COLUMBIA UNDERGRADUATE LAW REVIEW

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ARTICLES

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LETTER FROM THE EXECUTIVE EDITORS

Dear Reader,

On behalf of the Editorial Board, we are excited to present the Fall 2023 issue of the *Columbia Undergraduate Law Review*. This year, we received a record number of submissions from undergraduate institutions around the world. The selected pieces reflect the rich diversity of original scholarship written on a variety of pressing legal issues. With that in mind, we are thrilled to present the following articles.

In “A Divergence in Ecclesiastical Jurisprudence: How Courts Might Handle Intra-Church Lawsuits amidst a Surge in Non-Denominationalism,” Jason Chahyadi of Patrick Henry College examines the Supreme Court’s principle of non-intervention in the context of theological disputes and its relationship to existing church governance structures.

In “Corporations Are Property, Not People,” Stephen Dai of the University of California, Berkeley challenges the Supreme Court’s consistent expansion of corporate rights and argues for a novel understanding of corporations as property.

In "To Be Discretionary, or Not to Be: The Immigration Question of Law and Fact," Marco DeBellis of the University of Southern California examines the conflicting interpretations among circuit courts regarding the discretion of agency determinations under 8 U.S.C. § 1229b(b)(1)(D) in immigration hardship cases.

In "Hard Work, Little Pay: How Independent Artists Struggle to Earn Money via Digital Streaming," Nanda Deopersaud of New York University investigates the impact of safe harbor provisions in copyright laws on independent artists' struggle to earn fair compensation from streaming platforms, highlighting the “value gap” between the revenues of these services and the artists.

In “Is Chevron Deference Constitutional? Biden v Nebraska and the Major Questions Doctrine,” Nelson Takayuki Kanda of De Anza College uses a recent Supreme Court decision to examine the various interpretations of the Major Questions Doctrine and evaluate the constitutionality of the *Chevron* precedent.

In “Breaking The Grounds For Those Growing Up Behind Bars,” Nicole Nowak of George Washington University advocates for a unified federal regulation to increase the juvenile age limit to 25 years and ban life without parole sentences for juveniles.

In “Taking Climate Change to Court: How A Human Rights Framework Can Help Plaintiffs Overcome Power Asymmetries in Climate Litigation,” Claudia Sachs of Columbia University analyzes previous domestic and international cases to determine the effectiveness and limitation of human rights frameworks in addressing power asymmetries in climate litigation.

In “Investigating Progress: The Complicated History of Title IX and the Difficulties in Legislating Equality,” Aislinn Sullivan of the University of Pennsylvania critically examines the limitations of Title IX in achieving true equality for women athletes, analyzing three cases from the 1990s to present.

We hope you enjoy these incredible articles and the hours of work that our editors invested into preparing these works for publication. Thank you for your continuous readership of the *Columbia Undergraduate Law Review.*

Sincerely,
Jinoo Kim and Shaurir Ramanujan
Executive Editors, Print Division

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

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A Divergence in Ecclesiastical Jurisprudence: How Courts Might Handle Intra-Church Lawsuits amidst a Surge in Non-Denominationalism

Jason Chahyadi | Patrick Henry College

Edited by Avery Lambert, Ali Alomari, Ria Dalal, Gabriella Frants, Inica Kotasthane, Arya Kaul, Anushka Kumar, Ashling Lee, Simon Yang

Introduction

Although the concept was never formalized in American founding documents, the idea of separation of church and state has been long held in high esteem by the American public.[1] Furthermore, this view that the state should not intervene in the affairs of the church has been consistently reinforced by the Supreme Court. Since the Court's 1871 *Watson v. Jones* decision, the Supreme Court has been mostly consistent on its ecclesiastical jurisprudence, ruling that it is not the role of the civil courts to arbitrate controversies arising in the church.[2] The Court opted to take a noninterventionist approach to theological disputes because they considered such matters out of the judicial ken.[3]

In this paper, I show how the principle of ecclesiastical abstention, the Court's hands-off approach to disputes in the Christian Church, relies on robust church membership structures and hierarchical church authorities. Whether the Serbian Orthodox, Presbyterian, or Lutheran denominations, the churches addressed in prior Supreme Court ecclesiastical cases all had either a strong church membership structure or hierarchical church tribunals governing them. Nonde-nominationalism, however, stands out among the numerous camps of Christianity in large part because it lacks hierarchical church authorities and deemphasizes church membership structures. Thus, when a lawsuit concerning a non-denominational church is filed, the question remains how courts will apply the Supreme Court's established ecclesiastical jurisprudence. To answer this question, I first trace out the Supreme Court's precedent on ecclesiastical jurisprudence, from *Watson* to *Milivojevich* to *Hosanna-Tabor*, paying close attention to the Court's emphasis on church membership and internal adjudicatory bodies in the Christian church. I then offer empirical data that, in the US, there is both a surge in non-denominationalism as well as a decline in church membership. After, I look at *Doe v. First Presbyterian Church U.S.A. of Tulsa, Oklahoma* as a case to which the Supreme Court should have granted certiorari in order to clarify its ecclesiastical jurisprudence as applied to the current state of American Christianity. I conclude that the surge of non-denominationalism may erode the wall of separation between the church and the courts built by the Supreme Court since *Watson*.[4]

Part I: On the Supreme Court's Ecclesiastical Jurisprudence

The Supreme Court's ecclesiastical jurisprudence originated in the 1871 case *Watson v. Jones*.[5] There, the Court dealt with a property dispute in the congregation of the Third or Walnut Street Presbyterian Church, located in Louisville, Kentucky. The church had split into proslavery and anti-slavery factions, with each side claiming the church's building was rightfully theirs. Adding to their already contentious power struggle, the two groups also fought over matters of church management. The principal issue at hand was whether the congregation should retain its incumbent pastor, Reverend William T. McElroy, in light of his Confederate affinities.[6] The *Watson* decision established a trichotomy of the different types of church property disputes that may arise. The first type addresses disputes where the property or fund in question comes from a gift, grant, or sale that is contingent on the endorsement of a specific religious doctrine or belief. In such disputes, the majority in *Watson* held that civil courts may inquire into the dispute and resolve it, even if it requires the Court to examine the specific merits of the said religious doctrine.[7] This type of property dispute affords the civil courts the greatest amount of discretion among the three categories of disputes outlined in *Watson*.

The second type of property dispute occurs when congregationally-ruled churches are split in opinion regarding property division and acquisition. In such cases, the courts are bound by the judgment and wishes of the majority of the congregation's membership or by the rules of the individual church.[8] The third type of dispute occurs in cases where the church in question is part of a larger denomination with established tribunals for its internal ecclesiastical government. These tribunals are responsible for all questions of "faith, discipline, rule, custom, or ecclesiastical government."[9] When the ecclesiastical tribunals have cast their judgment, the courts must accept that decision as binding, lest they infringe on the church's free exercise of religion. The second and third types of church property disputes articulated in *Watson* offer little or no discretion to the civil courts as compared to the first type of property dispute. *Watson's* holding on cases regarding independent congregations appear to answer this article's main inquiry at first glance. If *Watson* held that civil courts are bound by the judgment of a majority of an independent congregation's members, then we must ask how the rise of non-denominationalism has any effect on this holding and why non-denominational churches threaten to upend the Supreme Court's long-held precedent on ecclesiastical matters.

One factor to consider regarding these questions is that non-denominational churches are categorically different from the individual congregations in *Watson* because non-denominational churches lack external church authorities and de-emphasize the importance of church membership. Congregational churches, while lacking hierarchical church authorities,

nevertheless require church membership for individuals to partake in the governing process and procedures of the congregation. However, not all non-denominational churches can be congregationally governed, for not all non-denominational churches can logistically institute a robust church membership structure. Thus, such churches may complicate the Court's understanding on how to resolve ecclesiastical conflicts.

Megachurches are an example of non-denominational churches that struggle to form a robust church membership structure because of their large size. These congregations are defined as Protestant churches with an average weekly attendance of 2,000 or more individuals.[10] In their 2020 study, Warren Bird and Scott Thumma estimated that there are approximately 1,750 megachurches in the United States, with the average weekly attendance of those congregations being 4,092 individuals each.[11] For the 582 megachurches surveyed in this report, the median weekly attendance grew from 3,800 in 2015 to 4,200 in 2020.[12] In 2020, 70% of megachurches were multi-site congregations, a sharp uptick from 27% of megachurches at the beginning of the twenty-first century.[13]

Since the advent of the twenty-first century, megachurches have been growing in popularity. For this reason, it is difficult for these congregations to institute a manageable church membership structure, let alone govern themselves through a congregational polity. If a congregation has 4,000 attendants divided across four satellite campuses, it is rather difficult to expect a healthy majoritarian governing system. Ultimately, the *Watson* trichotomy is useful but not dispositive in answering this article's main question because *Watson* did not envision congregations that lack external church tribunals and internal church membership structures.

The Court's next case on ecclesiastical jurisprudence came in 1952 with *Kedroff v. St. Nicholas Cathedral*. The statute at issue was Article 5-C of New York's Religious Corporations Law, which transferred the administrative control of the Russian Orthodox churches in North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches. Though the statute did not seem to burden the Russian Orthodox Church at first glance, the Court nevertheless struck it down since "legislation which determines, in an hierarchical church, ecclesiastical administration or the appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution."[14] The Court held that religious institutions are entitled to "independence from secular control or manipulation" and hold the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[15] The Court in *Kedroff* relied on its prior holding in *Watson*, constitutionally rooting the principle of ecclesiastical abstention in the First Amendment's Free Exercise Clause.[16] It is noteworthy that the *Kedroff* concerned the Russian Orthodox Church, a branch of Christianity

whose ecclesiology is hierarchical. Since *Watson*, the Court's approach of ecclesiastical abstention worked because the "highest of the church judicatories" was the final authority in adjudicating disputes within a church.[17]

After the 1952 *Kedroff* decision, the Court took up a case originating in the Presbyterian Church of the United States (PC[USA]), another denomination where adjudicatory bodies in the greater Church oversee the individual churches affiliated with the denomination.[18] In *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the PC(USA) denomination was at odds with two affiliated churches, Mary Hull Memorial Presbyterian Church (Hull Church) and Eastern Heights Presbyterian Church, both located in Savannah, Georgia.[19] The local churches departed from the larger PC(USA) denomination over disagreements regarding the management and control of their properties. A church tribunal in the PC(USA) denomination responded by directing a trespass on both the Hull and Eastern Heights properties. The two local congregations declined to appeal to the internal church tribunals, instead turning to the district court to file injunctions against the larger denomination. The district court sided with the two congregations based on the theory that Georgia law implies a trust of local church property for the benefit of the greater denomination, assuming that the PC(USA) denomination adhered to its doctrinal tenets that existed at the time that the Hull and Eastern Heights congregations affiliated. The court instructed the jury to evaluate if PC(USA) significantly diverged from its original doctrines, and the jury concluded in the affirmative. The Supreme Court of Georgia affirmed the district court's ruling for the Hull and Eastern Heights congregations.

The Supreme Court, however, reversed the Georgia Supreme Court's decision. A unanimous court led by Justice Brennan ruled in favor of PC(USA), holding that "civil courts cannot, consistently with First Amendment principles, determine ecclesiastical questions in resolving property disputes."[20] Further, Brennan held that "since the 'departure from doctrine' element of Georgia's implied trust theory requires civil courts to weigh the significance and meaning of religious doctrines, it can play no role in judicial proceedings." Brennan's holding highlights the complexity of intra-church disputes. Though the crux of the dispute may seem well in the purview of civil law, as property conflicts generally are, the courts cannot address them if the resolution of the dispute necessitates that the courts weigh the significance and centrality of religious doctrines.

A common theme in the Court's ecclesiastical decisions thus far has been that the denominations in the prior cases had a hierarchical ecclesiology. This trend continued after *Blue Hull* when the Court decided *Serbian Orthodox Diocese v. Milivojevich* in 1976. In that case, Milivojevich, a bishop in the Serbian Eastern Orthodox Church, was removed from his diocese by the Serbian Orthodox Church's hierarchical authorities on the grounds of breaking the rules of the Church.[21] Milivojevich filed suit in Illinois state court, contending that the church

assembly and synod's decision to dismiss him from his post was arbitrary. Illinois' Supreme Court ruled in his favor after a lengthy litigation battle and reinstated him to his office of bishop. But akin to the *Blue Hull* decision, the U.S. Supreme Court reversed the state Supreme Court's decision, holding that civil courts should leave ecclesiastical adjudicatory bodies to resolve intrachurch disputes.[22]

The Court's ruling in *Milivojevich* was not necessarily concerned with whether the church's decision was arbitrary or not, but rather with the state court's examination of whether the church's decision was arbitrary. The Supreme Court ruled that the state court had "unconstitutionally undertaken the adjudication of quintessentially religious controversies."[23] The resolution of such controversies, *Milivojevich* holds, are reserved by the First Amendment exclusively to the ecclesiastical tribunals in the specific church. From *Watson* to *Milivojevich*, internal church tribunals that oversee and adjudicate issues arising in individual congregations play an essential role in the Court's rulings for civil courts to take a non-interventionist approach to the resolution of ecclesiastical disputes.

Until *Milivojevich*, the Court's ecclesiastical jurisprudence was quite settled. However, then-Associate Justice William Rehnquist, dissenting in *Milivojevich*, established an important caveat to the Court's general holding on internal church disputes. According to Rehnquist, if theological doctrine cannot be parsed from the dispute, courts should not try to resolve the matter, lest they violate the Free Exercise Clause. If, however, the theology of the church can be separated from the legal disagreement, there is room for civil courts to evaluate the dispute. Rehnquist lamented the Supreme Court's "rubber-stamp" approval for churches when challenged by a member in the church or a congregation affiliated with the greater Church.[24] He contends that the Court's excessive deference to hierarchical church bodies may present Establishment Clause concerns when deference of such magnitude is not afforded to similar voluntary associations.[25] Rehnquist argues that if the Court uncritically accepts the position of the larger church in fear of infringing on the Free Exercise Clause, it may be understood as an endorsement of the positions of the greater church, which would, by extension, offend the Establishment Clause.

Rehnquist's dissent called for the Court to take an approach based on the neutral principles of the law.[26] He proposed that if the theological aspects of an intra-church dispute could be fully parsed from the legal aspect, courts could review and resolve the dispute on those legal grounds. Three years after *Milivojevich*, the Court in *Jones v. Wolf* vindicated Justice Rehnquist's theory. In *Wolf*, the Court heard a dispute regarding the Vineville Presbyterian Church in Macon, Georgia.[27] The church was a part of the aforementioned PC(USA) denomination, but a majority of the congregation wanted to migrate to the Presbyterian Church of America (PCA) denomination. The majority faction split off from Vineville, and, as a result, a property dispute between the two factions was born. The Presbytery, a body of church elders and administrators presiding

over the Vineville congregation, ruled that the minority *status quo* faction should keep the property. On the contrary, Georgia state courts ruled in favor of the majority faction after concluding that they had not violated any rules in the church or statutes of the state.[28]

The Court concluded that the state courts were allowed to review the dispute of the two Vineville factions as long as the civil courts strictly followed "neutral principles of law" in adjudicating the dispute.[29] Justice Harry Blackmun, authoring the *Wolf* majority opinion, outlined four areas in church property disputes to which the courts may apply a "neutral principles of law" analysis: the consideration of the deeds, the state statutes governing the holding of church property, the local church's charter, and the general church's constitution.[30] More importantly, Blackmun writes that the First Amendment does not force the state to adopt a rule of "compulsory deference" to religious authorities in resolving church disputes.[31] However, on a textual analysis, that statement cannot be presumed to mean that the state cannot defer to religious authorities in church disputes, even in the case where neutral principles of law could be applied to adjudicate the case.

