Holder

1. Denial of Current Discrimination

In reviewing the Court’s decisions following the landmark case Shelby County v. Holder, the right to vote and access to voting has not been safeguarded. The decision made in light of Holder marks the beginning of the “gutting” of the Voting Rights Act, in which it has become increasingly difficult to block or counteract discriminatory practices before they are enacted. In the Court’s opinion issued by Justice Roberts, he states that the United States is no longer divided by racially discriminatory practices when he says, “Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.” The Court argued that due to progress being made in curtailing voter discrimination and increases in voter turnout in covered jurisdictions, it demonstrated that the coverage formula was no longer relevant.

However, much of the progress described by Justice Roberts was made possible through the passage of preclearance. This was made evident in a study conducted by Desmond Ang which sought to


evaluate the effects of federal oversight under the Voting Rights Act. In the study, Ang found that protections offered through preclearance boosted long-term voter turnout from 4 to 8 percent.\textsuperscript{21} Therefore, it is difficult to ignore the relevance of a coverage formula that has allowed for such success in promoting equal access to voting. The dissenting opinion given by Justice Ruth Bader Ginsburg highlights this further: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”\textsuperscript{22} This demonstrates that although the Court has claimed that such discrimination today is “rare,” it does not negate the fact that legislation, specifically a new coverage formula, is needed to address current challenges to voting.

2. A Lack of Coverage Formula Leading to Further Regression

Another key aspect to consider regarding the Court’s determination that such racial divisions are not reflected in today’s voting is the direct impact the striking down of Section 4(b) had on vulnerable populations. In many of the covered jurisdictions, stricter voting laws that were previously blocked by preclearance were passed directly after the coverage formula was deemed unconstitutional. North Carolina, one of many previously covered jurisdictions, enacted a voting bill, HB 589, which sought to pass restrictive photo ID laws. However, the requirements of the bill exceeded photo ID requirements, and shortened the early voting period, as well as removed the option


of same-day voter registration. The state of North Carolina was sued, and it was decided three years later by the Fourth Circuit Court of Appeals that the bill was enacted to exclude African American voters. The bill has been referred to as a “monster” voter suppression law. The Fourth Circuit Court of Appeals stated that HB 589 was perhaps one of the worst voter suppression laws since Jim Crow. Despite the Supreme Court’s opinion in *Holder* that sufficient progress has been made in promoting equal voting rights, disregarding current discriminatory laws only enables suppression and discrimination to persist.

3. A Retrogressive Approach to Curtailing Voting Discrimination

Not only will discriminatory practices and procedures persist without a renewed coverage formula, a lack of such formula will create a reliance on Section 2 of the Voting Rights Act.

As a result of *Holder*, many have looked to Section 2 of the Voting Rights Act as a promising substitute and viable avenue for challenging discriminatory voting procedures. Section 2 provides both private citizens and the federal government the right to challenge state voting laws. However, Section 2 does not provide such relief for plaintiffs, seeing that the burden of proof that must be met is both significant and costly. Filing such cases requires the plaintiff to meet the burden of proof, time, and expense, which is a serious divergence from Section 5, as it requires the state and locality to bear this burden. Thus, those looking to file Section 2 claims face hundreds of thousands, if not millions, of dollars in legal fees. Alongside


the significant financial burdens are serious time considerations. As mentioned previously, Section 2 claims address procedures after they have already been passed. As such, when these claims are resolved, many elections may have occurred in which the procedure being challenged was still in effect. Overall, Section 2 is a much more expensive route than Section 5 and does not provide injunctive relief. Thus, creating a “vibrant” Voting Rights Act that can meet the challenges of current discrimination is necessary and critical in protecting minority voters. 26

B. Modernizing Coverage Formula

The John Lewis Voting Rights Advancement Act, which as of this writing has been stalled within the Senate, seeks to propose a modernized coverage formula. As such, it proposes the following, as outlined by the Brennan Center for Justice 27:

1) States will be covered by preclearance if, within the past 25 years, they or their localities committed at least 10 voting rights violations and at least one violation was by the state, or localities within the state committed at least 15 voting rights violations.

2) Subdivisions in noncovered states will be covered if they committed at least three voting rights violations in the previous 25 years.

3) Voting rights violations are determined on the basis of (1) court judgments under the Constitution or the Voting Rights Act; (2) preclearance denials; and (3) consent decrees, settle-


ments, or agreements undoing voting changes, in which the jurisdiction admitted liability.
4) The Department of Justice (DOJ) decides whether a matter counts as a violation and whether a jurisdiction is covered.
5) A covered jurisdiction will be subject to preclearance for 10 years, after which it will exit coverage as long as it no longer has qualifying violations during the preceding 25 years (the review period is rolling).
6) A jurisdiction may also exit coverage if it has no violations within the prior 10 years.

Such provisions meet the challenge the Court posed to Congress to enact appropriate legislation to remedy voter discrimination. As such, the newly proposed coverage formula does away with “dated” election data that the Court stated the formula in 1965 unconstitutionally argued for. As such, a new coverage formula would allow for voting rights to be further secured and the legislative process to be preemptive rather than retrogressive, which has currently proven to be ineffective at addressing such claims.

While the newly proposed coverage formula works to address voter discrimination, it is important to recognize that due to the legislation being stalled other avenues must also be considered. Therefore, it is also proposed that a constitutional amendment be created that guarantees the right to vote. While the Supreme Court’s jurisprudence has asserted that voting is a fundamental right, it is not explicitly stated in the Constitution as such. Thus, proposing such an amendment would help to create a standard for the Court’s decision as they commonly use a narrow and strict interpretation of the Constitution, which would make it challenging to deny such a right is guaranteed to all citizens.

IV. Conclusion

In conclusion, preclearance under the Voting Rights Act is an inoperable shell of legislation, and without a newly proposed coverage formula, discriminatory practices are likely to persist. Furthermore, addressing voting discrimination is a complex issue involving a considerable analysis of cost and burden. As such, current identification of discrimination is inadequate and addresses such injustices after they have already occurred. The current system of relying on Section 2 of the VRA places serious time costs on the Court’s docket while harming minority voters in the process, as no protection can be offered.

This paper offers prescriptions to strengthen the Voting Rights Act, which is essential in upholding the foundation of democracy. Most importantly, the newly proposed coverage formula meets the conditions of relevancy outlined in Holder. Thus, current voting turnout and associated data would be used to ensure that preclearance is appropriately mandated to states in which discrimination is a significant burden on minority voters. This new formula will provide necessary federal oversight that will incentivize state accountability and compliance with maintaining voting practices and procedures that are not discriminatory in effect.
DEFENDING THE CONSTITUTIONALITY OF ABORTION RIGHTS

Sydney Reil¹ and Cynthiana Desir²

I. INTRODUCTION

In 2018, the constitutionality of the Mississippi Gestational Act was called into question by the Jackson Women’s Health Organization. This act illegalized the majority of abortions after 15 weeks of pregnancy. Given the constitutional right to abortion granted by Roe v. Wade³ and upheld by Planned Parenthood v. Casey,⁴ both the U.S. District Court for the Southern District of Mississippi and the U.S. Court of Appeals for the Fifth Circuit deemed the Act unconstitutional as a violation of that right.⁵ The State of Mississippi brought the case under the review of the United States Supreme Court in 2021, seeking a Court opinion that would support and uphold the

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Mississippi Gestational Act. On June 24, 2022, such an opinion was granted; the Supreme Court issued the Dobbs v. Jackson decision, which not only overturned the rulings of the lower Mississippi courts but overturned Roe itself, thereby removing the federal protection of abortion rights and returning the regulation of abortion to state legislatures.