In holding as such, Blackmun makes an interesting point that refers back to the *Milivojevich* decision. He argues that if the Court had adopted the posture of compulsory deference that the dissenting justices in *Jones* advocated for, it would require the courts to always "examine the polity and administration of a church to determine which unit of government has ultimate control over church property."[32] In such a scenario, the courts would have to clarify ambiguities in church administration with a "careful examination of the constitutions of the general and local church, as well as other relevant documents . . . to ascertain the form of governance adopted by the members of the religious association."[33] Blackmun contends that such examinations would constitute an inappropriate inquiry into church polity, against which *Milivojevich* warned.[34] On the other hand, the neutral principles approach "obviates entirely the need for an analysis…of ecclesiastical polity or doctrine in settling church property disputes," as the courts would simply look to purely legal arguments to evaluate and resolve property disputes.[35]

After a century of ruling that civil courts could not get involved in church disputes, the *Jones* case opened the door for civil courts to have a say in intra-church disputes, as long as they did not address the doctrinal and theological details of the dispute. An issue with the *Jones* holding, and by extension Rehnquist's *Milivojevich* dissent, is that church property disputes emanate from passionate theological disagreements. A dispute over which faction of the church retains the original building only occurs when there is desire for two groups to split. More often than not, that split originates from a disagreement in theology. The *Jones* majority acknowledged that pursuant to *Milivojevich* and *Maryland & Va. Churches v. Sharpsburg Church*, the First Amendment precludes the civil

courts from resolving church property disputes if they can only do so by scrutinizing religious doctrines and practices.[36] Yet the *Jones* decision seems to approve civil courts' resolving of church property disputes on the basis of neutral legal principles, even if theological disagreements are at the heart of the property dispute.

After *Jones,* the Supreme Court's next case on ecclesiastical jurisprudence came in 2012 with *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[37] The case involved Cheryl Perich, a former employee of Hosanna-Tabor Church and school who became sick and was diagnosed with narcolepsy while working for Hosanna-Tabor. Once the church was notified of her diagnosis, the church encouraged her to resign and eventually fired her. Perich filed suit, alleging that Hosanna-Tabor violated the Americans with Disabilities Act. In a unanimous decision, however, the Roberts Court sided with the church, citing the "Ministerial Exception" as justification to exempt Hosanna-Tabor from the general provisions of the ADA. The Court argued that because Hosanna-Tabor was a church, and Perich was presumed to be a functional "minister" for the church, the church had greater discretion for hiring and firing their ministers than do general organizations with their employees.[38] In ruling as such, *Hosanna-Tabor* carved out an exemption for churches from otherwise-valid laws in order that they may freely employ the clergy and ministers they see best fit to teach and disseminate their theological beliefs.

There are several takeaways from the Court's precedents to consider as we look to the future of ecclesiastical jurisprudence. First, all the Supreme Court's cases regarding ecclesiastical jurisprudence involve congregations affiliated with churches that have a hierarchical authority structure. The Presbyterian, Russian Orthodox, and Serbian Orthodox Churches are all denominations of Christianity that have hierarchical authorities that provide external accountability to the individual congregations in the Church. While all churches have authorities governing their conduct, non-hierarchical churches, such as congregationally-ruled churches, have solely internal authorities. Non-hierarchical congregations lack an outside mechanism of accountability that is detached from their internal dispute, which is important as detachment from a controversy minimizes the bias that an adjudicator may have when reviewing a dispute.

Aside from *Jones*, the Court has been consistent on its principle of ecclesiastical abstention because all of their cases have involved either congregations that are subject to external, hierarchical tribunals in their greater respective Churches or plaintiffs who were members of their church they were suing. Non-denominationalism, however, raises the issue of what happens to the Court's ecclesiastical jurisprudence when there is a case concerning either a non-member plaintiff or an individual church that is not a part of a hierarchically-governed denomination.

The majority in *Watson* suggested that the lack of hierarchical authorities does not change the Court's non-interventionist approach when it ruled that, in property disputes emanating from congregational churches, the civil courts must defer to the majority's decision. However, for a congregational church to make decisions, there must be a structure of church membership embedded in their majoritarian decision-making process. If anyone who stepped into a congregational church could cast a vote on an administrative matter, congregational churches across the country would have no control over who could vote. Non-hierarchical churches that make decisions based on majoritarian rule only count formal members in the majority and overall vote count.

This leads to the second observation on the Court's ecclesiastical jurisprudence history. All its cases involve individuals or groups who are "members," "clergy," or "factions" that have consented to being a member of the individual congregation challenged in the suit. In *Watson*, the parties involved were members of the Third or Walnut Street Presbyterian Church. *Milivojevich* and *Hosanna-Tabor* concerned individuals that were clergy members or employees of the church in question. *Blue Hull* and *Jones* dealt with individual congregations in the Presbyterian Church seeking to disaffiliate with the greater denomination.

The final observation regarding the Court's established ecclesiastical jurisprudence is that all its prior cases involved property disputes or administrative concerns. None covered tort claims levied by an individual on the church they attended or were a member of. While the Court has afforded more deference to churches when addressing administrative concerns emanating from theological doctrine, more study needs to be done on whether this deference extends to cases where a member or attendant files a tort claim in the church. With these observations in mind, I discuss in Part II the presence of American non-denominationalism in the twenty-first century.

Part II: On Non-Denominationalism in America

Unlike churches in the Presbyterian, Serbian Orthodox, and Russian Orthodox Churches, non-denominational churches do not answer to an external ecclesiastical authority.[39] Each nond-enominational church has the freedom to structure their church's leadership, worship service, and building details as they see fit. These churches have proliferated across the US. In 2015, there were over 35,000 non-denominational churches spread across 88% of counties in the United States.[40] The U.S. Religious Census reported in 2020 that there were 44,319 non-denominational congregations across the nation, more than twice the number of Catholic parishes in the United States.[41] Even when confined to the category of protestant denominations, non-denominationalism has stood out, with five times

more non-denominational congregations than churches in the Presbyterian denomination.[42]

While the non-denominational movement is growing at a staggering rate, established denominations in the United States are shrinking significantly. The United Methodist Church (UMC), as of July 2022, has seen 6,200 congregations in the United States disaffiliate from the denomination due to liberalization in the UMC's theology.[43] Within those 6,200 congregations are a collective one million church members and an even greater number of total church attendants.[44] Now, having left the denomination, these congregations are no longer answerable to the UMC's governing authorities.

Another example of a Christian denomination in decline is the Christian Church (Disciples of Christ). In the 1960s, the denomination had almost two million members. Yet by the 2010s, the number of members had shrunk to 500,000. As the decade progressed, the denomination continued to shrink, with only 281,348 reported members and 97,402 active attendants in 2021.[45] From 2019-2022, membership in the Disciples of Christ denomination dropped 21%, another deafening blow to a denomination already on a declining trajectory.[46]

The decline of church membership is not just a trend in particular denominations of Christianity; Americans at large are shying away from church membership in any denomination. At the start of this century, 70% of U.S. adults identified themselves as church members.[47] That percentage has steadily fallen since 2000, with just 47% of U.S. adults identifying as church members in 2021.[48] The declining trend may indicate that adults in the U.S. are not just forgoing church membership in an specific denomination, but rather that U.S. adults are generally growing more indifferent about church membership regardless of a congregation's denominational status.

These statistics may indicate that the current state of American Christianity is significantly different than the state of American Christianity in the twentieth century, when a majority of the Supreme Court's cases on ecclesiastical matters were decided. Whereas those twentieth century cases dealt with intra-church disputes involving members of a congregation or a whole congregation in hierarchically-governed denominations, church membership and hierarchical denominations seem to be fading in popularity today. The Supreme Court has long respected the contract between a congregation and its members by declining to intervene in disputes arising in hierarchically-governed denominations, as we have seen from *Watson* to *Hosanna-Tabor*. However, the decline in church membership, as well as the uptick in non-denominational churches, are circumstances foreign to the fact pattern of the Court's previous ecclesiastical cases. Thus, I posit that the Court's principle of judicial noninterventionism may shift if a future ecclesiastical dispute lacks either a church membership structure or a hierarchical accountability structure. A 2017 case decided by the Oklahoma Supreme Court offers some insight to the potential contours and limitations of the

Court's ecclesiastical jurisprudence as it moves forward into an era of American Christianity characterized by non-denominationalism.

Part III: *Doe* and the Supreme Court's Missed Opportunity for Clarification

When the Oklahoma Supreme Court decided *Doe v. The First Presbyterian Church U.S.A. of Tulsa* in 2017, it introduced a groundbreaking theory in ecclesiastical jurisprudence. While the appellee was a church within the Presbyterian denomination, the *Doe* case stood apart from past Supreme Court precedent on ecclesiastical jurisprudence because the appellant, Mr. Doe, was an attendant, not a member of the First Presbyterian Church U.S.A. of Tulsa (FPC). In 2012, John Doe was baptized in the First Presbyterian Church U.S.A. (FPC) of Tulsa, Oklahoma.[49] Doe was originally from Syria and was raised Muslim but moved to the United States and converted to Christianity as an adult. While Doe sought to be baptized at FPC, he never consented to membership at FPC. When requesting to be baptized, Doe also requested that the ceremony be kept private. He understood that if he were to return to Syria and the Syrian government learned of his baptism, he would face religious persecution. Pursuant to Doe's request for privacy, James Miller, the pastor of FPC, baptized Doe in a non-televised service. However, one day after Doe's baptism, FPC published information about his baptism on the congregation's website.[50] Doe alleged that FPC's publication of his conversion to Christianity caused him harm, as he traveled back to Syria and was tortured due to his status as a Christian. In sum, Doe's lawsuit argued that FPC committed a tort in the form of a breach of Doe's contract to be baptized privately.

The Oklahoma Supreme Court ruled in favor of Doe, concluding that churches are only immune from judicial scrutiny in controversies that arise between the congregation and a member of the church. The Oklahoma Supreme Court saw the member/attendant distinction as critical to marking the contours of the Ecclesiastical Abstention Doctrine. In making a distinction between member-congregation controversies and attendant-congregation controversies, Oklahoma's highest court ruled that the principle of religious autonomy is grounded not in the First Amendment but rather in the consent between a congregation and its member. Thus, the Oklahoma Supreme Court ruled that, in instances where a non-member files suit against a congregation, the religious autonomy that churches typically enjoy is suspended, and the civil courts may evaluate the case.

After the Oklahoma Supreme Court's ruling, FPC filed a writ of certiorari to the United States Supreme Court. Thus, the High Court had a chance

to review *Doe* and set binding precedent on how an absence of church membership affects the existing ecclesiastical jurisprudence. However, the Supreme Court denied the FPC's writ, leaving the state of ecclesiastical jurisprudence on unsettled grounds considering the Oklahoma Supreme Court's ruling. I now take an in-depth look into the facts of *Doe* to examine critical juncture points that led the Oklahoma Supreme Court to rule that the Ecclesiastical Abstention Doctrine ends when churches are sued by non-member attendants.

When Doe's lawsuit against FPC was being reviewed in the District Court of Tulsa County, Judge Daman Cantrell acknowledged that a non-member filing a tort claim regarding baptism was a unique case both to the Oklahoma judiciary and the federal judiciary. The central question for Cantrell was whether FPC's online publication of a baptized non-member was an ecclesiastical action protected by the Supreme Court's Ecclesiastical Abstention Doctrine. FPC prevailed in the case, having their motion to dismiss granted on the grounds that the district court lacked subject matter jurisdiction, for the case revolved around FPC's theological understanding of baptism. Judge Cantrell pointed out the importance of FPC being a part of a larger Christian denomination with its own court system to adjudicate claims brought against a specific congregation or member. Because the Presbyterian denomination has its own judicial structure, Cantrell contended that it would be best for the magistrates of the Presbyterian Church, not the Oklahoma District Court, to resolve Doe's tort claim against FPC.[51]

Following the loss in the District Court, Doe appealed the case to the Oklahoma Supreme Court. The highest court in Oklahoma reversed the District Court's ruling and sided with Doe. The basis of the court's ruling for Doe was two-fold. First, it contended that a church's ecclesiastical jurisdiction, and by extension its protection from judicial oversight, extends only to disputes involving a church and one of its members. To support this, the Oklahoma Supreme Court cited the U.S. Supreme Court's *Watson* decision, where it contended that the right for voluntary religious associations like churches to form an "ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned."[52] *Watson* decision defined "individual members" as those "who unite themselves to such a [congregation] . . . with an implied consent to [the congregation's government], and are bound to submit to it."[53]

Within that definition are two important observations. First, *Watson* established that to become a member of a church, one must unite themselves to the congregation. In doing so, they consent to being governed by the congregation's government. The second observation is that the strength of church

membership is, to a certain degree, tied to whether the congregation is ruled by a governing body in the larger church. Applying *Watson*'s framework of church membership, the Oklahoma Supreme Court ruled that FPC would only have ecclesiastical jurisdiction over Doe, and therefore would only be shielded from judicial oversight, if Doe had consented to becoming a member of FPC. Since Doe was not a member of FPC, the Oklahoma Supreme Court, citing their earlier decision in *Hadnot v. Shaw*, argued that "the church has no power over those who live outside of the spiritual community."[54] In *Hadnot*, the Oklahoma Supreme Court maintained that while the First Amendment's Free Exercise Clause protects the jurisdiction of a hierarchical tribunal in a denomination, it also protects an individual's right to worship according to his conscience. As such, "the absolute privilege from tort liability no longer attaches" when membership is either severed or is never established.[55]

The second argument used by the Oklahoma Supreme Court in favor of Doe was that the principle of church autonomy is an affirmative defense rather than a jurisdictional bar. To support this, the court cited the U.S. Supreme Court's *Hosanna-Tabor* decision, claiming that the ministerial exception, rooted in the church autonomy doctrine, "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."[56] The Oklahoma Supreme Court contended that Doe's not consenting to the publication of his baptism should be the foundational issue in the case, stating, "without . . . consent, Doe's religious freedom to not subject himself to the Appellees' judicature must be respected and honored under the longstanding and clear constitutional decisions from our Court and the [US] Supreme Court."[57] Thus, the Oklahoma Supreme Court reversed the district court's ruling and remanded the case back to the trial court.

FPC appealed the case to the U.S. Supreme Court, but the Supreme Court denied its petition for writ of certiorari. In declining to review the case, the Supreme Court left open the question of whether congregations are shielded from judicial intervention when they are sued by non-members. The Oklahoma Supreme Court's underlying assumption in ruling for Doe was that the principle of religious autonomy is rooted in consent, given to other members of the congregation alongside the larger denomination. When this consent is given, the Oklahoma Supreme Court argued, the member becomes subject to the authority of the church, not the civil courts. The *Doe* majority, like the Supreme Court's precedent on ecclesiastical matters, stressed the importance of church membership. By extension, if church membership is present in a lawsuit, having external judicatory bodies in the larger church is also essential to the courts' noninterventionist posture in intra-church disputes. *Doe* charted a new course for ecclesiastical jurisprudence, and one that the U.S. Supreme Court should have

addressed, especially considering the rise of non-denominational churches. While Doe did not challenge a non-denominational church, the case indicates a potential outcome of an ecclesiastical case that lacks either church membership or adjudicatory bodies in the larger denomination, for Doe was not a member of FPC and thus was not subject to the governing structure of the Presbyterian Church. If an attendant of a non-denominational congregation were to sue the church they attend, they would likewise be a non-member attendant and not subject to any external adjudicatory bodies in the larger Church.

Conclusion

The Supreme Court's non-interventionist ecclesiastical jurisprudence relies on the presence of a strong denominational governing structure and the plaintiff' membership in the congregation they are challenging. However, the surging non-denominational movement poses a threat to the Court's traditional approach towards intra-church disputes. With the rise of autonomous congregations attracting thousands of weekly attendants, the instituting of church membership and sustainable governing structures become more difficult. Consequently, when an individual sues a non-denominational church, the elements of church government and church membership that were critical to the Court's ecclesiastical jurisprudence are missing. It may well be the case that as non-denominational churches continue to spread in America, civil courts may slowly become more involved in resolving disputes within such churches, given the lack of robust church government and membership structures in non-denominationalism. Such a trend would pose a threat to both the Establishment and Free Exercise Clauses, as the judiciary could start to review intra-church disputes that touch on theological disagreements.

Moreover, if church membership across denominations continues to decline, we may witness a transformation in the traditional non-interventionist ecclesiastical jurisprudence. This shift would ground the Court's ecclesiastical jurisprudence not in the First Amendment's Religion Clauses, but rather in the framework of consent: whether the plaintiff is a member of the church they are suing. The Oklahoma Supreme Court's decision in *Doe* grounds the independence that churches have from judicial oversight on membership status instead of the constitutional right of the free exercise of religion. Consequently, the U.S. Supreme Court should have granted certiorari to *Doe* in order to clarify how courts should address suits involving a non-member attendant suing a local church, even if that church is held accountable by external adjudicatory tribunals in the larger denomination.

[1] Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association in the State of Connecticut, Jan. 1, 1802, Presidential Papers Microfilm, Thomas Jefferson Papers, Manuscript Division, Library of Congress, Ser. 1, reel 25, Nov. 15, 1801 – Mar. 31, 1802.
[2] *Watson v. Jones*, 80 U.S. 679 (1871).
[3] See *Employment Division v. Smith*, 494 U.S. 872, 887 (1990), citing *Hernandez v. Commissioner*, 490 U.S., at 699, 109 S.Ct., at 2148. (As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.")
[4] The term "church" can be used to refer to a specific congregation within a larger denomination that individuals are attendants or members of, as well as a body of affiliated congregations (for example, "Roman Catholic Church". In this text, I refer to aggregate denominations with a capital "Church" and individual congregations with a lowercase "church."
[5] *Watson v. Jones*, 80 U.S. 679, 681 (1871).
[6] Louis Weeks and James C. Hickey, "'Implied Trust' for Connectional Churches: Watson v. Jones Revisited," *Journal of Presbyterian History (1962-1985)* 54, no. 4 (1976): 459–70, online at https://www.jstor.org/stable/23328100.
[7] *Watson v. Jones*, 80 U.S. 679, 680 (1871).
[8] Ibid, 725.
[9] Ibid, 732.
[10] Warren Bird and Scott Thumma, "Megachurch 2020: The Changing Reality in America's Largest Churches," 2020, online at http://hirr.hartsem.edu/megachurch/2020_Megachurch_Report.pdf, 2.
[11] Ibid, 3.
[12] Ibid, 6.
[13] Ibid.
[14] *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 106-116, 119 (1952).
[15] Ibid, 116.
[16] Ibid, 115-116. Justice Stanley Reed writes, "Freedom to select the clergy, where no improper methods of choice are proven, must now be said to have federal constitutional protection against state interference, as a part of the free exercise of religion."
[17] Ibid, 113.
[18] Though the abbreviation for the denomination is technically styled as "PC (USA)," I abbreviate the denomination in this manuscript as "PC(USA)" to avoid confusion with spacing in relation to the text preceding and succeeding the abbreviation.
[19] *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).
[20] Ibid, 445-452.
[21] *Serbian Orthodox Diocese v Milivojevich*, 426 U.S. 696 (1976).
[22] Ibid.
[23] Ibid, 720.
[24] Alexander J. Lindvall, "Forgive Me, Your Honor, for I Have Sinned: Limiting the Ecclesiastical Abstention Doctrine to Allow Suits for Defamation and Negligent Employment Practices," *South Carolina Law Review* 72, no. 1 (2020).
[25] *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 734 (1976).
[26] Ibid, 734-735.
[27] *Jones v. Wolf*, 443 U.S. 595 (1979).
[28] Ibid.

[29] Ibid, 602.
[30] Ibid, 595.
[31] Ibid, 605.
[32] Ibid.

[33] Ibid.
[34] *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).
[35] *Jones v. Wolf,* 443 U.S. 595, 605 (1979).
[36] Ibid, 602.
[37] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 565 U.S. 171 (2012).
[38] Ibid 19-20

[39] Celeste Palmer-Atkins, "An Exploratory Study of a Non-denominational Church and Leadership Behaviors, Principles, Strategies, and Practices," *Walden Dissertations and Doctoral Studies* 1, 4671 (2018), online at https://www.proquest.com/docview/1983937722?pq-origsite=gscholar&fromopenview=true.
[40] Thom S. Rainer, *Eight Reasons People Are Leaving Denominational Churches for Non-Denominational Churches*, (Church Answers, April 22, 2015), online at https://churchanswers.com/blog/eight-reasons-people-areleaving-denominational-churches-for-non-denominational-churches/.
[41] The U.S. Religious Census reported 19,405 Catholic parishes in the United States in 2020. See The Association of Religion Data Archives, "U.S. Membership Report (2020)," online at https://thearda.com/usreligion/census/congregational-membership?t=4&y=2020.
[42] Mark Tooley, "The United Methodist Crisis Goes Critical," *WORLD*, July 20, 2023, online at https://wng.org/opinions/the-united-methodist-crisis-goes-critical-1689852913.
[43] Ibid.
[44] Ibid.
[45] Jeffrey Walton, "Disciples Suffer Massive Membership Drop Post-2019," *The Institute on Religion and Democracy*, September 14, 2023, online at https://juicyecumenism.com/2023/09/14/dc-mainline/.
[46] Ibid.
[47] Jeffery Jones, "U.S. Church Membership Falls below Majority for First Time," *Gallup*, March 29, 2021, online at https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx.
[48] Ibid.
[49] *Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284 (Okla. 2017).
[50] Ibid, 286.
[51] *Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284 (Okla. 2017), Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, 11.
[52] *Watson v. Jones*, 80 U.S. 729 (1871).
[53] Ibid.
[54] *Hadnot v. Shaw,* 826 P.2d 978, 1992 OK 21 (Okla. 1992).
[55] *Hadnot*, ¶19, 826 P.2d 989.
[56] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 565 U.S. 171 (2012), fn. 4, as cited in *Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 291 (Okla. 2017).
[57] *Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284, 291 (Okla. 2017).

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Corporations Are Property, Not People

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Abstract

Corporate personhood—the idea that corporations exist as a legal entity and hold certain rights distinct from those of their constituents—has existed for 700 years and has faced backlash and scrutiny for perhaps as long. In the United States, corporate personhood has received similar criticism, yet the Supreme Court has steadily expanded the rights available to corporate persons. In this thesis, I argue that much of that expansion should not have occurred. After analyzing the complex legal history surrounding corporate personhood, I argue that the Court, in an effort to abide by stare decisis, mistakenly granted natural personhood rights to what is fundamentally property. Under the Supreme Court's precedents, an entity should *not* be treated as both *property* and a *person*. I conclude that the Supreme Court should overturn all its decisions treating the artificial person form of corporations as natural persons with the exception of cases based on rights granted to corporations by state legislatures and Congress.

Introduction

The word "person" descends from the Latin word *personare*, meaning to "sound through."[1] In this sense, a corporation could be thought of as a person in that it acts as a representative that its constituents speak through. However, as critics (correctly) point out, these semantic details provide a far from adequate explanation for corporate personhood—the idea that corporations ought to enjoy certain privileges and rights as legal "persons." It is easy then to understand the widespread outrage that has resulted from recent Supreme Court decisions seemingly enshrining corporate personhood into constitutional jurisprudence. Looking at some of the mega-corporations that have emerged in recent decades, one may also assume that recent advancements in corporate personhood have been the result of an army of well-equipped corporate lawyers collaborating with a pro-business Supreme Court.

Yet, corporate personhood is far from a modern invention. The idea of the corporation as a distinct legal person traces its origins to the "rediscovery" of Roman Law in the Middle Ages, and modern American jurisprudence is merely the latest iteration of the concept. However, corporate rights under American jurisprudence have been more steady and expansive than under any other jurisdiction in history. *Citizens United v. FEC*[2] and *Burwell v. Hobby Lobby Stores*[3] are the two latest cases indicating the Supreme Court's seeming commitment to widening the scope of rights enjoyed by corporations.

Thus, in this article, I seek to address the Court's continued expansion of corporate rights throughout the history of the United States. In exploring this question, I argue that there is one issue at the core of current and past Supreme Court rulings surrounding corporate personhood: the Court applied and continues to apply personal constitutional rights to *property*. The Court should *not* ascribe any constitutional rights to corporations based on corporations' statuses as "persons." Its only authority is to recognize rights possessed by a corporation's constituents and rights delegated to a corporation by state legislatures and Congress.

In Section Ia, I will provide an overview of the legal and historical developments that gave rise to the modern corporation. Then, in Section Ib, I will survey modern criticisms and proposals for corporate rights and point out holes in them, specifically in the area of *how* and *why* the Supreme Court expanded rights in the manner that it did. In Sections IIa–b, I will strive to fill the gaps in the current literature by pointing out the core issue of Supreme Court rulings regarding corporate rights. Finally, in Section III, I will propose how the Court ought to progress in the future.

I. Background to Modern Controversy

Broadly speaking, corporations are entities consisting of groups of people coming together for a purpose. They are typically granted special legal status by governments, involving the creation of an artificial, legal entity distinct from its constituents. However, what corporations are, or are deemed to be, has undergone several changes throughout American history, and the law has reflected these changes.

A. The Rise of Corporate Personhood

Most scholars divide the development of corporate rights in the United States into three time periods: the Founding and Early Republic (1770s–1850s), the Industrial Revolution and Gilded Age (1850s–), and the Civil Rights Era (1950s–). Each passing era carried with it significant and distinct characteristics that reshaped views of the role corporations ought to play in American society. Consequently, the Supreme Court also adjusted its precedents to reflect these changes, gradually expanding the list of rights and privileges of corporations.

In the discussion of each period, I will focus on two things: corporate "forms" and corporate "models." A corporate form refers to the idea that corporations exist *both* as a group of individual humans and as a legal fiction (an artificial person recognized by the law). As alluded to earlier, the separation of corporations into an abstract "artificial person" distinct from its constituents did not occur until the Middle Ages.[4] After medieval Italian jurists devised the "corporation" as a legal "person" distinct from its constituents, this idea spread to English common law.[5]

Shortly after, joint-stock companies independently began emerging around Europe. Joint-stock companies are entities with "shares" that can be publicly bought and sold by individuals, known as "shareholders," such that they become owners of the company. The joint-stock company model merged with corporations and became the precursor to more modern publicly traded corporations, such as the Virginia Company. Consequently, this merger also significantly transformed the artificial person form of the corporation. Medieval jurists and legal scholars have envisioned the "corporation" as a combination of the two forms: the artificial person acted as a "curtain" draped over the heads of the human beings who constitute the corporation, granting them special status and certain protections as defined by law. However, since outside individuals could buy a share of the corporation, the merger of the joint-stock model with the two forms of the corporation effectively removed the human beings from under the curtain of the artificial person and replaced them with capital, assets, and property owned by others. In other words, the artificial person itself became property that could be bought and sold. It was these conceptions of the dual forms of corporations that underlie American discussions at the time of the

Constitutional Conventions. I will use "artificial person" to describe the abstract, legal person aspect of corporations, and I will use "constituents," "members," and related words to describe the aspect of corporations consisting of individual human beings.

On the other hand, a corporate model refers to the structure the artificial person form of corporations generally took on during the respective era; the model is informed by factors within the period, such as the social and political views of what roles corporations ought to play in society and what privileges, restrictions, and responsibilities the legal framework of the era provided to corporations. I will discuss three corporate models in this thesis: the "quasi-public entity" model, the "aggregate of private capital" model, and the "natural person" model. The terms "quasi-public entity" and "aggregate of private capital" are taken directly from Joshua Barkan's work, *Corporate Sovereignty*.[6] In each section, I will first chronologically describe the historical, legal, and theoretical developments that occurred in each era before tracing how changes in the corporate model changed the rights and responsibilities of corporations as artificial persons.

1. Founding and Early Republic and the Corporation as a "Quasi-Public Entity" (1770s–1850s)

The period of the Early Republic was characterized by the framers of the Constitution's attempts to limit the power of corporations. Though the framers unsuccessfully restricted the power of states and the federal government to charter corporations, social pressures confined corporations into the "quasi-public entity" model. In other words, corporations could only be chartered to service public purposes, such as building bridges, hospitals, and churches.[7] Several different perspectives on the effects of corporations conflicted in this period, leading to uncertainty in corporations' legal statuses. On the one hand, English common law treated corporations as a theoretical boon. William Blackstone, in his authoritative *Commentaries on the Laws of England*, highlighted the idea that corporations existed only for the benefit of the public, and corporate power could be harnessed through the establishment of churches, universities, and businesses. To American colonists, however, the monopolistic presence of large corporations— like the East India Company— suffocated domestic small businesses.[8] Ted Nace and Thomas Hartmann argue that the resultant anti-corporation and anti-monopoly sentiments eventually sparked the Boston Tea Party and the American Revolution more so than any other political motives.[9]

With these two conflicting views of corporations in mind—the theoretical ideas of public benefit and the lived experiences of monopolistic oppression—the framers faced the dilemma of how *they* wished to treat corporations in the Constitution. Though James Madison subscribed to the common law view and sought to enshrine a federal power to incorporate businesses, the other delegates struck down his attempts and omitted any

provision regarding the power to charter corporations *and* any specific limitations on what privileges or rights corporations might enjoy once they were incorporated. As such, much regarding incorporation and the scope of corporate rights remained up for legal interpretation by the federal government and state governments.

Soon after the ratification of the Constitution, both state governments and the federal government filled the power vacuum. States, relying on the Tenth Amendment's "Unenumerated Powers" Clause, seized the power to charter corporations sparingly, only for corporations dedicated to the "public good."[10] Contrary to many of the framers' wishes, the federal government also obtained the power to incorporate businesses. In *McCulloch v. Maryland*,[11] Chief Justice Marshall rejected the argument that the Tenth Amendment granted the power to incorporate *only* to the states. Around the same time, in *Bank of Deveaux v. United States*,[12] Marshall granted corporations the right to sue and be sued in court by deriving the right from the rights of the constituents and shareholders of the bank. Similarly, in *Dartmouth v. Woodward*,[13] Marshall stated that charters provided Dartmouth College with the ability to own property and form contracts, so the government could not abridge this right without violating the Contract Clause of the Constitution.

As such, there were two key events of this era. First, the framers' distrust toward corporations resulted in them enshrining no provision regarding (1) the legal status of corporations (whether the United States recognized corporations as artificial persons) or (2) who had the power to incorporate. Both the states and the federal government ended up seizing the power of incorporation and, thus, the power to define the legal statuses of corporations. Second, Chief Justice Marshall's opinions in *McCulloch* and *Dartmouth* had the effect of reattaching the United States to the common law tradition by clarifying that American law would also treat corporations as artificial persons dedicated to serving some common good.

2. Industrial Revolution and Gilded Age and the Corporation as an "Aggregate of Private Capital" (1850–)

With the onset of the Industrial Revolution came what most scholars recognize as the second significant stage in the legal history of corporate personhood. Changes in this era transformed corporations from a "quasi-public entity" model to "aggregates of private capital." In other words, corporations became ways for the federal government and state governments to legally recognize private property rather than as vehicles serving the public good.

First, states passed laws granting investors limited liability (meaning investors would only be liable for the amount of money they invested in the corporation) to encourage investment.[14] Second, most states passed laws granting "general incorporation."[15] This meant that groups seeking to incorporate no longer had to state a specific purpose for incorporation, for example, to establish hospitals, universities, and canals.[16] Thus, incorporation became a less stringent

process that groups followed to obtain the associated benefits for whatever purposes they wished. Finally, many states began a process Thom Hartmann named "chartermongering."[17] In order to attract large corporations into their borders, states began to pass more lenient restrictions and beneficial privileges.[18] These included laws allowing corporations to exist in perpetuity, removing corporate asset limits, and decreasing the influence of corporate shareholders.

Railroad corporations, which were the largest corporations to form in this age, spearheaded the changes in legal personhood. Most scholars identify the defining case in this era as *Santa Clara County v. Southern Pacific Railroad*.[19] The case itself was relatively inconsequential; it involved wrongful taxation of fencing used alongside railroads. Nonetheless, there were several key events surrounding the case that established its significance in legal history. First, the Fourteenth Amendment, ratified in 1868 to protect newly freed slaves, declared the following:

> No State shall … deny to any person within its jurisdiction the equal protection of the laws.[20]

Roscoe Conkling, a prominent corporate attorney, Republican senator, and Framer of the Fourteenth Amendment, presented a journal supposedly showing the framers of the Fourteenth Amendment's intent to include "corporations" within the definition of "persons" it sought to protect.[21] His argument was proven to be false, but it convinced the court reporter in *Santa Clara* to incorrectly write in the headnotes of *Santa Clara* that "corporations were people" under the Fourteenth Amendment, even though nothing in the opinion ruled that as such.[22] Consequently, this "precedent" was cited in cases such as *Charlotte Columbia and Augusta Railroad Co. v. Gibbes*,[23] *Covington and Lexington Turnpike Road Co. v. Sanford*,[24] and *Smyth v. Ames*,[25] cementing *Santa Clara*'s place in legal history.