The Court’s majority opinion in Dobbs, written by Justice Samuel Alito, stated that Roe was unconstitutionally decided and was based on a false record of the history of American abortion law. The opinion further impugned Roe for the country’s current divisiveness on abortion, claiming that the 1973 decision set back the natural progression of many states toward more lenient abortion regulation. The allegations made by Justice Alito against Roe does not fully encapsulate the reality of abortion patterns, practices, and law in the United States. The majority rejected the notion of abortion as a constitutional right, relying on the fact that abortion is not directly and explicitly enumerated in the Constitution. However, former Courts have held that the Constitution protects multiple unstated rights including the right to interracial marriage, the right to marriage between members of the same sex, and the right to bodily autonomy. Contrary to the information set forth in the majority opinion by Justice Alito, the legal history of the United States provides sufficient evidence for an American tradition of protecting and upholding abortion rights, as widespread state restrictions on abortion began developing in the mid-to-late-1800s, well after the writing and ratification of the U.S. Constitution. This history of abortion in the United States is but one of many factors that was either overlooked or obscured in the decision that overturned Roe. Due to the history of abortion in American law, the precedent and protections of the

6 Id.
7 Loving v. Virginia, 388 U.S. 1 (1967)
Fourteenth Amendment, and the realistic consequences of *Dobbs*, abortion should be considered and protected as a constitutional right.

This Comment will begin its defense of the constitutional right to abortion with a summary of the background of abortion law in the United States, from the finalization of the Constitution in 1778 to the present day. Next, it will discuss the constitutionality of *Roe, Casey*, and other cases defending the constitutionality of abortion rights based on the implicit right to privacy found in the Due Process clause of the Fourteenth Amendment. Finally, the Comment will examine both the real and potential consequences of the overturn of *Roe* via *Dobbs*; these consequences will be analyzed in the context of the “moral controversy” of abortion mentioned by Justice Alito.

II. BACKGROUND

A. American Abortion Law: 1778 – 1840

The history and tradition of United States abortion law has been utilized as support for both *Roe* and the linchpin in its downfall, *Dobbs*. These rulings present opposing views of this history; thus, it is essential to understand the controversial history of American abortion law and the precedent it sets for the United States today. As this Comment is dealing, in large part, with the constitutionality of abortion, it is essential to understand the social and cultural norms in which the U.S. Constitution was written and finalized. In 1778, British Common Law was the law of the land in the newly independent colonies.11 Under British Common Law, abortion was only “illegal” (though it is arguable that no abortion, under Common Law, was officially illegal) once the fetus had “quickened”.12 The term quickening refers to the woman’s perception of fetal movement, and it usually occurs around 20 weeks, or four months, into pregnancy.13 Thus, four months of development was the legal beginning

12 *Id.*
13 *Id.*
of human life under British Common Law, and abortion was left to the pregnant woman’s own understanding of her pregnancy. This is the context in which the Constitution was written and accepted by independent America.

The first American legislation officially restricting abortion was passed in Connecticut in 1821, a decision catalyzed by a New England scandal. In 1818, an Episcopal pastor named Ammi Rogers attempted an abortion on his mistress and congregant, Asenath Smith.\(^\text{14}\) Though the abortion was not successful, Asenath gave birth to a stillborn child. While the stillbirth could not be directly attributed to the abortion attempt, it nonetheless led to the prosecution of Rogers, who was ultimately convicted of sexual assault and sentenced to two years in prison in 1820.\(^\text{15}\) The charges brought against Rogers were not related to the botched abortion, but the case influenced the subsequent abortion legislation passed by the General Assembly of Connecticut. In May of 1821, the General Assembly revised the Connecticut crime and punishment law, adding new sections including Section 14\(^\text{16}\), which made the use of poison to “cause or procure the miscarriage” of a woman in the “quickened” period of pregnancy punishable by imprisonment.\(^\text{17}\) The inclusion of the quickened fetus doctrine, borrowed from British Common Law, in this statute, provides both the pregnant woman and physicians with flexibility and a period in which to perform legal abortions.\(^\text{18}\) Additionally, both the background and specific wording of this statute place the legal responsibility on the person performing or inducing the abortion rather than on the mother herself. This highlights the

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15 *Id.*


18 *Id.*
general goal present in early abortion regulation, that mothers should be protected from dangerous abortion methods. This protection of maternal life, rather than limitation of bodily autonomy and protection of fetal rights, seems to be the likely intent of this early regulation.

Following Connecticut, other states began passing similar abortion regulations. The majority of these early regulations simply codified British Common Law, protecting a woman’s right to abort her pregnancy before quickening. One reason for the codification of these regulations was, as in the 1821 Connecticut legislation, the protection of the mother from dangerous methods of abortion.19

The adoption of the Act Prohibiting Importation of Slaves in the 9th Congress20 was another reason for abortion regulation codification. In 1808, this act outlawed the importation of enslaved peoples, halting the legal transatlantic slave trade to the North American continent.21 Since enslaved peoples could no longer be imported to the States from elsewhere, slavery could only be perpetuated through slaves already on the North American continent. This made the childbearing abilities of enslaved women increasingly valuable, based on the legal doctrine of partus sequitur ventrem, meaning that those born to women slaves were born into slavery, to those states that continued to use slavery as their central labor force. Thus, written restriction of abortion would motivate enslaved women to carry to term.22 This sentiment, particularly in southern states, paired with the abortion legislation being passed in New England, lead to ever-increasing restrictions on abortion and contraceptive rights.23

In 1829, New York passed a law making abortion post-quickening a felony and pre-quickening abortion a misdemeanor.24 Still,

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20 Act Prohibiting Importation of Slaves, ch. 28, 1 Stat. 104 (1807).
22 Id.
23 Id.
the majority of states that passed statutes used these first abortion statutes to uphold British Common Law.\textsuperscript{25} By 1839, only eight states regulated abortion by statute, with the other eighteen states maintaining British Common Law without additional legislation. It was not until the sensationalism of botched abortions, the development of vocalized anti-abortion sentiments from obstetricians and gynecologists, and increased sentiment on the immorality of abortion largely beginning in the 1840s that abortion faced widespread state restrictions.\textsuperscript{26}


In the 1840’s, the “horror stories” of maternal infections, permanent deformities, and deaths from abortion procedures impacted abortion laws disparately in each state, but this disparate treatment did not massively increase the restrictiveness of most state laws.\textsuperscript{27} By 1859, only 12 of 33 states adopted abortion restrictions beyond British Common Law.\textsuperscript{28} Fifteen states officially adhered to British Common Law, ten of which did not punish abortion at any stage of pregnancy and the other five made abortion punishable only after quickening.\textsuperscript{29} The remaining six had no official statutes, but generally adhered to British Common Law principles. It was not until the 1860s that states began to adopt more stringent statutes that both limited the timeframe in which abortion is legal and intensified the punitive consequences of illegal abortion.\textsuperscript{30} However, in these stricter statutes, the blame for criminal abortions was still directed

\begin{flushleft}
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\end{flushleft}
largely at the physician or facilitator of the procedure rather than the woman aborting the fetus, and as abortion procedures remained risky for the mother, these laws were seen as intended to preserve the life of the pregnant woman.\textsuperscript{31}

The increased restriction of abortion in many American states in the mid-1800s can be largely attributed to the emergence of medical morality considerations. As abortions became more safely attainable, abortion legislation focused on the morals of abortion as opposed to maternal life preservation. Gynecologist Horatio Storer was a particularly influential figure in abortion restriction.\textsuperscript{32} He led a campaign regarding the immorality of abortion at any stage, with the support of the American Medical Association (notably composed of only male members), Storer’s campaigning greatly impacted legislation against abortion all over the country. However, even in states that prohibited abortion at any stage of pregnancy, the public attitude formed under Common Law persisted.\textsuperscript{33} In terms of the new, Storer-driven legislation, legal blame shifted to include the woman soliciting an abortion as well as the physician performing it, and, in some states, sentences for women who underwent abortions at any stage was 10-20 years in prison.\textsuperscript{34} Nonetheless, the social stigma around abortion across the country remained tied to the quickening doctrine rather than to the actual legality of abortion under the new legislation. Given this prevailing opinion, abortions were seldom prosecuted.\textsuperscript{35} This was the state of American abortion law and regulation until the 1870s.