Thus the "natural person" model of corporations emerged. Hartmann notes that 288 of the 307 cases regarding the Fourteenth Amendment between 1886 and 1910 were corporate challenges regarding their natural personhood.[26] However, this disproportionate litigation pattern and *Santa Clara's* declaration of corporations as natural persons sparked little to no immediate outrage or legal change. Most of the cases cited by Hartmann deal with relatively trivial matters, such as statutory interpretations of taxes on "persons."[27] The true importance of the natural personhood status of corporations only becomes evident in the context of substantive due process, discussed in the next section.

3. Civil Rights Era to Modern Day and the Corporation as a "Natural Person" (1950s–)

Between the Civil Rights Era of the mid-20th century and the present, the renewal of substantive due process under the Warren Court redefined what it meant to be a rights-bearing person in the United States. Riding on the momentum of this change, corporations used their legal statuses as natural persons from *Santa Clara* to gain several rights, and this trend continued in the modern era.

Following Justice Stone's infamous "footnote 4" of *United States v. Carolene Products*,[28] the Warren Court eagerly embraced Justice Stone's call to action, expanding interpretations of constitutional protections to a myriad of rights and historically marginalized groups.

However, as people started gaining an unprecedented number of rights and protections under the Warren Court, corporations also began gaining certain constitutional rights because of their ambiguous legal status as "persons." In *NAACP v. Alabama*,[29] Justice Harlan wrote that the NAACP (the artificial person) and its members were "identical," so the NAACP could assert First Amendment rights on behalf of itself. Since people possessed the right to associate with others anonymously under the First Amendment, the NAACP possessed a derivative right to freedom from compelled speech.[30]

Two decades later, the Burger Court tackled a different corporate issue involving First Amendment rights in *First National Bank of Boston v. Bellotti*.[31] The majority opinion in *Bellotti* cited the Court's precedent in *NAACP v. Alabama* to assert that corporations possessed First Amendment rights, but the Court took a different approach in its justification. Justice Powell, writing for the slim 5–4 majority, stated that the First Amendment was meant to be a "guarantor of a free marketplace of ideas, making his decision less dependent upon the identity of the speaker—be it an "artificial" or "natural" person speaking—than whether speech was being restricted. Justice Powell's opinion implied that corporations derived First Amendment rights not from their constituents but from their status as natural persons, given that Justice Powell cited *Santa Clara* and several of its progeny in the footnotes.

This decision brings us to *Citizens United* and *Hobby Lobby.* Though both cases dealt with the First Amendment, the Court arrived at their conclusions using two different lines of reasoning. *Citizens United* took a nearly identical line of reasoning to that used in *Bellotti.* Justice Kennedy, writing for a 5–4 majority, declared that the First Amendment's speech protections did not discriminate between artificial persons like corporations and natural persons.[32] In *Hobby Lobby*, the Secretary of United States Health and Human Services (HHS) tried to compel respondent Hobby Lobby to provide contraceptives to all employees upon request.[33] In another 5–4 majority opinion, Justice Alito agreed with Hobby Lobby, stating that individuals did not lose their right to freely exercise their religion upon forming a corporation.[34] In other words, Justice Alito gave the artificial corporate person a right by deriving it from its constituents' rights.

However, though this problem seems to indicate a solution, the central question of *why* the Court has continuously expanded corporate constitutional rights throughout history remains unanswered. The progression of corporate models to increase corporate constitutional rights offers clues as to why the Court continued its expansion. In the next section, I will summarize how modern scholars have responded to and tried to make sense of the Court's decision to expand corporate rights and personhood.

B. Scholarly Analysis and Holes in Current Literature

In response to the Supreme Court's steady expansion of corporate rights, scholars have arrived at many different conclusions using similar underlying reasoning. Most scholars identify the problem as the Supreme Court's ruling in *Santa Clara* and proposed disparate legislative and legal recommendations. I find these arguments are important because *Santa Clara* is undoubtedly a linchpin in the current framework of corporate rights. However, I still find the argument inadequate because it still begs the question: What stops the Supreme Court from declaring corporations legal persons under the Fourteenth 14th Amendment, even if the framers of the 14th Amendment did not intend for persons "persons" to apply to corporations?

Joshua Barkan, in *Corporate Sovereignty*, also honed in on this observation, writing that "the conception of the corporation as a person does not, by itself, determine the scope of corporate powers."[35] This is because a "'person' signifies what the law makes it signify."[36] Thus, personhood is ultimately a legal concept created by the government to recognize certain rights for certain things. The government could grant personhood status to an animal, a tree, or an inanimate object, or deny it to African American slaves for more than a century and a half, without usurping its legal authority. There are, of course, moral issues with denying African American slaves personhood for more than a century and a half. Still, moral consistency and legal consistency often occupy mutually exclusive spheres of influence.

Barkan further writes that "corporate personhood is a retroactive attempt to reconcile an institution formulated based on sovereignty and police with a framework of a new capitalist economy based on concepts of personhood, rights, and citizenship."[37] What Barkan means when he contends that corporate personhood is a "retroactive attempt to reconcile an institution…" is that corporate models changed. Yet, courts are still attempting to make doctrines associated with the previous quasi-public entity model consistent with the newer model of the liberal state.

Barkan's argument essentially describes the phenomenon I observed as being at the root of corporate personhood's problems in American law. However, his description falls crucially short in arriving at why such a phenomenon occurred. Therefore, I will build on Barkan's argument by describing why the Supreme Court was compelled to continue expanding corporate rights. And, in doing so, I will also arrive at an account of where the Supreme Court made a mistake and how the Court should move forward.

II. Fundamentally Inconsistent Developments

Building on Barkan's model, I argue that two factors forced the Supreme Court to consistently expand corporate constitutional rights: (1) societal

pressures, which is better characterized as *judicial activism*, and (2) stare decisis. From this analysis, I also identify a central issue that the Supreme Court missed—that the Court cannot expand corporate rights in the same way it expanded other natural persons' rights in the areas of, for example, the Fourth and Fourteenth Amendments. Corporations exist as *both* property and natural persons under the Fourteenth Amendment, a legal form fundamentally inconsistent with American law. From this observation, I argue that a different parallel would better show how corporate rights should have progressed following *Santa Clara*: the development of the rights of slaves following the recognition of their citizenship and personhood via the Fourteenth Amendment.

A. Development of Other Constitutional Rights as Compared to Corporate Rights

Similar to the transformation of other rights, the expansion of corporate constitutional rights represents a conflict between judicial activism and stare decisis. Judicial activism is the legal philosophy that the Supreme Court's role is not solely to apply precedent but to interpret the Constitution in a manner that reflects the needs of society at the time of the decision. On the other hand, the doctrine of stare decisis obligates a court to have an "indispensable respect" for precedent because doing so adds stability and legitimacy to the Supreme Court's decisions.[38] If the Court finds itself unable to stay consistent with precedent, it can overturn prior decisions in a limited set of circumstances. In past cases, the Court has provided factors to consider for when precedent ought to be overturned: when cases are "intolerable simply in defying practical workability," when principles of law have "so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed … as to have robbed the old rule of significant application or justification," among a few other similarly stringent scenarios.[39]

The interplay between judicial activism and stare decisis manifests in recurring patterns. First, the Court makes an initial decision that is often highly controversial. Then, new cases come before the Supreme Court with persuasive scenarios and questions that poke, prod, and often directly challenge the central holding of the initial decision. The Court appeals to stare decisis and is reluctant to overturn past decisions directly, so it makes qualifications, reconciles doctrines, and draws distinctions. Eventually, the Court arrives at the point where it recognizes that the original decision is, as Justice O'Connor described it, "unworkable." The Court then finally overturns the initial decision by admitting a mistake or appealing to how society has progressed since the initial decision. And the cycle repeats.

For example, consider the changes that the Equal Protection Clause of the Fourteenth Amendment underwent due to societal pressures. In *Plessy v. Ferguson,*[40] the Court famously ruled that racial segregation did not violate the

Equal Protection Clause because black individuals could exist in a state "separate but equal" to that of white individuals. In the decades since, many important events, like the military distinctions of segregated units during World War II or social reactions to Hitler's racism, contributed to changing popular views on segregation[41]

As such, in 1950, the Supreme Court decided to reconsider *Plessy.* In *Sweatt v. Painter,*[42] the Court had the option to overturn Plessy entirely, but out of an interest in stare decisis, the Court qualified its ruling to apply solely to law schools. This decision set the groundwork for the far more known decision, *Brown v. Board*.[43] In that case, the Court once again decided to only carve away at *Plessy*, ruling that the "separate but equal" doctrine was inapplicable to all public schools. After *Brown*, the Court continued eroding *Plessy*, deeming racial segregation unconstitutional in public beaches[44] and golf courses.[45] Finally, seeing the dismal state that the

Plessy decision was in, the Court decided to quietly overturn it entirely in *Gayle v. Browder.*[46]

From tracing the evolution of Fourteenth Amendment case law, it appears that the Court's process to overturn precedent is extremely gradual. A case brought before the Court must be persuasive and directly challenge the premises or holding of an initial case to even begin wearing away at the initial case's decision. Furthermore, the Court requires several such cases before the precedent becomes weak enough for the Court to confidently overturn it. I argue that the Court's recurring hesitancy suggests a compelling explanation for why the Court continuously expanded corporate rights.

As the Court and society moved from one corporate model to another, judicial activism fueled the Court's desire to create doctrines that adapted corporations to the needs of each specific era. During the quasi-public entity model of the Early Republic, corporations needed (1) the right to create contracts so that the government could "hire" corporations to perform certain tasks for the public good and (2) the right to sue and be sued so that citizens could keep corporations accountable if they failed to promote the public good. The Court granted such rights in *Dartmouth* and *Deveaux,* respectively. During the aggregate of private capital model, the Court felt the need to expand natural personhood to corporations in *Santa Clara* because the framers of the Fourteenth Amendment supposedly intended to include artificial persons in the list of entities the Fourteenth Amendment would apply to. Finally, the Court expanded natural personhood rights for corporations during the Civil Rights era because of *Santa Clara*'s precedent and because several corporate rights cases "rode the coattails" of a larger social movement aimed at redefining the rights and privileges enjoyed by people in the United States.

While the Court actively set new precedents transforming what rights corporations possessed, it did so without applying any brakes because the Court did not think that its rulings violated stare decisis. Unlike the transformations of

other amendment rights previously discussed, corporate rights are not confined to just one clause or amendment. Corporate rights cases have dealt with clauses spanning the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, among others. It was not immediately clear to the Supreme Court, nor to many of its observers, how, for example, a decision granting corporations the right to free speech conflicted with a decision granting them the right to sue and be sued in court.

There is one crucial factor the Court failed to consider throughout the decades of ruling on corporate decisions. In transforming the other rights outlined, the subjects holding the rights in question never changed. The constitutional rights I traced all began as provisions that applied to *human beings* and ended as provisions that applied to *human beings*. However, the artificial person imagined to hold corporate rights has changed with every new corporate model. They went from quasi-public entities and aggregates of private capital—property that serves different purposes—to natural persons under the Fourteenth Amendment.

Since the Court did not properly consider this crucial factor, it wrongly believed that it had been adhering to stare decisis in its decisions on corporate rights. In fact, the situation described falls squarely within one of the necessary conditions Justice O'Connor identified in
Planned Parenthood v. Casey[47] for breaking from stare decisis—when "facts have so changed … as to have robbed the old rule of significant application or justification." As such, any two cases ruled with different corporate models in mind should have necessitated that the Court explain why such a change is or is not significant enough to warrant a deviation from precedent.

The Court's wrongful assumption that its decisions adhered to stare decisis explains why the Court continued granting constitutional rights to corporations seemingly without running into significant reversals or reconciliation problems. The Court felt compelled by changing views on corporations to engage in judicial activism, and because it mistakenly believed that no stare decisis concerns were at play, it continuously expanded rights without the usual hurdles present with conflicting precedents. With the reasoning for the Court's expansion of corporate rights revealed, one question now remains: what should be done?

B. A Different Parallel

Only one other group in the United States has undergone a similar change in legal status to corporations: slaves. The legal transformation of slaves from property into natural persons hints at what the Court ought to do with corporate rights.

Prior to December 6, 1865, slaves were considered property. In one of the most infamous decisions in American history, *Dred Scott v. Sandford*,[48] the

Court ruled that African Americans were "article of property" that could be bought and sold like merchandise. Chief Justice Taney elaborated that African Americans were "never thought of or spoken of except as property" and listed several of the constitutional property rights applied to slaves: they must be delivered back to their masters when they escaped and were captured, they could not be seized from their masters if doing so caused "injury or inconvenience," and their statuses as property must be protected by the federal government.[49] With the ratification of the Thirteenth and Fourteenth Amendments in 1865, the legal statuses of slaves in the United States changed, and affiliated court cases, federal statutes, and state laws all became moot as a result. These two amendments consequently overturned the Court's decision in *Dred Scott* as well as other cases involving property rights associated with slaves. It is another debate altogether to discuss whether freedmen could be fully considered natural persons under the law, given the failed Reconstruction era and subsequent Jim Crow South. However, the fact remained that newly freed African Americans enjoyed a de jure status as natural persons that remained latent during decades of de facto sub-human treatment but eventually came to fruition during the Civil Rights era.

This parallel offers a view of what the Court *should* have done in regard to corporations. Prior to *Santa Clara*, the artificial legal person form of corporation was *property.* Particularly in joint-stock corporations, a theoretically unlimited number of natural persons could buy and sell shares in a corporation. After *Santa Clara* declared corporations natural persons for purposes of the Fourteenth Amendment, the Supreme Court should have similarly overturned all the rights and decisions based on the premise that corporations were *property.* Instead, the Court, as earlier outlined, continued adding rights associated with natural personhood on top of previous rights from Court decisions that had corporations as property as a premise.

III. The Path to Righting Corporate Rights

The comparison of the transformation of corporations to the emancipation of the slaves provides two options for the Court: classify corporations solely as property and overturn its natural personhood decisions, or classify corporations as natural persons and overturn decisions treating corporations as property. Given the predominant purpose of using the corporate model to perform commercial activities, manage the assets of numerous individuals, and, in general, deal with the aggregate property of many individuals under one legal entity, the Court ought to classify corporations as solely property and revert its natural personhood decisions.

The Court has historically expanded rights to corporations through three different justifications: (1) by stating that individuals have certain rights and that corporations can act on behalf of the individuals to assert said rights, (2) by transferring a right outlined in (1) to the artificial person, and (3) by directly granting the artificial person a right. I argue that corporate rights covered by (1) should still stand, but corporate rights established via (2) and (3) ought to be overturned.

Beginning with (1), corporate rights arising from this path should remain constitutional because they reserve the rights to the people who constitute the corporation rather than attributing them to the artificial person. In the *Deveaux* decision, the Court declared that corporations could never hold citizenship, but because its constituents were citizens who held the right to sue in federal courts, corporations could sue in federal courts on behalf of their constituents.[50] In this example, the corporation is a tool that makes it easier for the Court and the government to deal with aggregates of individuals. Assuming a corporation has fifty shareholders who are suing an individual, the corporate artificial person form makes it so that the corporation can sue the individual as *one* entity rather than through fifty separate lawsuits.

What distinguishes the situation outlined in (1) from that of (2), and makes the rights granted in (2) unconstitutional, is that the Court attributed the rights in question *to the artificial person*. Both *Hobby Lobby* and *NAACP v. Alabama* fall into this category. The Court's reasoning in both of these cases implies that the artificial person possesses the respective rights in addition to their constituents. The Alabama statute in *NAACP v. Alabama* did not target individuals to coerce them to disclose their associations. Rather, it restricted the NAACP—an artificial person—which acts as a separate entity from its constituents. Similarly, in *Hobby Lobby*, HHS's requirement did not directly violate the owners' free exercise rights. It coerced Hobby Lobby and Mardel—both artificial persons—to perform certain actions, violating the owners' free exercise rights. Thus, such corporate ascriptions of rights are unconstitutional because they represent granting natural rights to property.

Justifying (3), I need to make one more distinction between judicially-based rights and legislatively-based rights. Cases found in the former category—*Bellotti* and *Citizens United*— need to be overturned, but cases in the latter category—mainly *Dartmouth*—ought to still stand. This distinction is necessary because the Supreme Court is *not* the correct authority for sourcing rights to corporations.

In *Bellotti* and *Citizens United*, the Court primarily relied on constitutional interpretation to grant corporations free speech rights. Citing *Santa Clara's* ruling that corporations were "natural persons" for purposes of the 14th Amendment, the Court in *Bellotti*[51] extended First Amendment protections to corporations. Subsequently, the Court in *Citizens United*[52] cited *Bellotti.* In practicality, the Court created a right out of one that had not previously existed

by expanding the First Amendment to cover corporations as well as humans. Both the Court in *Bellotti* and *Citizens United* and proponents of judicial activism argue that the Court never "creates" rights but merely "uncovers" those inherently found in the Constitution. My analysis of discussions of the framers revealed that they had no intention of applying the First Amendment to artificial persons. Furthermore, my summary of scholarly analysis surrounding *Santa Clara* has also revealed that the framers of the Fourteenth Amendment did not intend to apply the amendment to corporations. As such, there is no argument that a right to free speech for corporations implicitly existed in the Constitution. For the purpose of this analysis, the Court in *Bellotti* and *Citizens United* "legislated from the bench" by granting corporations the right to free speech.

On the other hand, though the Court granted corporations a right in *Dartmouth*, it did not source the right from an appeal to its implicit existence in the Constitution. Instead, Chief Justice Marshall ruled that Dartmouth College's charter of incorporation "endowed it with certain powers," including the right to "contract" with its members and others.[53] In other words, Dartmouth possessed the ability to form contracts because the British Crown, which Dartmouth had been incorporated under, defined corporations as "artificial persons" capable of making contracts. And New Hampshire's government, the successor of the Crown, honored all rights granted to corporations chartered under the British Crown. In this sense, the Court in *Dartmouth* (1) contended that New Hampshire's statutes, not the Constitution, granted corporations such a right and (2) confirmed that states like New Hampshire held the power to do so.

The reason the Court's approach in *Dartmouth* is constitutional and its approaches in *Bellotti* and *Citizens United* are not tie to the fundamentals of personhood. As Barkan stated in his work, a "'person' signifies what the law makes it signify."[54] Personhood, at its core, is a legal status that an authority can give to any entity it chooses, abstract or tangible. However, it must be the *correct* legal authority doing so. The judicial branch does not hold the power to declare individuals as persons, and as such, the Supreme Court cannot be the authority granting rights to artificial persons. Consequently, the Supreme Court must overturn its decisions in *Bellotti* and *Citizens United*, but it can leave *Dartmouth* alone.

As a final note, this conclusion does not mean that corporations can *never* possess free speech or other constitutional rights. Several qualifications need to be expressed regarding my central arguments. First, all the arguments and analyses made in this paper should not be construed to limit state legislatures and Congress in any way. My arguments criticize the Supreme Court's approach to corporate rights and aim to specify what restrictions or expansions the Court can make. Second, my central argument—that the artificial person form of corporations exists as property and cannot possess natural personhood rights—*also* applies solely to the Supreme Court. As such, my argument leaves open the possibility of state legislatures and

Congress passing laws that extend free speech rights to corporations.

Conclusion

This article examines the history of corporate personhood in the United States and discovers a core inconsistency in the Supreme Court's application of corporate personhood, necessitating a reframing of the legal structure of the concept. My proposal is to reconceive the artificial person form of corporations not as a legal entity shielding human beings but rather as a legal entity made of property. From this new conception, I derive my argument that the Supreme Court should not have granted rights that belonged to human beings to property, so the Court ought to overturn any case in which it granted the artificial person form of corporate rights.

My reframing of corporations as property and the proposals I provide leave significant room for speculation regarding what the future holds for corporate rights. Some may argue that states have historically proven to be incapable of handling the ability to expand corporate rights. After all, states "chartermongering" during the 19th century was the chief reason why corporations gained powers, such as perpetual existence and limited liability. There is no reason for states not to do the same with the right to free speech, free exercise of religion, and Courtgranted rights corporations currently grant.

I admit that state-level reexpansion of corporate rights represents a potential outcome. Nonetheless, my sole focus was on assessing the state of corporate rights based on *how* their rights came about rather than empirical or pragmatic analyses of whether or not corporations ought to possess certain rights. If states "chartermongered" and expanded corporate rights back to the current status quo, it would have been done through legitimate, democratic channels. As such, the people–the *human beings* of the United States–now possess a direct mechanism for keeping corporate rights at bay rather than being at the mercy of an unelected body of nine justices. The *people* of the United States of America have power, and it must be up to the *people* to decide which oppressive, unfair, and absurd laws must be changed.

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[4] J.P. Canning. "The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries." *History of Political Thought* 1(1): 9–32. https://www.jstor.org/stable/26211834 (March 19, 2023), 15.

[5] Ibid.

[6] Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press, 2013).

[7] Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations.* (Harvard University Press 1917), 84–88; Elizabeth Pollman. 2010. "Reconceiving Corporate Personhood." SSRN. http://www.ssrn.com/abstract=1732910 (September 30, 2022), 1634.

[8] Ted Nace. *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy*. (Berrett-Koehler 2003), 42.

[9] Nace, 42; *Thom Hartmann. Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. (St. Martin's Press 2002), 75 [10] Nace, 48.

[10] 12 US 316 (1819).

[11] 9 US 61 (1909).

[13] 17 US 518 (1819).

[14] Barkan, 57; Nace, 52.

[15] Nace, 55; Barkan, 56; Pollman, 1640.

[16] Ibid.

[17] Hartmann, 128.

[18] Ibid, 128–130.

[19] 118 US 394 (1886).

[20] US Const Amend XIV..

[21] Nace, 109–112; Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (Liveright Publishing Corporation 1st ed 2018).

[22] Winkler, 151.

[23] 142 US 386 (1892).

[24] 164 US 578 (1896).

[25] 169 US 466 (1898).

[26] Hartmann, 24.

[27] 129 US 26 (Minn. 1889).

[28] 304 US 152 (1938).

[29] 357 US 459 (1958).

[30] Ibid, 460–461.

[31] 435 US 765 (1978). [32] 558 US 343 (2010).

[33] 573 US 682 (2014).

[34] Ibid, 706.

[35] Barkan, 68.

[36] Ibid.

[37] Ibid.

[38] 505 US. 854 (1992).

[39] Ibid, 854–855.

[40] 163 US 537 (1896).

[41] George Q. Flynn. "Selective Service and American Blacks During World War II." *The Journal of Negro History*
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[42] 339 US 629 (1950).

[43] 347 US 483 (1954).

[44] 350 US 877 (1955).

[45] Ibid, 879.

[46] 352 US 903 (1956).

[47] 505 US 855 (1992).

[48] 60 US 410 (1856).

[49] Ibid, 414.

[50] 9 US 61 (1809).

[51] 435 US 780 (1978).

[52] 558 US 312 (2010).

[53] 17 US 667 (1819).

[54] Barkan, 68.

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To Be Discretionary, or Not to Be: The Immigration Question of Law and Fact

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Abstract

The circuit courts are split with respect to interpreting agency determinations under 8 USC § 1229b(b)(1)(D).[1] Under the statute, the Department of Homeland Security determines whether a set of facts rises to the standard of hardship. The courts disagree as to whether the determination is discretionary. If such determination is considered to be non-discretionary, then the hardship determination is available for judicial review. However, USC § 1252(a)(2)(B)[2] bars review of USC § 1229b[3] unless a question of law is presented under USC § 1252(a)(2)(D).[4] The discord amongst the circuits is a result of the 2020 Supreme Court case, *Guerrero-Lasprilla v Barr,*[5] in which the Court ruled that mixed questions of law and fact are reviewable as questions of law. This note posits that the Supreme Court should settle the debate and establish the hardship standard determination as a non-discretionary application of law to fact, reviewable by federal courts. This note probes the arguments of the three circuit courts in favor of this position, addresses the counterarguments of the three circuit courts against, and ultimately provides a novel mode of analysis under the framework of the statute.

Introduction

The circuit courts are split as to whether the Department of Homeland Security's (DHS) decision that a set of facts does not rise to the *exceptional and extremely unusual* hardship standard is discretionary. *Wilkinson v Garland*, which the Supreme Court granted certiorari to in 2023, foregrounds this issue. Yet even when the Court hands down its decision, this note's analysis will be preserved from preemption because its novel perspective may supplant the void that the Court leaves in future litigation.

When DHS charges an immigrant with removability, the person may apply for cancellation of removal in an immigration court under § 1229b of the Immigration and Nationality Act (INA).[1] Such cancellation of removal is conditional upon the satisfaction of four criteria, one of them—the hardship standard—requiring "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[2] If the immigration court does not grant the petitioner relief, the petitioner may appeal the decision to the Board of Immigration Appeals (BIA). However, § 1252(a)(2)(B) proscribes federal courts from reviewing "any judgment regarding the granting of relief under section[…] 1229b."[3] Congress included the Limited Review Provision under § 1252(a)(2)(D) nonetheless, stating that § 1252(a)(2)(B) shall not preclude "review of constitutional claims or questions of law."[4] Before 2020, the Limited Review Provision did not grant courts the ability to review the BIA's hardship determination.[5] However, in 2020, the Supreme Court ruled in *Guerrero-Lasprilla v Barr* that the Provision's "questions of law" include "mixed questions of law and fact" and thus "the application of a legal standard to undisputed or established facts."[6] This ruling widened the applicability of the Provision and extended federal courts' power of judicial review beyond pure legal determinations.

In light of *Guerrero-Lasprilla,* the Sixth,[7] Fourth,[8] and Eleventh Circuits[9] have ruled that the hardship standard is not discretionary and, therefore, reviewable, while the Tenth,[10] Third,[11] and Fifth Circuits[12] have ruled in the opposite direction. This disagreement across the nation is "anything but academic"[13] since the implications of hardship eligibility review manifest themselves far and deeply. Between 2017 and 2020, 60,588 non-lawful permanent residents applied for cancellation of removal.[14] In several of these cases, "if the [petitioner] were eligible for cancellation of removal," the BIA would have granted "such relief in the exercise of discretion."[15] But without the option for judicial review of the hardship determination, families of removed petitioners face ruptures in every aspect of their lives.[16]

This note contends that the Court should settle the rift in favor of the Sixth, Fourth, and Eleventh Circuit, holding that the hardship standard is not

discretionary. By first compiling the leading arguments from these Circuits, then qualifying them with prominent rebuttals from the Tenth, Third, and Fifth Circuit, this note concludes by weighing the conflicting jurisprudence against one another.

The Hardship Standard is Not Discretionary

In reaching their conclusion, the Sixth, Fourth, and Eleventh Circuits consider statutory text as well as structure.

Statutory Text

In *Singh v Rosen,* the Sixth Circuit begins by surveying the text of the INA. The statute states that "the Attorney General *may* cancel removal… if the alien" (emphasis added) meets all four of the requirements under § 1229b(b)(1): continuous presence, good moral character, lack of criminal convictions, and the hardship standard.[17] The court admits that the word "may" most commonly denotes the exercise of discretion.[18] Nonetheless, the *Singh* court distinguishes "the Board's final discretionary decision whether *to grant cancellation of removal*… from its earlier eligibility decision whether *the immigrant has shown hardship*."[19] The eligibility decision is not discretionary since the Board may not grant relief unless eligibility is met. This is contrasted from the final discretionary decision, where the Board may choose whether to grant relief or not. As the federal courts often reason in textual analysis,[20] if Congress intended to make the hardship eligibility standard discretionary, it would have also included the word "may" in subsection (D) of § 1229b(b)(1). But since Congress declined to do so, there is no clear evidence on the text's face that the standard is discretionary.

The Sixth Circuit further explores the history of the hardship standard. Prior to 1996, the law required that "deportation would, *in the opinion of the Attorney General*, result in extreme hardship" in order to cancel removal.[21] Under this language, the Sixth Circuit treated the test as discretionary.[22] However, Congress introduced the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, removing the phrase "in the opinion of the Attorney General" from the statute.[23] It would thus be inconsistent with both the face of the text and the intent of the legislature if courts were to treat the standard the same as they did before 1996.

Merrick Garland's response to the petition for certiorari in *Wilkinson v Garland* takes aim at this historical argument. Garland cites to one line from a 2003 court of appeals decision arguing that "the absence of the 'in the opinion of' language does not change the essential, discretionary nature of the hardship decision."[24] Garland's argument refuses to address both the Sixth Circuit's analysis and other relevant legal tests. It assumes that the hardship decision was discretionary in the first place; but as this note will later reveal, discretionary and even subjective standards have been deemed reviewable by federal courts in the past. In addition, Ninth Circuit jurisprudence to which Garland cites is outdated

since the circuit courts have updated their views on the hardship determination in the wake of *Guerrero-Lasprilla*. It would be more convincing if Garland provided an alternative reason as to why Congress decided to remove the "in the opinion of" phrase.

The Fourth Circuit's treatment of the Act echoes that of the Sixth's. Citing from *Singh,* the Fourth Circuit, in *Galvan v Garland*, agrees "that the discretionary language in the statute attaches only to the final decision whether to grant cancellation of removal and does not impact the eligibility determination of 'exceptional and extremely unusual hardship.'"[25] This court even draws from the Fifth Circuit before it changed its stance on the hardship standard, referencing the Fifth Circuit's previous opinion that "satisfying the statutory prerequisites merely makes the alien eligible for the discretionary relief."[26] Put simply, if any one of the four eligibility requirements is not satisfied, the Attorney General cannot even consider granting discretionary relief.[27]

Yet a comparison between the definition of "discretion" and the standard's text is more forthright. In the absence of a definition of "discretion" in the statute, it is necessary to defer to dictionaries and the legal literature. The Oxford English Dictionary defines the legal definition of "discretion" as the "power of a court[…] to decide the application of a law."[28] Similarly, Black's Law Dictionary conceives "judicial discretion" as "the power of a court to act or not to act."[29] In the secondary literature, "discretion" is viewed as the "power to make a choice between alternative courses of action."[30] This definition is the most conclusive and overarching, and it best illustrates the distinction between judicial discretion and the application of the hardship standard. When read in conjunction with the analysis in the prior paragraph, discretion does not apply to § 1229b(b)(1)(D) since, again, the Attorney General has no "alternative course of action" but to deny relief if the hardship requirement is not met. Conversely, the text *would* be discretionary if the Attorney General *may* grant relief in spite of the requirement not being satisfied. This illustrates the distinct two-step process: the non-discretionary eligibility determination followed by the discretionary decision of whether to grant relief.

The Eleventh Circuit takes a similar approach in its interpretation of discretionary relief. Referring to *Jay v Boyd*[31] within *Escoe v Zerbst*,[32] the court likens the "discretion delegated to the Attorney General, and in turn to the immigration courts," to that of "probation or suspension of criminal sentence," since both function as "an act of grace."[33] These decisions' language is rooted in the Court's interpretation of the Federal Probation Act: "[p]robation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing."[34] Like probation in criminal law, applicants who satisfy the hardship requirement are eligible for but not entitled to a favorable exercise of discretion.[35]

But once more, the hardship determination itself is not discretionary, since unless it is fulfilled, the Attorney General cannot grant relief.

The Sixth, Fourth, and Eleventh Circuit Courts are all in accord with respect to what the INA does and does not include. They have reinforced one another's ruling that the statute does not delineate the hardship standard as discretionary. In this void, the evidence supporting the claim that the standard is not discretionary is far more compelling.

Statutory Structure

Turning to the structure of § 1229b, the Sixth Circuit examines the BIA's treatment of the other criteria for cancellation of removal. It is undisputed that the BIA does not exercise discretion when determining whether a petitioner has been in the U.S. for at least ten years[36] under subsection (A), or whether a petitioner has been convicted of a disqualifying crime[37] under subsection (C);[38] yet Congress placed subsection (D) alongside these non-discretionary factors. If Congress had intended on distinguishing the hardship requirement as discretionary, it would not have listed it alongside the non-discretionary factors.