\textsuperscript{31} Id.


In 1873, Anthony Comstock and the New York Society for the Suppression of Vice put forth the Comstock laws, which outlawed anything “lewd” or “lascivious”. Among these lewd, lascivious things was the information surrounding birth control and abortion. Prohibitions similar to the Comstock laws were passed in 24 of the 47 states in the 1880s. By the turn of the century, abortion law and social stigma had changed very little from Comstock’s “reformation” in 1873. Any changes or reforms were largely cosmetic. Nonetheless, although abortion was considered a felony in most states, doctors continued to perform abortions at considerably high rates. In the 1960s and 1970s came second-wave feminism and the still-restrictive abortion statutes were no longer socially acceptable; the statutes were not protective of the woman, which was their original purpose back in the early 1800s, and criminal abortions were still occurring in spite of criminalization. In 1965, Griswold v. Connecticut led to the reversal of some Comstock laws and similarly restrictive laws of the 1870s and beyond, allowing married couples access to contraceptives. Eisenstadt v. Baird gave similar rights to unmarried people in 1972. In the 1960s, Hawaii and New York decriminalized all abortions, though stated in their statutes that only a licensed physician may perform abortions. Many other states followed suit, to varying degrees and with varying statutes. It was within this period of social reformation and renewed acceptance of abortion that the Roe decision was made.

37 Id.
39 Id.
C. An American Tradition of Abortion

One of the central arguments of the recent Dobbs decision is that the United States does not have a tradition of abortion rights, and this, in part, prevents this right from inclusion as an implicit right under constitutional protection. This Comment intends to refute this claim, both by sufficiently revealing such a tradition and by exposing the contradictions and inconsistencies of this qualification.

As previously noted in this Comment, the history of American abortion rights began with the British Common Law, which contained no explicit bans on abortion until fetal quickening. Abortion went through periods of legal restrictions on a state-by-state basis, though remained largely liberalized and socially acceptable until the late 1800’s, when Horatio Storer, the American Medical Association, and the Comstock laws created more restrictions, social and legal, on abortion than ever before. These widespread restrictions remained until the second-wave feminist movements of the 1960’s and 1970’s, which caused anti-aboriton sentiments and restrictions to liberalize, culminating in Roe. This is the basic trend of American abortion rights as outlined in the prior two sections of this Comment. Though it is impossible to understand the true cultural attitudes toward abortion from the Constitution to the present, the codified laws and historical sources available seem to support an “American tradition” of abortion, a tradition found in the near century of quickening doctrine adoption and codification, and public sentiment in support of this doctrine.

However, what sufficiently qualifies as a tradition is subjective; perhaps it is the lack of federal abortion protection over the course of American history that the Dobbs majority views as a lack of tradition. Such a stance, however, would be wholly inconsistent with other lines of legal cases. For example, the right to interracial marriage went without federal protections until Loving v. Virginia in 1967, where the anti-miscegenation statutes of states were found

to violate both Due Process and Equal Protection. Similarly, same-sex marriage was not protected in every state until 2015 with the *Obergefell v. Hodges* decision. These constitutional rights are evidence that a history of federal protection and/or regulation is not a prerequisite for a right to be provided for in the Constitution. Furthermore, abortion rights have been supported, or at least upheld, by more states and over more of United States history than both the right to interracial marriage and to same-sex marriage, in addition to numerous other currently upheld constitutional rights. Thus, it would seem, there are constitutional rights that have a paucity of American tradition, and instead appear to be a reflection of changing sentiments alone. Therefore, the “American tradition” argument should not be applied to the examination of the constitutionality of abortion rights, as it has not been a factor for many other constitutional rights. Removing this “American Tradition” argument leaves *Dobbs* relying then on the argument of moral controversy, which will be discussed in the following sections of this Comment.

**D. Roe v. Wade (1973) and Dobbs v. Jackson (2022)**

*Roe* was the linchpin in American abortion law, providing constitutional protection for abortion. A Texas resident under the pseudonym Jane Roe was denied a legal abortion under Texas criminal abortion law, which stipulated that abortion was only legal if the pregnancy threatened the life of the mother. Jane Roe’s life was not in danger and she could not afford to travel to another jurisdiction to abort her pregnancy. *Roe* claimed that the criminalization of abortion under the Texas State Penal Code was violating her right to personal privacy, implicit in Amendments 1, 4, 5, 9, and 14. Roe argued that the Texas Penal Code improperly invaded a right possessed by the pregnant woman to end her pregnancy, thereby violating her personal liberty under the Due Process clause of the 14th Amendment. The Due Process Clause has been interpreted to

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include both procedural due process, which enforces the legal procedures that must take place in state proceedings, and substantive due process, which is based on the principle of fundamental fairness and determines whether a law can be applied by states or must be applied at the federal level\textsuperscript{49}. In terms of \textit{Roe}, it is the substantive due process that was violated by the Texas State Penal Code, based on the argument that abortion requires federal regulation and protection as a matter of fundamental fairness.\textsuperscript{50} These Texas statutes were also claimed to violate the personal, marital, and sexual privacy protected by the Bill of Rights.

Samuel Warren’s and Louis Brandeis’s 1890 Harvard Law Review article titled “The Right to Privacy” states that the implicit right to privacy, which has been largely applied to intellectual property and publishing, forms no new principle in extending its protections to “personal appearance, sayings, acts, and to personal relation, domestic or otherwise.”\textsuperscript{51} The right to privacy applied to the contents and products of one’s mind violates no existing principles when it is similarly applied to one’s body and intimate relations, a category under which abortion arguably falls. In the \textit{Roe} decision, written by Justice Blackmun, the Supreme Court affirmed that, despite the lack of extensive explicit privacy rights in the Constitution, the Court has recognized the right to personal and bodily privacy going back to \textit{Union Pacific Railroad v. Botsford}.\textsuperscript{52} Since Botsford, this controversial right has been extended to marriage-related activities,\textsuperscript{53} procreation,\textsuperscript{54} contraception,\textsuperscript{55} family relationships,\textsuperscript{56}

\textsuperscript{49} U.S. Const. amend. XIV, § 1.
\textsuperscript{50} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{51} Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
\textsuperscript{52} Union Pacific R.R. v. Botsford, 141 U.S. 250 (1891).
\textsuperscript{53} Loving v. Virginia, 388 U.S. 1 (1967).
\textsuperscript{54} Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).
\textsuperscript{56} Prince v. Massachusetts, 321 U.S. 158 (1944).
and child-rearing and education. The case of Griswold was particularly pivotal in establishing the right to privacy as a stark, significant, and broadly applicable right. This decision cites the dissenting opinion of Justice Harlan in Poe v. Ullman, which states that the safeguarding of the home and family, a right explicitly protected by multiple penumbras of the Constitution, can and should be extended to the marital relations between man and wife. This decision, by protecting the privacy of marriage and marital intimacy, gave invaluable support to the validity and unstated breadth of implicit privacy rights. Thus, the right to privacy, having been broadly applied pre-Roe to cases of marital, familial, and intimate relations, is broad enough to include abortion, as a definite facet of such relations.

There have been numerous cases since Roe that have limited the scope of Roe on both the federal and state level. One of the most significant and impactful of these cases was Casey, in which the issue of the constitutionality of Roe was placed under scrutiny. The primary holding of the Casey decision is that Roe was correctly decided, however, it granted states the ability to prohibit abortion of a viable fetus under any circumstances other than protecting maternal health and life. Thus, once the fetus is viable outside the womb, the state’s interest in protecting unborn life may take precedence over the privacy and autonomy rights of the mother without violating any constitutional provisions under Roe. This case limited the scope of Roe on the federal level; at the state level, legislation and abortion facility availability further undermined this scope. However, while Roe has been limited and undermined, it remained an underlying, ever-present protection for women in each and every American state until 2022, when the landmark 1973 decision was overturned by Dobbs. This recent decision states that the U.S. Constitution makes no reference to abortion nor is it implicitly protected by any constitutional provision. Furthermore, it states that the Due Process Clause

of the Fourteenth Amendment does protect certain unwritten rights, particularly those rights which are deeply rooted in the nation’s traditions and history, but does not extend to abortion. This decision is claimed to be “not inherently sex-based,” thus, it does not violate the Equal Protection Clause. Finally, the decision mentions the moral controversy of abortion, and thus, the necessity to return this decision to the people. As it is not provided for in the Constitution, the citizens and legislators of each individual state will now regulate abortion on their own terms.

*Dobbs*’ overturn of *Roe* is largely based on fundamentally incorrect information, however, it did provide us with the framework used by the today’s Supreme Court for determining constitutionality. For a decision to be constitutionally sound, it must be based in U.S. tradition (an argument addressed in the previous section) and be morally unambiguous. This Comment has begun to and will continue discussing how the right to abortion fulfills these requirements in full, how the history of abortion rights and the protections granted under the Fourteenth amendment support the constitutional nature of the right to an abortion, and how the moral controversy stressed in the *Dobbs* decision is, similar to the American tradition argument, null and void.

### III. Proof of Claim

#### A. The 14th Amendment: the Due Process Clause, the Equal Protection Clause, and the Implicit Right to Privacy

The Fourteenth Amendment’s ratification began the reconstruction of American society after the Civil War. This amendment endowed formerly enslaved African Americans and other individuals who were emancipated with citizenship and equal protection under the law, thereby encompassing them under the expansive phraseology “all persons born or naturalized in the United States.” 61

Despite its original intent to safeguard newly free African Americans, the Fourteenth Amendment has served as a powerful legal

61 U.S. Const. amend. XIV, § 1.
force for ensuring that crucial individual rights essential to freedom, self-respect, and self-governance are safeguarded for all persons throughout the United States. In regards to the abortion issue, Roe stated and Casey reaffirmed that the 14th amendment’s concepts of personal liberty and privacy protected individual decision making related to marriage, procreation, contraception, family relationships, and child rearing and education, and that this is extensive enough to include a woman’s decision of whether or not to terminate her pregnancy. While the interpretation of the Fourteenth Amendment’s protections has been controversial, it has played a crucial role in securing fundamental American rights.

B. The 14th Amendment and Abortion

Given the introduction of Roe v. Wade in the Background of this Comment, it is imperative to delve deeper into its legal foundations regarding the 14th Amendment of the Constitution, a provision that formerly recognized abortion as a constitutional right and served as a pivotal element in the Roe ruling. To briefly restate the central holding of this decision, the 1973 Supreme Court found that the right to an elective abortion up to the point of fetal viability is covered by the implicit right to privacy found in the Due Process Clause of the Fourteenth Amendment. The right to privacy and the right to an elective abortion are not explicitly outlined in the Due Process clause; it is this ambiguity that lies at the heart of the ongoing controversy. However, as stated by Justice Harlan in his dissenting opinion in Poe v. Ullman, a decision which upheld a Connecticut law banning contraceptives, “the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.” This was the logic behind Roe v. Wade’s landmark ruling, which established that the right to elective abortion is implicitly covered by

the Due Process Clause of the Fourteenth Amendment. The Court arrived at this conclusion by examining precedents dealing with bodily autonomy and familial relationships, which consistently recognized the right to privacy as a fundamental value safeguarded by the First, Fourth, Fifth, and Ninth Amendments. Thus, the right to privacy is well established and unarguably a component of the Fourteenth Amendment. The *Dobbs* decision does not dispute this point; the controversy lies in the question of whether this right to privacy, as well as the right to liberty established in this Amendment, does in fact cover the abortion rights of American women.

*Roe* held that abortion is a private matter that should be decided within personal and interpersonal contexts, and therefore is safeguarded by the Due Process Clause of the Fourteenth Amendment. This implicit right is based on the “liberty” interest enshrined in the Due Process Clause. Furthermore, the term “people” in the Amendment does not automatically include unborn fetuses, as they are not considered legal persons under the Constitution. As such, the Court held that the right to elective abortion is a fundamental right protected by the Constitution. Abortion is a private decision on par with sexual relations, child-rearing, and interpersonal relationships. These rights are covered by the Fourteenth Amendment, particularly those pertaining to reproductive and sexual autonomy, suggesting that abortion should be similarly protected.

The constitutional rights afforded under *Griswold* and *Eisenstadt*, which were specifically surrounding the use of contra-

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66 Id.
ceptives but nonetheless uphold the underlying right to choose the means and timing of child production, feed directly into Roe, which once offered this same underlying right through the protection of elective abortion. The fact that abortion is no longer considered a constitutional right under Dobbs places the right to determine any familial or interpersonal affairs privately at significant risk. In addition, Roe explains the term “people” stated in the Fourteenth Amendment. People implies life and personhood, the determination of which is remarkably unclear and controversial. As a morally controversial topic, no aspect of the legal system should base law and policy on one singular and extreme definition of life. The law should allow all extremes and opinions of life’s genesis to exist in unison in each state; this is the logic used by Dobbs to remove federal protection of abortion; however, it is through this removal that the space for differing and contradicting opinions is lost. Given the history of abortion discussed in the Background and the fairly liberal abortion regulation in effect in most states at the time this Amendment was made in 1866, it is fair to say that the term “people” did not originally apply to the unborn, nor should it automatically apply to the unborn today.

Through Roe, the coverage of the Due Process clause of the Fourteenth Amendment expanded to include abortion. There have been numerous cases post-Roe that uphold this coverage and expand upon its bounds. Doe v. Bolton,74 decided the same day as Roe, held, like Roe, that a strict abortion statute in Georgia violated the implicit privacy rights highlighted in the Fourteenth Amendment. This statute required examinations by multiple physicians to assess the medical need of women seeking abortions, which Doe states violates the right to take care of one’s own “health and person and to seek out a physician of one’s own choice.”75 Thus, these privacy laws were applied not only to abortion up to fetal viability, but also to one’s interactions with doctors and medical personnel. The Planned Parenthood v. Danforth76 decision upheld Roe in full and further stipulated that

75 Id.
the spouse of persons seeking abortion may not legally prevent those persons from procuring an abortion. Thus, another facet of the right to an abortion was unveiled. *Bellotti v. Baird*\(^77\) revealed that the right to an abortion is expanded to minors, who must not attain parental consent to legally acquire an abortion. As stated in the *In re Gault*\(^78\) decision, “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” and abortion, protected under this Amendment, should not be bound by different rules. These cases are not alone in their expansion and elucidation of Fourteenth Amendment abortion rights.