The Sixth Circuit even expands its vision by comparing the hardship requirement under cancellation of removal to that under a waiver of inadmissibility.[39] The requirement under a waiver of inadmissibility could be waived "if it is established *to the satisfaction of the Attorney General* that the refusal of admission to the United States of such immigrant alien would result in extreme hardship"[40] (emphasis added) to the immigrant or certain relatives. Yet again, Congress includes discretionary language within the waiver of inadmissibility but declines to do so within the cancellation of the removal statute. Assuming Congress drafts its bills with intent, these choices must be evaluated with scrutiny—if the waiver of inadmissibility is not subject to review, then it follows that cancellation of removal must be available for review.

The Sixth Circuit draws one last comparison to the due-diligence test in *Guerrero-Lasprilla*. When evaluating whether the hardship determination requires judicial discretion, the Sixth Circuit concludes that "the application of the due-diligence standard in that case is no less subjective than the application of the hardship standard in this one."[41] Namely, the due-diligence test is two-sided: "[a]n alien may equitably toll the time period to file a motion to reopen if he demonstrates that (1) he 'has been pursuing his rights diligently' and (2) an extraordinary circumstance prevented him from timely filing."[42] But not unlike the hardship eligibility standard, whether one "has been pursuing his rights diligently," and "an extraordinary circumstance," are both inherently vague and are not supplemented with much practical guidance. In fact, these two factors within due diligence may invite *more* discretion than that within hardship eligibility. Yet *Guerrero-Lasprilla* found that courts are not precluded from reviewing the BIA's denial of a request for equitable tolling. If the due diligence test is reviewable, then the hardship determination must be as well.

In analyzing the form of the statute, the Eleventh Circuit finishes what the Sixth started. While the Sixth Circuit juxtaposes the BIA's treatment of § 1229b(b)(1) subsections (A), (C), and (D), the Eleventh introduces subsection (B): the good moral character requirement. The court begs the question, "[if] Congress intended to block our review of the ultimate decision to grant relief, why would courts be entitled to assess the evidence for the more objective eligibility requirements, such as residency requirements, while being barred from weighing the evidence for the qualitative requirements, such as the character requirements?"[43] The underlying theme of these Circuit Courts is clear: adopting the jurisprudence of the dissenting three Circuit Courts flies in the face of not only the structure of the text but also the implicit intent of Congress.

Garland's response to the petitioner views the relationship between subsections (B) and (D) differently; his reluctance to treat the good moral character requirement and the hardship standard similarly is due to the Courts of Appeals' discretionary treatment of the former.[44] Nonetheless, the courts that have deemed the good moral character requirement discretionary have also subjected it to review.[45] The fact that some courts read subsection (B) as discretionary becomes irrelevant.

The Eleventh Circuit also underscores a monumental feature of the two purported groups of eligibility determinations. Both "those that we have previously deemed 'discretionary' and those that we have deemed 'non-discretionary' involve the same decisional process: applying the law to a set of facts."[46] Despite the "mental gymnastics" in determining "if a particular decision is 'discretionary or not,'"[47] the issue amongst the circuits can easily be resolved because "§ 1252(a)(2)(B) must be read in conjunction with § 1252(a)(2)(D)." Put simply, if the BIA's decisional process under hardship eligibility is, in fact, "applying the law to a set of facts,"[48] then that process is undisputedly a "question of law"[49] under § 1252(a)(2)(D) as per *Guerrero-Lasprilla.* And if subsection (D) is "read in conjunction"[50] with subsection (B), then the former overrides the latter when there is a "question of law"[51] presented. To that end, if the stipulations above are presumed true, the circuit courts, as well as the Supreme Court, need not evaluate whether the hardship standard is "discretionary or not"[52] under subsection (B); it automatically presents a "question of law"[53] under subsection (D) and is, therefore, subject to judicial review.

The Fourth Circuit reaches a similar conclusion. Despite also considering the non-discretionary nature of the hardship standard, this court examines its "legal, rather than factual, character,"[54] that the requirement "is a precondition of cancellation of removal, rather than merely a factor to be weighed"[55] by the BIA. The distinction between legal and factual factors is hazy at best due to its inherent overlap, yet legal theorists believe the respective definitions lie between normative and empirical questions. "[N]ormative questions - questions concerning what ought to happen or how persons ought to

behave - are necessarily legal; while all and only empirical questions - those concerning (roughly) what happened in the world - are factual."[56] In the case of the Fourth Circuit, the "precondition to cancellation of removal" follows the normative basis—what should happen to the petitioner—while "a mere factor to be weighed" concerns the empirical question—what happened to the petitioner. After deeming the hardship standard a legal factor, the court analogizes its case to "the mixed question of law and fact involving 'due diligence' addressed by the Supreme Court in *Guerrero-Lasprilla*."[57] In furtherance of the conclusion in the prior paragraph, courts should do what the Supreme Court did in *Guerrero-Lasprilla* and what the Fourth Circuit addresses here: if the hardship standard is interpreted as the application of a legal standard, then whether it is discretionary is immaterial. It is a mixed question of law and fact eligible for judicial review.

The Hardship Standard is Discretionary

Despite employing the same modes of analysis, textual and structural, the Tenth, Third, and Fifth Circuits reach a different conclusion: because the hardship standard *is* discretionary, the determination is not subject to judicial review.

Statutory Text

In *Galeano-Romero v Barr*, the Tenth Circuit asserts that the hardship eligibility determination is discretionary based on the face of the INA's text but fails to provide any substantial reasoning.[58] The court points to the discretionary aspects of relief that are barred from review under § 1252(a)(2)(B), claiming that these aspects include "'the determination of whether the petitioner's removal from the United States would result in exceptional and extremely unusual hardship to a qualifying relative.'"[59] The court ends its analysis of subsection (B) there, declining to explicate how exactly the hardship determination is discretionary. In the absence of such an explanation, the textual analysis in this note's prior section should take precedence.

The Third Circuit follows suit in *Hernandez-Morales v Attorney General* with a meager two sentences. The court's textual analysis begins by stating that it lacks "jurisdiction to review discretionary denials of relief"[60] and ends by concluding that "whether hardship is 'exceptional and extremely unusual' 'is a quintessential discretionary judgment.'"[61] The court does not expound the logic that links "discretionary judgment" to the hardship standard. It presumably expects readers to take its word.

Respondent in *Wilkinson* attempts to proffer more concrete reasons for the hardship standard's supposed discretionary nature. To support the claim that the hardship determination is a "fact-intensive"[62] task, the respondent points to the BIA's explanation of "hardship" as having "multiple manifestations and inherently introduc[ing] an element of subjectivity."[63] Yet as this note has already examined, with respect to the good moral character requirement and the due-

diligence test, standards that require "subjectivity" are not automatically barred from judicial review as discretionary. The BIA itself has reviewed "whether the underlying facts found by [an] Immigration Judge meet[…] legal requirements"[64] and has classified the hardship eligibility determination as an "application of[…] pertinent legal standards."[65] This reading of the BIA's decisions echoes the idea that the hardship determination is immune to discretionary preclusion of review since it falls under a subsection (D) "application of legal standard."

The Fifth Circuit does take a slightly different route to the same deduction. It cites *Patel v Garland,*[66] a 2022 Supreme Court decision that held "that the § 1252(a)(2)(B) bar applies to 'authoritative decisions.'"[67] In resting its logic on the phrase, "authoritative decisions," the Fifth Circuit infers "that a determination that a citizen would face exceptional and extremely unusual hardship due to an alien's removal is a discretionary and authoritative decision."[68]

This is a gross misreading of the Court's opinion in *Patel*. First, the Court does not once classify the hardship determination as "discretionary"; it "neither [says] nor [implies] anything about review of eligibility decisions," for a "'judgment' does not necessarily involve discretion."[69] And second, the Fifth Circuit conflates "authoritative" decisions with the hardship determination. The Court in *Patel* ruled that "'judgment' means any authoritative decision,"[70] and § 1252(a)(2)(B) "prohibits review of *any* judgment *regarding* the granting of relief."[71] From here, the Fifth Circuit conjures a connection between the hardship determination and an "authoritative" decision without explicitly stating how nor defining what constitutes an "authoritative" decision.[72] Although it might seem as though the hardship determination is inherently a form of "judgment" regarding the cancellation of removal, the holding in *Patel* is so narrow that it does not permit this reading of the law. The *Patel* Court was only concerned with the factual findings related to granting relief, and it only affirmatively ruled that *these* findings (for instance, the medical conditions of a petitioner's family member) are unreviewable.[73] If "judgment" or "authoritative" decisions meant *any* decision that the Attorney General makes relating to the relief, then this rule would swallow subsection (D). A mixed question of law and fact (for example, whether the fact that the petitioner's child depends on him for financial and physical reasons rises to the legal standard) is a "judgment" relating to the relief, but these are specifically protected by subsection (D). It logically follows that *Patel*'s use of "judgment" refers to either factual determinations or the final determination of relief, *not* the mixed-question eligibility determination.

In attempting to rebut the petitioner's arguments, the respondent in *Wilkinson* further errs in their reading of the Court's disposition in *Patel*. They reject the claim that "the statute bifurcates supposedly non-discretionary eligibility determinations (such as hardship) from the ultimate, discretionary decision of whether to grant cancellation" by deferring to *Patel*: "this Court rejected the similar argument that '[e]verything is reviewable' except the

'decision whether to grant relief to an applicant eligible to receive it.'"[74] While ostensibly true, as discussed in the previous paragraph, the Court refuses to positively rule that the hardship standard is discretionary nor does it lay out which decisions *are* reviewable; its sole disposition is that pure factual findings are unreviewable. In spite of these textual arguments, even if the hardship determination is discretionary, the structure of the INA does not leave room for conjecture.

Statutory Structure

The Fifth Circuit acknowledges the Limited Review Provision but fails to reason why it deems it inapplicable in its own case or in that of *Patel.* The Fifth Circuit Court recognizes its previous position that "the BIA's hardship determination is not subject to the jurisdictional bar in § 1252(a)(2)(B)[…] because it falls within the statute's carveout for 'questions of law.'"[75] Due to the Court's ruling in *Patel,* the Fifth Circuit claims that the determination is now subject to the jurisdictional bar. Yet, the court's failure to provide analysis is indicative of its refusal to distinguish how the carveout no longer applies.[76] Moreover, even if the aforementioned claim – that the hardship determination *is* a discretionary form of judgment regarding the granting of relief – prevails, the Court in *Patel* refrained from barring review of the determination precisely because of the statutory carveout.[77] Rather, in citing *Guerrero-Lasprilla,* the Court argues that even if the application of mixed questions of law and fact are preserved for review, "subparagraph (D) 'will still forbid appeals of factual determinations.'"[78] If an agency determination presents a mixed question, then it is presumed to be protected for judicial review under subsection (D). Nonetheless, subsection (D) does not preserve questions of pure fact for review.

Respondent in *Wilkinson* disagrees with this structural interpretation, erroneously relying on *Martinez v Clark*. The respondent argues that, because the hardship determination is supposedly "fact-intensive,"[79] allowing judicial review would undermine the jurisdictional bar established in subsection (B).[80] The misunderstanding arises from the fact that *Martinez* addressed the 8 U.S.C. § 1226(e) bar of judicial review on the apprehension and detention of aliens.[81] Unlike § 1252, § 1226(e) does not include a Limited Review Provision. Consequently, the Respondent's use of *Martinez* is inapplicable since § 1252(a)(2)(D) provides a structural safety net for review.

The Tenth Circuit also challenges this note's reading of the Limited Review Provision. This court "decline[s] to interpret subsection (D)'s 'questions of law' provision so expansively that subsection (B) becomes superfluous, a nullity."[82] Yet this concern is unfounded. Subsection (B) does not become null if subsection (D) takes authority since questions of pure fact are reserved to subsection (B). The line in the sand is clear: subsection (B) applies to pure questions of fact and subsection (D) applies to mixed or pure questions of law.

This court engages in this conjecture as a diversion from its refusal to distinguish the hardship standard from a mixed question of law and fact.

Instead, the Tenth Circuit posits that "the determination of whether the requisite hardship exists is discretionary because '[t]here is no algorithm for determining when a hardship is exceptional and extremely unusual.'"[83] The Sixth Circuit takes this argument directly into account, rebutting that "the word 'hardship' is not so amorphous as to turn this factor into a standardless discretionary call."[84] The court proceeds to analogize the hardship standard to bankruptcy laws that "prohibit a debtor from obtaining a discharge of certain student-loan debts unless the debts impose an 'undue hardship' on the debtor."[85] There is little guidance for both cancellation of removal hardship or bankruptcy hardship. However, if the latter is subject to judicial review,[86] then the former is entitled to the same treatment.

The Third Circuit Court glances over the Limited Review Provision and reinforces the false dichotomy between discretionary and legal questions. Without defining "discretionary judgment" nor "legal question," the court dismisses the Limited Review Provision argument, declaring that "a disagreement about weighing hardship factors is a discretionary judgment call, not a legal question."[87] This analysis references *Galeano-Romero,* and in doing so, wrongly binarizes discretionary and legal factors.[88] These are overlapping, not dialectical forces. The former operates within § 1252(a)(2)(B), intertwined with the latter in § 1252(a)(2)(D).[89] A discretionary question may be legal in nature and therefore subject to review. Meanwhile, a non-discretionary question may be non-legal and still subject to review. In either case, subsection (B) works in conjunction with subsection (D).[90]

Conclusion

The counterarguments amongst the Tenth, Third, and Fifth Circuits unsuccessfully overcome the disposition of the Sixth, Fourth, and Eleventh Circuits. These latter courts contend that the hardship standard is not discretionary through a thorough reading of § 1229b and § 1252(a)(2)(B).[91] These courts then contextualize these sections by comparing other parts of the statute as well as similar types of standards. They ultimately conclude that the BIA's hardship determination is subject to review.

The Tenth, Third, and Fifth Circuit Courts rest their argument in a shallow interpretation of the statute. They introduce claims that are left unsupported, and much of their analysis is through speculation. They ignore the reasoning of their sister circuits, and they deflect from answering their rebuttals. These courts somehow conclude that the hardship determination does not pose a legal question since it is discretionary and is, therefore, not available for review.