It cannot be said that the rights to contraceptive access and abortion are not without limitations and regulations as well; *Roe* states that the right to abortion “must be considered against important state interests in regulation.”\(^79\) Thus, *Roe* itself protects elective abortions only until fetal viability, allowing individual states to regulate abortion beyond this point to varying degrees of restriction\(^80\) without violating Due Process. Numerous cases post-*Roe* have added further boundaries to the scope of abortion rights, including *Maher v. Roe*.\(^81\) which upheld the Connecticut Welfare Department’s regulations that limited state Medicaid benefits to abortions that are “medically necessary”. This particular case upheld *Roe*, clarifying that the right to an elective abortion is protected, but that this protection does not include forcing a state to pay for the procedure under any and all circumstances. The *Maher* decision was further supported by the Hyde Amendment,\(^82\) a legislative provision adopted in 1980. This provision barred the use of federal funds to pay for abortions sought outside the contexts of preserving maternal health and/or of rape and/or incest. Elective abortions are protected under the Fourteenth Amendment in both Maher and the Hyde Amendment, but


\(^78\) In re Gault, 387 U.S. 1 (1967).


\(^80\) *Id.*


certain boundaries, including limiting the governmental funding of abortion, do not violate this right. Under *H.L. v. Matheson*, a Utah statute requiring doctors to report abortions acquired by minors to the minors’ parents (if possible) was upheld. However, *Bellotti v. Baird* was upheld in *H.L. v. Matheson*; the parents of minors must be notified of the abortion under the Utah statute, but their permission is not required for the procedure. Thus, the scope of the right to privacy under Due Process is further revealed; states may require parental notification of an abortion acquired by a minor. Finally, *Casey*, as discussed in the Background, further limited this scope by allowing states to fully prohibit abortion of a viable fetus under any circumstances other than to protect maternal health. These cases collectively reveal the true protection of abortion rights under the Fourteenth Amendment; these rights are subject to some level of regulation, allowing some level of autonomy at the state level to regulate abortion in various ways. *Roe* did not protect all abortions under all circumstances, rather, showed that abortion, as personal, private decision, and as a branch of that, a woman’s autonomy over her own body, is protected to some degree under the United States Constitution and the legitimate privacy rights it contains.

Under *Roe*, the Fourteenth Amendment protected abortion up until fetal viability; this right is individual to the pregnant women and extended to pregnant minors as well, though does not require governmental provision of an abortion, nor does it prevent any and all abortion regulation. The argument that abortion is a constitutional right under the right to privacy implicit in the Due Process clause of the Fourteenth Amendment is not a new one, as shown by the consistent upholding of this idea in numerous cases over the past five decades. However, given that *Dobbs* has recently upended this argument, it is important to reemphasize this central point. The right to privacy covers the right to an elective abortion. This right allows the autonomy of all women in every state to be protected at a basic level.

Before the *Dobbs* decision was made official in June of 2022, over a dozen states, including Tennessee, Utah, Idaho, Wyoming, Indiana, North Dakota, and Texas, imposed trigger bans on abortion. In essence, these states created restrictive abortion laws that would be automatically enforced after, and thus were contingent upon, the fall of *Roe*. In some cases, the trigger ban was enforced immediately after the *Dobbs* decision was made public, in other States, there was a 30-day period preceding trigger ban enforcement to allow officials to confirm that *Dobbs* had in fact overturned *Roe*, but nonetheless, the mere consideration of *Roe* being overturned put abortion rights in numerous states under threat. After the overturn was official, the trigger bans went from contingencies to actual abortion restrictions in the majority of trigger ban-holding states. The restrictive effects of *Dobbs* on abortion rights, premeditated through trigger laws, have been immediate.

Bans and limitations on abortion have not only been immediate, but widespread and varied. Some states have banned abortion entirely, others have outlined exceptional cases, and some simply offer no official protections for the procuring of an abortion. Tennessee’s House Bill 1029 (a trigger ban enforced in August of 2022) prohibits all elective abortions with the exception of those in the context of rape, incest, and for the preservation of maternal life. Idaho’s ban makes similar exceptions, and states that the punishment for a criminal abortion under the ban is 2-5 years imprisonment for the procurer of the procedure and a license suspension for a minimum of 6 months for the responsible physician. As one of the more reproducively conservative States, Alabama’s recently adopted ban, House Bill 314, does not make exceptions for rape or incest provided for in Tennessee and Idaho, limiting exceptional abortions exclusively to

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those done for the preservation maternal life.\textsuperscript{89} This bill states that any unexceptional elective abortion is a felony offense.\textsuperscript{90} It must also be stated that many state legislatures, such as those in California and New York, have voted to protect abortion rights, some even granting expanded access to abortion that was not possible under the stipulations of \textit{Roe}.

There is variability between states, this much is clear, with some leaning towards even more liberalized abortion policy and others doubling down on abortion regulation and restriction since the overturn of \textit{Roe}. The problem is not, therefore, that abortion restriction is universal and all-encompassing, it is not that every state is facing extreme abortion regulation, but that the right to an abortion is no longer equitably afforded to all American women. It is contingent on the state in which one resides, not considering, as stated by Justice Alito, the “sharply conflicting views” of Americans in each and every state.\textsuperscript{91} The pro-choice minority in Alabama, Idaho, Tennessee, and so on must therefore suffer the consequences of these bans, whereas, under the protections of \textit{Roe}, no such consequences were imposed on individuals who are morally opposed to abortion. Under \textit{Roe}, one could choose to terminate their pregnancy or choose to refrain from such practices, but, at least in principle, neither option was forced upon the individual and neither option was so grossly restricted. The infraction of rights, including the aforementioned rights to privacy, to bodily autonomy, and to equal opportunity, has only been imposed by these state abortion bans.

The argument in support of restrictive abortion policy is not without legitimate merit. The argument has been made countless times, and was reemphasized by Justice Alito in \textit{Dobbs}, that States should have a right to take an interest in the protection of “potential life.”\textsuperscript{92} This is the genesis of the “profound moral question” of abortion, namely, when does potential life become life? When should


\textsuperscript{90} Id.


that potential life be afforded legal rights and protections? With these questions in mind, the restriction of rights under abortion bans becomes more nuanced, the rights of the unborn and the rights of the mother come into conflict, and it becomes a matter of whose life, whose rights, should be protected by law. Those with pro-choice sentiments tend to state the mother as the more deserving entity of such protection, while those supporting pro-life ideals believe the fetus, the potential life, to be deserving of such human rights, at the very least, the right to life. Resolving this fundamental and controversial argument is beyond the scope of this Comment and may well be beyond the scope of the American legal system. However, perhaps, in terms of realistic consequences, the moral controversy heavily pressed in the Dobbs majority opinion does not matter.

The opinion of Justice O’Connor in the 1984 Lynch v. Donnelly decision explained that both the objective meaning of a government policy and the subjective intent of said policy must be considered when deciding if the action violates some established law or practice. The new State abortion policies, regulations, and bans must be examined by this metric. Dobbs states that the desire of a state to preserve life is not in violation of the Constitution. This is the oft given and now Supreme Court supported reasoning for the instatement of abortion bans, thus, it is fair to conclude that the subjective intent of many of the recent bans and regulations is to protect fetal life. However, the objective effects of these bans are quite opposite from this constitutionally supported intent. Bearak et al. (2020) conducted a series of model-based studies on 195 countries, comparing their average yearly abortion rates between 1990 and 2019 to the nature of each country’s abortion policies. Uncertainty and data accuracy considered, the study found no significant difference between abortion rates in countries where abortion is “broadly

legal” versus countries where abortion is “prohibited altogether.”\textsuperscript{96} They found also that the rate of unintended pregnancy is generally higher in countries with more restrictive abortion regulation, and that in spite of these regulations, about half of all unintended pregnancies worldwide end in abortion.\textsuperscript{97} \textsuperscript{98} Thus, the objective effect of restrictive abortion laws, according to this study, is disjointed from the intent to preserve life; in fact the effects of such restriction are remarkably similar to the effects of liberalized abortion regulation.

Numerous studies support the findings of Bearak. Rafu (2002) and Adinma (2011) examined abortion practices in Nigeria, a country where abortion is largely prohibited (with the exception of preserving maternal life).\textsuperscript{99} \textsuperscript{100} In 2002, unsafe abortion practices accounted for 20,000 maternal deaths in Nigeria, and 72% of teen (19 years old and younger) deaths.\textsuperscript{101} By 2011, 760,000 abortions were being performed each year, largely illegal and unsafe\textsuperscript{102}, and from 2019, well over a million abortions were being performed yearly in Nigeria.\textsuperscript{103} Additionally, in each year, the number of abortions has been roughly half of all unintended pregnancies.\textsuperscript{104} Using Nigeria as a case study,

\begin{itemize}
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{98} World Health Organization, Fact Sheet: Abortion, https://www.who.int/news-room/fact-sheets/detail/abortion
  \item \textsuperscript{99} Abiodun Raufu, Unsafe Abortions Cause 20,000 Deaths a Year in Nigeria, 349 BMJ (2002).
  \item \textsuperscript{100} E. Adinma, Unsafe abortion and its ethical, sexual and reproductive rights implications, 6 Afr J Reprod Health 13-22 (2002).
  \item \textsuperscript{101} Abiodun Raufu, Unsafe Abortions Cause 20,000 Deaths a Year in Nigeria, 349 BMJ (2002).
  \item \textsuperscript{102} E. Adinma, Unsafe abortion and its ethical, sexual and reproductive rights implications, 6 Afr J Reprod Health 13-22 (2002).
  \item \textsuperscript{103} Guttmacher Institute, Nigeria, https://www.guttmacher.org/regions/africa/nigeria (last visited Feb. 28, 2023).
  \item \textsuperscript{104} \textit{Id.}
\end{itemize}
it would seem that, in spite of restrictive abortion laws, the rate of abortion did not change, and in fact, both the number of unintended pregnancies and the total number of abortions increased, doubling between 2011 and 2019. Additionally, the restrictions and accompanying social stigma lead to more widespread unsafe abortion practices leading to increased maternal mortality and morbidity rates. The World Health Organization corroborates these findings in Nigeria, stating that when safe abortions are not accessible, women often turn to unsafe practices, leading to 45% of all abortions worldwide being performed in unsafe, unofficial environments.\footnote{105}{World Health Organization, Abortion, https://www.who.int/news-room/fact-sheets/detail/abortion (last visited Feb. 28, 2023).}

The subjective intent of \textit{Dobbs} may well be to offer states constitutional protection of the right to protect and preserve life. This may well be the subjective intent of the bans and restrictions in Alabama,\footnote{106}{Ala. House Bill 314, Reg. Sess. (2019).} Idaho,\footnote{107}{Idaho Code Ann. §§ 18-601 to 18-608 (West 2021).} Tennessee,\footnote{108}{Tenn. House Bill 1029, 112th Gen. Assemb., Reg. Sess. (2021).} and all other states with extreme abortion restrictions. This is a significant part of the subjective intent and moral argument stated in pro-life narratives across the United States. But nonetheless, the objective meaning, and more significantly, the objective \emph{effects} of these laws do not support the subjective intentions. This is why the moral argument is largely null and void, or, at the very least, should have no significant place in abortion policy; restricting abortion on the grounds of subjective morality does not preserve life. If life is truly to be preserved, as is desired by supporters of the pro-life narrative, the more realistic solution is to liberalize abortion laws, thereby curbing the loss of both maternal and fetal life. Liberalized abortion laws not only preserve life to a greater extent, based on global trends, than restrictive abortion laws, they also consolidate both sides of the moral spectrum on the issue.

The “moral controversy” used by the \textit{Dobbs} majority decision as reasoning to exclude abortion from the spectrum of constitutional rights is based on the subjective intent of federal abortion protection rather than the aforementioned objective effects. However, examining
the objective effects of state-by-state abortion bans as restrictions as opposed to its being a federally protected right, the moral controversy is of no matter. The trends throughout American history and through the observation of other nations shows that liberalized abortion laws and access to safe abortions is the best policy for preserving life. Thus, this exclusionary argument was incorrectly applied to \textit{Roe} in \textit{Dobbs}.

\textbf{IV. Conclusion}

The absence of respect for privacy laws, disregard for and selective utilization of American legal history, and the interference of personal morals in law pose a threat to safe and accessible abortion practices, which was under \textit{Roe}, and should continue to be, protected by the U.S. Constitution. The time for rectification is now; less than a year since the repeal of \textit{Roe} and already state laws are rapidly being developed that restrict the accessibility of abortion for those within their respective states. These laws are not without significant consequences to American women nationwide. The courts should consider, at a minimum, the tremendous negative impacts of the overturn of \textit{Roe}, and, these consequences and the precedent set by U.S. legal history and preceding Fourteenth Amendment cases, the matter of the constitutionality of abortion rights should be revisited.
THE CONSTITUTIONALITY OF OUR GOVERNMENT’S CONTRIBUTIONS TO CLIMATE CHANGE

Madeline Troxell

I. INTRODUCTION

Though the issue of human-caused climate change has been upheld by science for decades, topics of its legitimacy, relevance, and repercussions are still debated heavily today. In an attempt to argue for their constitutional right to a safe and livable climate, 21 young plaintiffs have sued the federal government for its affirmative action increasing America’s dependency on fossil fuels, thus exacerbating the climate crisis. The obstacles facing their case can be reduced to an argument concerning the court’s jurisdiction over climate issues. This article will argue that the plaintiff’s case is centered around the civil rights of children, and thus the court must use its powers of judicial review to condemn the federal government’s actions and oversee a plan to remediate the plaintiffs’ complaints.

The Intergovernmental Panel on Climate Change (IPCC) provides an overview of the most current science regarding climate change for governments and policy makers. Recently they published a report explaining the decreased dangers of minimizing global warming to below 1.5 degrees Celsius for post-industrial times.

The report explains that any increase in global temperature by 0.5 degrees Celsius is projected to adversely affect human health. With increases in global surface temperature, risks for diseases such

1 Madeline Troxell is a sophomore at Brigham Young University studying Environmental Science with an emphasis in environmental law and legislation. She would like to thank her editor Ben O’Brien a senior studying economics at Brigham Young University.
as malaria are projected to increase, both in prevalence and in geographical range. If global warming of 2 degrees Celsius is achieved, this is expected to pose greater risks to urban areas, based on their infrastructure and proximity to coastal regions. The IPCC cites that coastal areas and island infrastructures will be negatively impacted by rising sea levels.\(^2\) The EPA has also linked human induced climate change with a likely increase in the frequency of extreme weather events, such as heat waves or large storms. These storms displace families and destroy infrastructure, in addition to the death toll.\(^3\)

The CDC confirms that the health effects of climate disruptions include “increased respiratory and cardiovascular disease, injuries and premature deaths related to extreme weather events, change in prevalence and geographical distribution of food- and water-borne illnesses and other infectious diseases, and threats to mental health.”\(^4\)

As global warming increases, the risks of these consequences become greater, and some examples have already been proven today. Adverse health effects, safety threats from extreme weather, damaged property, and risk of illness are simply a few of the threats directly affecting today’s youth and future generations.