But in their entirety, all of the circuit courts seem to overlook the idea that § 1252(a)(2)(D) supersedes § 1252(a)(2)(B) if satisfied.[92] Granted,

respondent in *Wilkinson* declines to adopt this application of *Guerrero-Lasprilla* to subsections (B) and (D).[93] Respondent suggests that there may be a "discretionary category of decisions that are neither pure questions of law nor mixed questions of law and fact."[94] If the Court were to follow this line of reasoning, then the case becomes about whether the hardship determination is both a non-mixed question *and* a discretionary one. If the Court were to integrate this note's mode of interpretation, then the question is merely concerned with whether the hardship determination is a mixed question. Either way, § 1229b(b)(1)(D) poses a mixed question, and the dispute amongst the circuits can be resolved with the uniform preservation of judicial review across the nation.[95]

[1] 8 USC § 1229b.
[2] 8 USC § 1229b(b)(1)(D).
[3] 8 USC § 1252(a)(2)(B).
[4] 8 USC § 1252(a)(2)(D).
[5] *See, e.g.*, *Khozhaynova v Holder*, 641 F.3d 187, 192 (6th Cir 2011); *Arambula-Medina v Holder*, 572 F.3d 824, 828 (10th Cir 2009); *Mendez-Moranchel v Ashcroft*, 338 F.3d 176, 178-79 (3rd Cir 2003).
[6] *Guerrero-Lasprilla v Barr*, 140 S. Ct. 1062 (2020).
[7] *Singh v Rosen*, 984 F.3d 1142 (6th Cir 2021).
[8] *Galvan v Garland*, 6 F.4th 552 (4th Cir 2021).
[9] *Patel v US Attorney General.*, 971 F.3d 1258 (11th Cir 2020).
[10] *Galeano-Romero v Barr*, 968 F.3d 1176 (10th Cir 2020).
[11] *Hernandez-Morales v Attorney General. US*, 977 F.3d 247 (3rd Cir 2020).
[12] *Castillo-Gutierrez v Garland*, 43 F.4th 477 (5th Cir 2022).
[13] Petition for Writ of Certiorari at 31, *Wilkinson v Garland*, No. 22-666 (2023).
[14] *TRAC*, SYRACUSE UNIVERSITY, online at https://trac.syr.edu/immigration/reports/631/#:~:text=Immigration%20Judges%20considered%20a%20total,facing%20deportation%20(i.e.%2042A), (visited Oct. 29, 2020).
[15] In re Monreal-Aguinaga*,* 23 I. & N. Dec. 56, 65 (B.I.A. 2001).
[16] *See* Nelly Gonzalez & Melissa L Morgan Consoli, *The Aftermath of Deportation: Effects on the Family*, 46(3) INTERAMERICAN JOURNAL OF PSYCHOLOGY 425 (2012).
[17] 8 USC § 1229b(b)(1).
[18] *Singh v Rosen*, 984 F.3d 1142, 1151 (6th Cir 2021).
[19] *Singh,* 984 F.3d at 1151.
[20] *See, for example, University of Texas. Southwestern Medical Center. v Nassar*, 570 US 338, 353-54 (2013).
[21] 8 USC § 1254(a)(1) (1994).
[22] *Singh,* 984 F.3d at 1152.
[23] Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-594.
[24] *Romero-Torres v Ashcroft*, 327 F.3d 887 (9th Cir 2003).
[25] *Galvan v Garland*, 6 F.4th 552, 559 (4th Cir 2021).
[26] *Trejo v Garland*, 3 F.4th 760, 766 (5th Cir 2021).
[27] *See* Galvan*,* 6 F.4th at 560.
[28] OED Online, *discretion, Oxford Univ. Press*, online at https://www.oed.com/view/Entry/54039?redirectedFrom=discretion#eid.
[29] The Law Dictionary, *judicial discretion, Black's Law Dictionary, 2nd Edition,* online at https://thelawdictionary.org/?s=judicial+discretion.
[30] *E.g.,* Daniel Kanstroom*, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TULANE LAW REVIEW 703, 719 (1997).
[31] *Jay v Boyd*, 351 US 345, 354 (1956).
[32] *Escoe v Zerbst*, 295 US 490, 492 (1935).
[33] *Patel v US Att'y Gen*., 971 F.3d 1258, 1267 (11th Cir 2020).
[34] *Burns v US*, 287 US 216, 220 (1932).
[35] *See* Barton v Barr, 140 S. Ct. 1442 (2020).
[36] *See* 8 USC § 1229b(b)(1)(A).
[37] *See* 8 USC. § 1229b(b)(1)(C).
[38] *Singh v Rosen*, 984 F.3d 1142, 1151 (6th Cir 2021).
[39] Ibid, 1152.
[40] 8 USC § 1182(i).
[41] *Singh,* 984 F.3d at 1153.
[42] *Londono-Gonzalez v Barr*, 978 F.3d 965, 968 (5th Cir 2020).

[43] *Patel v US Attorney General*, 971 F.3d 1258, 1279 (11th Cir 2020).
[44] *See* Response to Petition for Writ of Certiorari at 9, *Wilkinson v Garland*, No. 22-666 (2023).
[45] *See, e.g., Domingo-Mendez v Garland*, 47 F.4th 51 (1st Cir. 2022); *Ledezma-Cosino v Sessions*, 857 F.3d 1042 (9th Cir. 2017).
[46] Ibid,1278.
[47] Ibid,279.
[48] Ibid,1278.
[49] *Guerrero-Lasprilla v Barr*, 140 S. Ct. 1062, 1069 (2020).
[50] *Patel,* 971 F.3d at 1279.
[51] *Guerrero-Lasprilla,* 140 S. Ct. at 1069.
[52] *Patel,* 971 F.3d at 1279.
[53] *Guerrero-Lasprilla,* 140 S. Ct. at 1069.
[54] *Galvan v Garland*, 6 F.4th 552, 560 (4th Cir 2021).
[55] Ibid.
[56] Emad H. Atiq, "Legal vs. Factual Normative Questions & the True Scope of Ring," 32 *Notre Dame Journal of Law, Ethics & Public Policy* 47, 49 (2018).
[57] *Galvan,* 6 F.4th at 560.
[58] *Galeano-Romero v Barr*, 968 F.3d 1176 (10th Cir. 2020).
[59] Ibid, 1181.
[60] *Hernandez-Morales v Attorney General. US*, 977 F.3d 247, 249 (3d Cir. 2020).
[61] Ibid.
[62] Response to Petition for Writ of Certiorari at 7, *Wilkinson v Garland*, No. 22-666 (2023).
[63] *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (B.I.A. 2001).
[64] *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 591 (B.I.A. 2015).
[65] *Matter of Perez*, 25 I. & N. Dec. 164, 165 (B.I.A. 2010).
[66] 142 S. Ct. 1614 (2022).
[67] *Castillo-Gutierrez v Garland*, 43 F.4th 477, 481 (5th Cir 2022).
[68] Ibid.
[69] *Patel v Garland*, 142 S. Ct. 1614, 1625 (2022).
[70] *Patel v Garland*, 142 S. Ct. 1614, 1621 (2022).
[71] Ibid.
[72] *Castillo-Gutierrez,* 481.
[73] *Patel*, 1627.
[74] Response to Petition for Writ of Certiorari, *Wilkinson v. Garland*, No. 22-666, 9 (2023).
[75] *Castillo-Gutierrez,* 43 F.4th at 481.
[76] Ibid.
[77] *See Patel,* 142 S. Ct. at 1621.
[78] Ibid, 1623.
[79] *Martinez v Clark*, 36 F.4th 1219 (9th Cir 2022).
[80] *See* Response to Petition for Writ of Certiorari at 8, Wilkinson v Garland, No. 22-666 (2023).
[81] *See Martinez*, 36 F.4th at 1219.
[82] Galeano-Romero v Barr, 968 F.3d 1176, 1183 (10th Cir 2020).
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Abstract

Since the late 1990s and early 2000s, digital music streaming has continuously been on the rise due to the invention of file-sharing technology. In 2022, consumers streamed music over one trillion times.[1] Furthermore, the rise of digital streaming has enabled music to supersede geographical borders and reach areas with which it had no previous contact[2]—the result being the increase of streaming revenues in Europe, Asia, and Latin America.[3] However, despite reaching a wide audience on streaming services like Spotify and YouTube, independent artists, artists who are not signed to any major record label, struggle to earn mechanical royalties, which are generated through digital means, including streaming.[4] Many policy factors contribute to this issue, but there are also legal loopholes in copyright law, particularly the safe harbor requirements in the Digital Millennium Copyright Act (DMCA), that limit artists' profit via streaming. This causes the "value gap"—the discrepancy between the enormous revenue streaming services make and the minimal profit artists generate from their work on those platforms.[5] This paper examines how the safe harbor requirements, along with platforms' business models and practices, impede independent artists' ability to earn adequate financial compensation from these platforms.

I. Background on U.S. Copyright Law

According to the U.S. Copyright Office, copyright refers to the legal protection granted by the United States to authors who create original works in tangible forms of expression that can be perceived, reproduced, or communicated for a significant duration.[6] In the music industry, copyright grants exclusive rights to the copyright owner, including the ability to make copies or phonorecords of their work, create derivative works, sell or distribute copies to the public, publicly perform the work, publicly display the work, and digitally stream sound recordings.

The Constitution created the foundational framework for copyright law in 1787 by drafting Article I, Section 8, Clause 8. This clause is the basis for the country's copyright and patent law, determined that states could not protect copyrights and patents on their own.[7] As each state had its own regulations, creators had to go to each state individually to obtain their copyrights and patents. The Framers resolved this issue by creating a national framework for copyright and patent protection through this clause. Also known as the intellectual property clause, it states that "[The Congress shall have power] . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[8] This permits Congress to grant "authors" and "inventors" exclusive rights to their work for limited time frames. Copyrights and patents were considered essential to incentivize "authors" and "inventors" to create new "writings" and "discoveries." Without this clause, competitors could easily steal the originators' work and prevent them from being financially compensated for it. This in turn would discourage creators from creating at all.

U.S. copyright law began to address music-related copyright in recent years. In 1971, Congress granted federal copyright protection for sound recordings to prevent piracy.[9] In 1995, Congress granted the same to public performance rights.[10] Though U.S. copyright did not initially address music-related concerns, the rise of digital technology prompted Congress to consider music copyright protections. On October 28, 1998, President Bill Clinton enacted the DMCA into law. Like previous legislation, this Act was written to address advancements in technology and find common ground among traditional copyright holders(authors, film studios, musicians, record companies, and television networks) and Online Service Providers (OSPs). Previous copyright legislation in the United States addressed traditional forms of media—books, films, and music. The Internet's emergence created additional scenarios for copyright infringement as digital technology made media more easily accessible to users.[11]

The DMCA adapted two of the World Intellectual Property Organization's (WIPO) treaties, the WIPO Copyright Treaty[12] and the WIPO Performances and Phonograms Treaty,[13] in its Title I Section. These two treaties adapted copyright law relating to digital technology across several countries. Within the DMCA, the U.S. Congress implemented safe harbor provisions for OSPs to comply with the international standards outlined by the WIPO treaties.

These provisions, specifically Title II, § 512 (c)(1)(A) - (C), provide OSPs, including streaming services like YouTube and Spotify, with legal protection from monetary liability for copyright infringement committed by their users, under certain conditions. Platforms rely on safe harbors for legal protection against their users' behavior. Considering that streaming services rely on the users to upload the content, it is in their best interests to advocate for safe harbors with very loose restrictions. However, these provisions create challenges for independent artists.

I.a. Safe Harbor Eligibility Requirements, Related Cases, and Implications for Independent Artists

Firstly, the DMCA requires that OSPs must not have "actual knowledge" of infringing works on their platforms to qualify for the safe harbor.[14] However, the provisions have not defined what constitutes "actual knowledge." For instance, the DMCA states that "a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially [with the statute] shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which the infringing activity is apparent."[15] Therefore, a takedown notice does not constitute actual knowledge and the Act poses a significant challenge for copyright holders in establishing platforms' actual knowledge. The lack of definition for "actual knowledge" disincentivizes platforms from tracking individual's websites for infringement. This can be problematic for independent artists, as the burden to monitor and identify instances of infringement falls on them.

This process can be time-consuming and costly for independent artists, who often lack the resources and legal support to navigate these procedures effectively. To exacerbate the issue, the DMCA provides a mechanism for infringers to submit counter-notifications, which can result in the reinstatement of the removed work unless the copyright owner files a court order against the infringer. This means that infringers can continuously reupload the infringing works, resulting in a never-ending cycle of takedowns and reuploads. After the reupload, a copyright owner may file a court order against the platform and the infringer if they want to keep the infringing material off the Internet. However, because filing multiple court orders incurs fees, this would be financially burdensome for copyright owners who are independent artists. Additionally, these

copyright owners would not be able to retain lawyers to represent them in these legal matters, given the minimal financial compensation they earn on the platforms. This situation has been likened to a game of "whack-a-mole," where removing one instance of infringement leads to multiple others appearing. Overall, the DMCA's safe harbor provisions can pose challenges for independent artists in terms of monitoring and addressing copyright infringement, ensuring fair compensation, and dealing with the persistent reuploading of infringing works.

Secondly, the DMCA requires that OSPs must not directly financially benefit from the infringing works.[16] This condition can be challenging for independent artists, as they may not have direct control over the advertising or revenue generation on the platforms where their music is hosted. Therefore, they may not have a say in how their work is monetized or whether they receive fair compensation for its use.

The case *Viacom Int'l., Inc. v YouTube* demonstrates the liberties OSPs have taken by invoking the safe harbor provisions, specifically the first and second requirements. The plaintiff, Viacom, sued Google and YouTube in a $1 billion lawsuit for copyright infringement of their content. In their complaint, Viacom stated that more than 150,000 unauthorized clips from the entertainment company were released on YouTube and were collectively viewed 1.5 billion times, and argued that the defendants "engage in, promote and induce" infringement to boost their engagement and advertising revenue and thereby violate the first requirement. In support of their argument that YouTube possessed knowledge, Viacom provided records of messages from YouTube product manager Maryrose Dunton to cofounder Steve Chen, in which the former scrutinized YouTube's "most viewed/most discussed/top favorites/top rated" content and determined that "over 70 percent" was infringing material. To demonstrate YouTube's financial benefit from the infringement, Viacom also presented email correspondence from YouTube cofounders Steve Chen and Jawed Karim discussing how removing the "obviously infringing" content would decrease consumer engagement in the video-sharing platform. It can be argued here that YouTube had "actual knowledge" and despite that, they allowed the infringement in order to financially benefit from it. Additionally, Credit Suisse, Google's financial advisor, determined that "60 percent of YouTube's views were of "premium" copyrighted content, and that only 10 percent of that content was licensed". Keeping the infringing material on YouTube allowed the platform to monetize from it. In spite of the evidence, the Second Circuit ruled in YouTube's favor, stating that the platform's right to control necessitated more than "the ability to remove or block access to materials posted on a service provider's website".[17]

Thirdly, the DMCA requires that OSPs to expeditiously remove infringing works upon receiving a valid takedown notice from copyright holders, in what is known as the notice and takedown process, from the copyright owner.[18] However, the DMCA does not explicitly define the time frame within which OSPs must expeditiously remove the infringement. In order to remove infringing

material, an OSP must assign an agent to receive and analyze takedown notices on its platform and make said agent's name and contact information publicly available on its website. However, during the length of time the takedown process takes, the copyrighted work is being infringed upon.

Regarding takedowns, DMCA 17 U.S.C. § 512(i) also states that OSPs must allow copyright holders to employ "standard technical measures" (STMs), defined as those "used by copyright holders to identify and protect copyrighted works," and "developed pursuant to a broad consensus of copyright owners and service providers" to monitor infringement on the platforms.[19] Though it explained the purpose of STMs, Congress did not legally define what kinds of technology constitute them, as in 1998, it was difficult to provide clear examples due to the lack of existing appropriate technology. Eventually, YouTube started using Content ID, which digitally scans and analyzes uploaded content against copyrighted material. Copyright owners can then either choose to have the infringing material removed or have it monetized for them by playing ads in it.[20] However, platforms that use STMs are unwilling to share access to them with copyright owners. For instance, YouTube does not make its content ID technology readily accessible to copyright holders; however, it may grant access contingent upon meeting specific prerequisites, such as reduced royalty rates.[21] This means that copyright owners must sacrifice part of their already meager earning power to gain access to content ID. While OSPs, including streaming services, praise the safe harbors for protecting them from liability, members of the music industry have criticized their requirements for their negative implications on copyright management, which hurts independent artists' livelihoods.

II. Streaming Platform's Payment Models and Mechanical Royalty Distribution

Streaming has grown in popularity since the 1990s, allowing users to access and consume media without having to download them before playback. Consequently, streaming services were created to cater to consumers' tastes in films, television, and music. Initially small companies, these platforms have rapidly transformed into massive corporations like YouTube and Spotify. Music-wise, the surge in popularity of streaming services over the years has facilitated the breakdown of geographical barriers in the music industry.

However, despite the increasing use of these platforms, independent artists earn very little from them. YouTube Music and Spotify currently pay artists approximately $0.002 and $0.00318 per stream, respectively. To earn just $1, an artist would need around 500 streams on YouTube Music and 314 streams on Spotify. According to a study conducted within the industry, the average artist makes less than $25,000 per year from streaming alone.[22] As such, independent artists earn minimal financial compensation from major streaming services.

The payment models employed by streaming services also strongly factor in determining the royalties earned by artists. YouTube and Spotify utilize the pro-rata model as their current payment method.[23] In this model, a user's monthly fees are primarily allocated to the rights holders of the most popular tracks, regardless of whether the user listened to those particular songs.[24] The pro-rata model tends to prioritize and highlight major artists, often with the consequence of overshadowing independent artists who may not receive the same level of exposure. Consequently, as most of the revenue is directed toward major artists, independent artists face challenges in generating a sustainable income within this model.

Contracts between platforms and major labels further compound the issue. These negotiations cause a disparity in visibility and promotion between major artists and independent ones. While the specific details of artists' payments through these contracts are not publicly disclosed, some artists negotiate clauses that provide them with a larger share of the streaming revenue. However, many artists still operate under contracts that were established during the compact disk era, which only grants them 15-20 percent of their streaming revenues.[25] Despite the exceptionally low payout rates per individual stream, major artists still earn considerably higher royalties compared to independent artists due to the promotional campaigns run by their labels on platforms like Spotify. Since independent artists are not affiliated with major labels, they lack the promotional and contractual power that would have been otherwise granted to them.