II. BACKGROUND

The US government’s response to climate change and environmental protection is under increasing polarization, ultimately undermined by each administration’s continued dependance on the fossil fuel industry. The earliest forms of environmental legislation were created and amended in the 1960s and 1970s. These include the

\(^2\) The Intergovernmental Panel on Climate Change, *Global Warming of 1.5 °C* (2018).

\(^3\) United States Environmental Protection Agency, *Climate Change Indicators: Weather and Climate* (August 1, 2022).

\(^4\) Center for Disease Control and Prevention, *Climate Effects on Health* (April 25, 2022).
Clean Air Act, Clean Water Act, and the Endangered Species Act.\textsuperscript{5} The EPA, a government agency devoted to curbing health risks, was also created during this time. The EPA conducts research, as well as creating and enforcing environmental regulations.\textsuperscript{6} Yet despite this new wave of conservation legislation, every administration in the last 50 years has consciously chosen to increase America’s dependence on the fossil fuel industry. Each successive administration after President Carter has had the opportunity to begin a trajectory away from fossil fuel dependency in light of new scientific findings. By the 1960s, climate models proving an increase in atmospheric CO\textsubscript{2} were made available to the Carter Administration. The increase in atmospheric CO\textsubscript{2} was linked to ocean warming, sea level rise, and other dangers. Despite this, the Carter Administration expanded coal leasing on federal lands under oil embargo pressures, and amended the Outer Continental Shelf Lands Act, which would assure the oil leases in this area would contribute to domestic energy production. By the end of his administration exploratory drilling, natural gas production, and coal production had reached an all-time high.

Every presidential administration since Carter has had access to alternative policy pathways to develop renewable energy and increase efficiency, and yet opted for the short-term cost-effective option. By the end of the Obama Administration fossil fuel production in the US was again at an all-time high. Although Obama was arguably more concerned about the climate than some of his predecessors, his “all of the above” energy strategy only further entrenched America’s dependance of fossil fuels. This continued despite the EPA’s Endangerment Finding in 2009, a declaration under the Clean Air Act professing the imminent threat of climate change. It stated that “the evidence provides compelling support for finding that greenhouse gas air pollution endangers the public welfare of both current and future generations.


The risk and severity of the adverse impacts on public welfare are expected to increase over time.”

James Speth, a federal government environmental leader who worked with each administration, concluded, “We had a series of administrations that began to take the issue of climate change seriously. And, in my view, they were Carter and Clinton and Obama. And each one of them was followed by a flamethrower that was determined to destroy the steps that had been taken. And that was Reagan, and that was George W. Bush, and that was Trump.”

Over the last two decades, the US has experienced its most extreme pendulum of progression and halts to environmental regulation. A lack of decisiveness within American politics has led to grid locks within legislatures. The US government’s tactics against climate change are undermined by the cycle of changing administrations, with each new majority simply trying to undo the progress that the previous had achieved, either for or against climate action. The effectiveness of the government against climate change has been slowed to a pace more sedative than the rate of our warming planet.

By 2003 after heavy debates, the US withdrew from the Kyoto Protocol, an international treaty which would have placed limits on countries’ greenhouse gas emissions based on individual targets. A few years later in 2009, The American Clean Energy and Security Act passed the house but was never brought to the senate, due to threats of a Republican filibuster. Yet in Obama’s time as president, he used his executive power to create the Climate Action Plan, which would set the first limits on carbon pollution from US power plants. When we transitioned from a liberally held executive to a conservative one in 2016, many environmental setbacks ensued. President Trump

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withdrew from the Paris Agreement, an international legally binding treaty on climate change. He also replaced President Obama’s Clean Power Plan\textsuperscript{10}, a decision that was challenged through lawsuits for many years after. His administration deeply weakened the Clean Air Act by imposing procedural hurdles and other requirements that limited the EPA’s ability to use the most effective science to develop regulations.\textsuperscript{11}

During this time, the extent of the Clean Air Act’s jurisdiction over greenhouse gas emissions was also being challenged in the highest courts. Previous decisions were overturned in a matter of years. In the 2007 case Massachusetts v. EPA, the supreme court concluded that the federal government could regulate carbon emissions through the EPA under the Clean Air Act. Yet in 2022, the supreme court removed this ability in West Virginia v. EPA\textsuperscript{12}. This ultimately led to a different approach to reinstate this ability through the legislature.\textsuperscript{13}

Now that Biden has assumed the presidency, he has attempted to rejoin the Paris Agreement and pass the largest climate bill in the history of the US.\textsuperscript{14} However, our credibility as an exemplary force

\begin{itemize}
\item \textsuperscript{12} Nives Dolsak and Aseem Prakash, Supreme Court And Carbon Regulation: West Virginia V. EPA Requires Rethinking Climate Activism, Forbes Magazine, July 4, 2022.
\item \textsuperscript{14} Lisa Friedman, Somini Sengupta and Coral Davenport, Biden, Calling for Action, Commits U.S. to Halving Its Climate Emissions, The New York Times, July 8, 2021
\end{itemize}
for climate action to the rest of the international community has been desecrated by our lack of commitment. The last 20 years are a prime example of how polarization and indecision decrease the ability of the government to handle climate problems efficiently.

For these reasons, little progress in the shift towards renewable energy has been made in America, in part by the polarization of changing administrations, as well as the federal government’s conscientious decision to remain dependent on fossil fuels for their convenience consistently across all administrations.

III. Proof of Claim

The federal government’s polarization surrounding climate change and its affirmative action towards fossil fuels has exacerbated the climate crisis and infringed on the rights of youth in America. Juliana and 20 other youth plaintiffs sued the federal government for this reason. The case brought forth is one of civil rights, giving the court the necessary jurisdiction to intervene, by declaring the federal government’s actions unconstitutional, and by overseeing a plan to remediate the plaintiffs’ complaints. The scope of our constitutional rights to life, liberty, and property change with the demands of our century. Civil rights are intricately tied to a livable and safe climate, as exhibited by health risks and threats to safety linked to climate change. The urgency of the climate crisis and the vulnerability of America’s youth demands an intervention from the court to restore balance to the separation of powers and hold the federal government accountable for their actions, thus encouraging them to change.

In 2015, 21 young plaintiffs filed a complaint against the federal government, asserting that its affirmative actions towards fossil fuel subsidization and subsequent contributions to climate change violate the youngest generation’s constitutional rights and other public trust doctrine. They argue that the government’s involvement in increasing fossil fuel dependency was a conscious decision that went against not only climate experts but also our country’s historically held moral value of protecting its youth. The ultimate question of

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15 Youth v. Gov, a film directed by Christi Cooper, November 11, 2020.
their case is whether youth have a constitutional right to a climate that sustains life.

In their complaint, the plaintiffs first cited that their 5th and 14th amendment rights had been violated. The plaintiffs argue that the federal government has infringed on their right to life, liberty, and property. The government has knowingly caused a dangerous interference with climate systems, endangering the plaintiff’s health and welfare by promoting fossil fuel development. They claim that this also violates the due process clause. The equal protection clause additionally plays a large role in this case, because the government’s actions are disproportionately putting future generations at risk. Thus, the federal government is specifically discriminating against children, who have no control over their age or the environmental circumstance in which they were raised. They cannot yet consent to any government action, and are specifically vulnerable to an infringement of rights, thus requiring vigilant attention.

Secondly, plaintiffs cite the ninth amendment as the right to be sustained by America’s natural systems, which includes climate. The ninth amendment assures that, although not specifically mentioned, the right to life, liberty, and property is inextricably linked to a stable climate, as shown in the recent degradation of our climate systems and consequent societal struggles. Our earth’s resources are vital to our rights, a value exemplified even by America’s own conservation legislation.

Lastly, the plaintiffs reiterate their right to a livable environment through the public trust doctrine, which states that the public has a right to essential natural resources including air, water, and wildlife. The federal government has a duty to refrain from infringement of these natural resources, and yet has consciously failed to do so.

The plaintiffs ask for resolution, which includes a declaratory statement condemning the federal government’s actions using the court’s power of judicial review. They also ask that the courts oversee a plan to remediate the plaintiffs’ complaints.

The case was received with positive affirmations in its beginnings, with both Judge Thomas Coffin and Judge Ann Aiken denying motions to dismiss from the federal government and a host of fossil fuel companies who had joined. Judge Aiken issued a supportive
statement: “Exercising my ‘reasoned judgment,’ I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.” A trial date was set as the fossil fuel industry backed out of the case.

Subsequently the case hit multiple roadblocks from the federal government, including writs of mandamus, a request to review the case before the district court’s trial, and applications for stay. Finally an emergency motion was granted for the plaintiffs, and numerous amicus briefs as well as amicus curiae briefs were filed in their support.

When the evidence was presented in the Ninth Circuit Court of Appeals in 2020, the plaintiffs found that the redressability requirement of their complaint was the most difficult to convey to judges. In order for a party to sue, they must prove injury to the plaintiffs, a causation of that injury by the defendant, and redressability, or the ability of the courts to remedy the situation. The Ninth Circuit Court of Appeal’s three judges all affirmed these first two requirements after reviewing the evidence, by agreeing that the federal government had indeed violated the youth’s constitutional rights. Two of the three judges’ main opposition thus came from the issue of standing. They argued that a remedial plan violates the courts area of jurisdiction and thus separation of powers. The remedies requested can only be executed by the executive and legislative branches, because the scope of the proposed plan is too wide for the courts to control.16

Moving forward, the plaintiffs are left to convince the judges that their grievances can be addressed under the jurisdiction of the courts. They will need to address their errors in requested relief, and appeal these changes to the courts, all while avoiding settlement and keeping their case relevant.

Plaintiffs need to reiterate that when the legislative and executive make gross infringements on a specific group’s rights, it has been remedied through the courts before in ways that change the course of history, redefining the interpretations of the constitution to meet today’s needs. The case presented today, like many in the past, is one of social injustice. Focusing this case on civil rights helps plaintiffs make connections to historical landmark civil rights cases that

16 Juliana v. U.S., 947 F.3d 1159 (9th Cir. 2020).
set new precedents to increase equality. These cases include Brown v Board of Education, in which segregation, a deeply entrenched American system, was deemed unconstitutional and the courts oversaw its remedy. Other examples include Loving v Virginia, which legalized interracial marriage, or Obergefell v Hodges, which legalized gay marriage. Roe v Wade gave women the right to an abortion through the right to privacy. Throughout our nation’s history, when a group has had a grievance concerning the infringement of their rights, it has been remedied through the courts.¹⁷

Today, our future generations and today’s youth face a specific challenge unforeseen by the writers of the constitution. Thankfully due to the living nature of the document the unalienable rights instituted by the fifth amendment are susceptible to changes in interpretation, and receptive to changes in scope with the demands of the century. The harm instigated by the federal government against the rights of these children has already been confirmed in plentiful court statements. It is within the court’s jurisdiction to remedy the situation given the urgency of our time, the vulnerability of the youth, and our constitutional rights that mold with time’s progression. There is a need for accountability of the federal government’s actions and a change in their future behaviors. The court must be the avenue through which this is accomplished. The legislative and executive branches have exerted large amounts of power in their actions towards the climate, and thus the court’s intervention is not an attack on separation of power, but a restorative keystone in the balance of them.

As of today, Plaintiffs are grappling with two options, the first being a proposed congressional resolution that meets the demands of their original suit. The resolution was reintroduced in 2021 by members of Congress. It acknowledges that the current climate crisis disproportionately affects the rights of future generations and demands that the US develop a just climate recovery plan to reduce emissions.

The second option is to continue working with the Biden Administration and the Department of Justice to amend their complaint, ultimately seeking a condemnation of the US national energy institution

as unconstitutional. In 2021 the plaintiffs and the Department of Justice attempted to settle, but the meeting ended without a resolution. With settlement distant on the horizon, the Biden Administration has the option to soften the Department of Justices’ approach to the case, which would be in line with the administration’s own position on climate change. The administration can work with the plaintiffs to recognize that a declaration of rights is within the courts’ jurisdiction, and then settle the case by committing to climate remedies, which the Department of Justice has broad discretion over.\textsuperscript{18}

Youth are also suing their state governments for similar grievances caused by the state’s promotion of fossil fuels. In 2022 seven of Utah’s youth filed a constitutional climate lawsuit against their state. They argued that Utah was infringing on their constitutional rights to life, health, and safety through its policies to maximize, promote, and systematically authorize the development of fossil fuels. They claim that Utah legislators knew of the dangers linked to fossil fuel use, such as poor air quality or climate crisis impacts, which would affect younger generations, yet still took affirmative action to increase fossil fuels influence.

Soon after the youth plaintiffs’ filing, the state filed a motion to dismiss on May 6th, 2022. The state cited that the court should dismiss the plaintiffs’ claims because of the political question doctrine, which prevents the Court from overstepping its authority by creating climate change and fossil fuel policy. The state argued that the court cannot extend the substantive due process doctrine into areas where it has not previously been applied, such as policy for global climate change and fossil fuel policy. They additionally argued that the plaintiffs’ requested relief cannot effectively resolve the alleged harm that has been done to them.

On June 10, 2022 attorneys for the youth plaintiffs filed their response to the motion to dismiss, contending that there is no exception in Utah’s due process clause for fossil fuel policy. They reiterated that a declaratory judgment would be meaningful plaintiff relief. This entails a condemnation of specific policies that the state has adopted that disagree with Utah’s constitution. They assert their right

\textsuperscript{18} Juliana v. U.S., 947 F.3d
to a day in court because they have gathered evidence for a violation of rights under Utah’s constitution. The plaintiffs appeared in court on November 4, 2022 to give their oral arguments.\textsuperscript{19}

On November 9, 2022 the Judge granted the state’s motion to dismiss, and the plaintiffs began preparing an appeal. The judge noted that the “plaintiffs have a valid concern”, but that the issues of political question doctrine, redressability, and substantive due process led to his decision.

Today the plaintiffs are preparing an appeal with the senior staff attorney at \textit{Our Children’s Trust}. He emphatically contests Judge Faust, arguing that the state of Utah cannot substantially reduce the lifespan of Utah’s children without violating their constitutional right to life. He claims that the Court’s ruling has silenced the children’s claims and is thus not serving its role as a check on the other political branches.

Again, this case is an issue of human rights, and thus this article argues that the courts have the jurisdiction to intervene. In this instance, the courts need only use their power of judicial review to make a declaratory statement condemning the Utah government’s actions, creating a state level recognition of the plaintiffs right to a livable climate. This would restore balance to the separation of powers by giving the children a voice in court.

\textbf{IV. Conclusion}

Issues of our right to a livable climate have been confirmed in federal courts and are seeking confirmation in lower state courts. This is the first step in the process for relief of the grievances set forth by youth plaintiffs. An acknowledgement of children’s rights and a condemnation of government action are substantive steps towards holding the federal government accountable and restoring balance to the separation of powers. The federal government has proven ineffective at sufficiently addressing climate change. The courts have the jurisdiction to intervene according to the civil rights of vulnerable youth and the urgency of the climate crisis. They must hold

the federal government accountable by overseeing a plan to address climate change to prevent another fifty years of indecision and an increasing dependency on fossil fuels for their convenience.