The contracts further exacerbate the disparity as they arrange for platforms to continuously promote major artists via features like playlisting and algorithmic recommendations, leading to increased exposure and royalties for them. Their songs are featured on popular Spotify playlists at a disproportionately higher rate compared to independent tracks.[26] Furthermore, major artists are over-represented in the recommendation algorithms. Data from Alpha Data supports this disparity, revealing that the top one percent of artists account for 90 percent of consumer streams. Within that group, a mere 10 percent of artists capture 99.4 percent of all streams.[27] This discrepancy is in part influenced by the contracts between major labels and streaming services, which include terms for the distribution of royalties and advertising revenue.

In contrast, independent artists, who may be relatively unknown to the public, struggle to attract and retain new audiences. Independent artists often struggle to generate significant engagement and interaction between their music and listeners on these platforms without the support of a major record label, despite the increasing number of both free and paid memberships.[28] As a result, negotiations, compounded with the pro-rata model, hurt independent artists' ability to gain the exposure and royalties they deserve for their work on streaming services. One can ask, 'Why blame platforms if the major artists rake in profits on them? If they are popular, shouldn't this be expected?' Intensive promotion on the platforms is a big factor in why major artists *are* popular in the first place.

Recommendations, ads, and playlisting cause major artists to be discovered by more people. Because major labels pay for massive promotion, platforms disproportionately favor major artists over independent ones. In other words, streaming services elevate major artists' popularity, and therefore, their profits, intentionally leaving behind independent artists.

Streaming services also negotiate promotion deals with independent artists but at the expense of financial compensation. In exchange for increased promotional visibility and plays, streaming services offer lower payout rates for the artists' work. This was the case in Spotify's Discovery Mode program, which was introduced in November 2020. Under this program, artists receive greater visibility in exchange for accepting even lower royalty rates. However, concerns have been raised about the fairness of these arrangements. Representatives Jerry Nadler and Hank Johnson Jr. have expressed concerns about the program and its terms, but Spotify's founder and CEO, Daniel Ek, has not addressed these concerns directly.

Streaming services have also taken advantage of the safe harbor protections to negotiate lower licensing fees with artists. Music licenses, agreements in which copyright owners permit outside distribution of their work in exchange for fees, have become a controversial subject between streaming services and independent artists. A music license is when a copyright holder grants public use of their work in exchange for a fee or royalties. However, since users can upload the same copyrighted work whether it is licensed or not, streaming services have no incentive to pay higher licensing fees. The safe harbor provisions shield the platforms from liability for infringement, allowing them to exploit this situation. These practices raise concerns about the fairness and transparency of the agreements between streaming services and independent artists, highlighting the need for a more equitable and balanced approach to compensation in the streaming industry.

There have been several lawsuits concerning disputes over the amount of mechanical royalties paid to artists by streaming services, and one notable case is *Wixen Music Publishing, Inc. v Spotify USA Inc.* In this lawsuit, Wixen Music Publishing, Inc. filed a complaint against Spotify on December 29, 2017 that alleged that the platform had not properly obtained the licenses required to distribute and compensate artists for their music, thereby infringing upon their work.[29] The case highlighted the complex legal issues surrounding streaming services and their responsibility for ensuring proper licensing and compensation for artists. Similarly, on January 8, 2016, plaintiff Melissa Ferrick filed a putative class action against Spotify also alleging that the platform had not properly obtained the necessary licenses nor had it paid royalties to the songwriters. Spotify reached a settlement with the songwriters worth over $112.55 million, which includes "an immediate cash payment of $43.55 million to class members and a commitment to pay ongoing royalties."[30] The development of these cases indicates the need for fairer compensation for artists and more transparent

legislation to establish adequate licensing and royalty distribution in the music industry.

Numerous other independent artists have faced challenges with streaming royalties. For instance, Morgan Kibby, a self-publishing artist, experienced a situation where her popular work "Stay Young, Get Stoned" garnered thousands of views on YouTube.[31] However, because consumer engagement did not occur through her official artist page, she was unable to earn royalties for her work.[32] Streaming infringing material does not allow artists to be compensated for their work. This example illustrates the need for platforms to better manage infringement in order to help the artists using them.

While independent artists can always supplement their income through other means such as merchandise sales, live tours, and public performances, the fact remains that the surging dependence on digital streaming has made it increasingly necessary for them to rely heavily on streaming services as a primary source of income. However, because they are meagerly compensated per stream, independent artists find it challenging to earn a sustainable livelihood solely from their music.

III. The "Notice and Takedown" system on independent artists' ability to protect their copyrighted works

The current state of copyright infringement and the legal battles surrounding it have prompted artists, major labels, and music organizations to call for changes to the DMCA. Policing one's own work in the digital landscape is both time-consuming and expensive, making it economically unfeasible for independent artists.

To further understand the magnitude of the challenge, it is important to consider major artists' experiences in monitoring infringement. Even with the support of major labels, which have access to current content ID technology, major artists are not immune to infringement of their work. Within the first 18 months of the release of Taylor Swift's album "1989," her label, Universal Music Group (UMG), and the International Federation of the Phonographic Industry (IFPI) identified over half a million infringing URLs of her work.[33] Despite their implementation of YouTube's content ID technology and their prompt actions to remove them, the album was still infringed upon approximately 1.4 million times.[34] UMG estimated that monitoring and flagging infringements on their top twenty-five albums on YouTube alone would cost over $2 million annually and require a team of twenty to thirty people, with no guarantee of the complete elimination of infringement.[35] The amount of infringing activity is so rampant that it requires stricter measures to track infringement on the platforms. This highlights the need for the DMCA to define STMs, which will mandate the platforms to mitigate infringing material themselves.

While major artists face infringement issues, they are even more drastic for independent artists, who often cannot afford the technology to track infringement. These examples highlight the substantial challenges in monitoring infringing material, demonstrating the need for a more effective and balanced approach to copyright enforcement in the digital age.

IV. Policy Advocacy

In light of the poor financial compensation they have received from streaming services, independent artists have advocated for multiple business reforms in streaming services via peaceful protests around the world. So far, while their efforts have so far not transformed how platforms operate, independent artists have prompted Congressmembers to introduce new legislation that would raise streaming services' royalty rates.

The Union of Musicians and Allied Workers (UMAW) launched the "Justice at Spotify" campaign in October 2020 to demand that Spotify: increase the payout rate to one cent per stream (as opposed to the $0.0038 payout per stream), adopt a user-centric payment model, and publicly disclose all music contracts, among other demands. The UMAW has led large protests outside of Spotify's offices all over the globe. This campaign reflects the growing frustration and concerns among musicians and industry professionals regarding the current state of compensation in the streaming industry. While this campaign has received widespread coverage from prominent media platforms, Spotify has not yet yielded to their demands.[36] There are a few key reasons this is the case: paying a penny per stream is financially unfeasible for Spotify as it would have to pay more than what it generates to achieve it. As per Will Page, Spotify's director of economics, switching to the user-centric model is also financially unfeasible due to "significant financial costs to adopting and implementing user-centric distribution" while "creating and maintaining several million unique accounts linked to several million unique artists."[37] Due to these factors, it is unlikely that UMAW will be successful in achieving these key demands.

Despite Spotify's resistance to meeting UMAW's demands, UMAW's efforts prompted Congresswoman Rashida Tlaib (D-MI) to introduce the House Concurrent Resolution 102 (H.Con.Res.102) in August 2022. The resolution establishes a SoundExchange and CRB-administered royalty program that would generate higher royalties per stream, ensure that rates do not fall below rates for physical records sales, and be funded by "mandatory pro-rata contributions collected by SoundExchange from eligible providers of music-streaming service with the option for SoundExchange to request additional direct public funding."[38] Fellow Congressman Jamaal Bowman (D-NY) co-sponsors this resolution. However, as of November 2023, Congress has not approved H.Con.Res.102.

Independent artists have also achieved some progress in their fight for higher mechanical royalty rates. In a 2-1 decision in 2018, the Copyright Royalty

Board (CRB) ruled that streaming services must gradually increase their headline rate, which is the percentage of a service's revenue allocated to royalties, from 10.5 percent to 15.1 percent over the period of 2018 to 2022.[39] This translates to a nearly 44 percent increase in mechanical royalties for artists.[40] Furthermore, for the 2023-2027 period, the CRB decided to raise the headline rate from 15.1 percent to 15.35 percent over the next five years.[41] These decisions by the CRB have been applauded by music publishing companies and artists, with the National Music Publishing Association (NMPA) calling the increase for the second five-year period the "highest royalty rate in the history of streaming anywhere."

However, despite the CRB's increased royalty rates, independent artists will have even more difficulty obtaining royalties from Spotify. In its efforts to eliminate royalties from bot-stimulated artificial streams and "functional noise" (such as white noise and rain sounds), in October 2023, Spotify announced that in 2024, it will no longer pay royalties to artists whose music is streamed under 1,000 times within a 12-month period.[42] Considering that two-thirds of the songs from the largest paid streaming service do not meet this threshold, numerous independent artists will now receive absolutely no financial compensation from Spotify.

On the other hand, Deezer launched an "artist-centric mode" to better compensate artists in France. Policies include: giving a "double boost" to artists who achieve a 1,000-stream threshold per month from at least 500 unique listeners, doubling the "double boost" if listeners actively search for those artists, and enforcing a monetization cap of 1,000 streams per user (Deezer will only pay artists based on someone's first thousand streams) to disincentivize artificial streaming. Backed by UMG and Warner Music, Deezer's new model combines pro-rata and user-centric elements to benefit independent, indie-label, and major artists.[43] These developments demonstrate the efforts being made by musicians and industry organizations to advocate for fairer compensation and improved transparency in the streaming industry. While progress has been made, there is still ongoing debate and pressure to address the financial challenges faced by independent artists and to create a more sustainable and equitable ecosystem for all stakeholders involved.

V. Proposed Reforms to the Safe Harbor Requirements

The safe harbor provisions of the DMCA, initially conceived in 1998, provided OSPs legal protection from infringement their users conduct. At the time, technological activities such as making phone calls, sending emails, and browsing the web involved minimal use of audio and video content. Thus, the requirements set forth in the safe harbor provisions seemed reasonable and practical. However, technology has undergone significant advancement in the past two decades and the way it is used today has vastly changed. The current technological landscape is characterized by widespread digital media

consumption, streaming services, social media platforms, user-generated content, and more. The original safe harbor provisions no longer adequately reflect the current state of technology and its impact on copyright infringement. These technological changes have resulted in new challenges and complexities regarding copyright protection. The existing safe harbor provisions provide leeway for copyright infringement on streaming services, as they may not fully account for the scale, speed, and ease with which copyrighted material can be shared, distributed, and accessed in today's digital age.

Artists and legal professionals in the music industry have advocated for reforms to the DMCA's safe harbors. Some points of contention include the first safe harbor requirement, the broad definition of "actual knowledge," and the lack of definition of STMs.

As per the first requirement of the safe harbor, streaming services must "expeditiously" remove infringing material. However, the provision does not properly define the time frame in which a platform must remove an infringement once it receives a takedown notice. Quantifying how quickly a platform must "expeditiously" remove an infringement once alerted will force the platform to improve infringement monitoring. Speeding up this process will prevent situations like Morgan Kibby's from happening again. This will more quickly direct consumers to the actual copyrighted work, allowing creators to gain more royalties for their work instead of promoting infringing material. In other words, legally mandating platforms to crack down on tracking infringement will reduce the extent to which consumers engage with such material, not the copyrighted work.

The DMCA should also constitute the receipt of a takedown notice as "actual knowledge." Statute 17 U.S.C. § 512(c)(1)(A)(ii) requires that OSPs must not have actual or constructive knowledge of infringing work on their platforms. The way streaming services invoke the statute today was not the use that the government intended. In the Report of the Senate Committee on the Judiciary on S. 2037, the Digital Millennium Copyright Act, S. Rep. No. 105-190 (1998), the stated purpose of this statute was "to exclude sophisticated "pirate" directories – which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted – from the safe harbor." Amending this definition will mandate platforms to respond to all notices, thereby improving copyright management.

Additionally, Congress should amend the DMCA's definition of STMs. To avoid liability, platforms are not involved in creating STMs and can claim that they were not created in line with the "broad consensus" in 512(i), disqualifying them as STMs. The "broad consensus" terminology provides a loophole for platforms to not define STMs, which hinders their use in copyright management today.[44] The DMCA should remove this language and define examples of STMs on its own to mandate platforms to use STMs to mitigate infringement. While IP attorneys and representatives from prominent trade organizations, trade

associations, and policy think tanks in the technology industry have met in plenary sessions to define them and concluded that there is no one-size-fits-all option,[45] defining certain examples as STMs would not close off other options from being considered, and possibly included, in the future. Defining suitable examples of STMs, such as content ID, would regulate and enforce copyright identification, allowing copyright holders to better control the use of their work and earn financial compensation. This would also allow them to hold platforms more accountable for their efforts to remove infringing material. Because of this lack of clear STM definition, streaming services are not mandated to use them, which disincentivizes the platforms from using them to their fullest to monitor infringement. The DMCA should also explicitly shift the responsibility of using STMs from copyright holders, who lack the resources, to the platforms. This will alleviate the financial burden on copyright holders, as STMs are expensive.

Additionally, the DMCA should amend statute 17 U.S.C. § 512(i)(1)(A), which outlines conditions to terminate repeat infringers' access to the platforms on which they uploaded the copyrighted material. However, while this statute addresses repeat infringers, it does not adequately address repeat infringement itself. Since this infringement occurs by consistently uploading and/or sharing content via a plethora of different URLs, it is unfeasible for copyright owners to submit takedown notices when there are too many instances to account for. Notices currently only operate on a "URL by URL" basis, whereas by adopting existing technologies that track infringement in lieu of notices, flagging for copyright infringement would become more efficient and remove the burden from copyright owners. For example, YouTube utilizes content ID technology, an automated system that scans newly uploaded videos and compares them against a database of copyrighted content to flag potential infringements. Although not flawless, such technology can help identify unauthorized use of copyrighted material. Furthermore, streaming services are better positioned to track and identify copyright infringement that occurs on their own sites.

The safe harbor provisions shield streaming services from monetary liability for copyright infringement committed by their users, as long as they meet certain requirements, such as promptly removing infringing content upon receiving a valid notice. Given the protections afforded by these provisions, streaming services may not be inherently incentivized to support or advocate for reforms that would tighten the protections. From their perspective, stricter regulations could potentially increase their liability and legal obligations, affecting their business models and operations. With the aforementioned solutions, the platforms would have more difficulty demonstrating a lack of "actual knowledge" of infringements. They would also no longer be able to financially benefit from infringing material, which would decrease the amount of content they can monetize and in turn, their overall revenue. This could prompt the platforms to discontinue their free tier, lose advertising revenue (to financially benefit from offering free tiers, platforms play ads in the middle of streaming),

and lose potential subscribers. Along with decreased revenue, this would hinder platforms' growth.

VI. Policy Recommendation: Promote Platforms with User-Centric Payment Models

While the loopholes in copyright law contribute to big streaming platforms not adequately paying independent artists for their music, these platforms' business models and practices also contribute to the issue. Promoting platforms with more favorable payment models will encourage consumers to listen to independent artists there. In turn, creators will earn more royalties through these platforms.

For instance, platforms like Deezer and SoundCloud have implemented user-centric payment models.[46] Unlike the pro-rata model that Spotify and YouTube use, the user-centric model ensures that the money paid by individual consumers goes directly to the artists they listen to instead of being pooled and distributed based on overall stream counts. This can be advantageous for independent artists with dedicated fan bases or niche genres, as their earnings would be directly tied to the consumer engagement from their specific listeners. That being said, the user-centric model is still relatively new and its impact on artists' earnings is yet to be fully realized. However, there have been positive reports from platforms like SoundCloud, which noted that "there was a 97 percent increase in fans contributing more than $5 to a single artist."[47] This suggests that the user-centric model has the potential to provide a fairer distribution of royalties and better support for emerging and independent musicians.

U.S. copyright law should incentivize all platforms to utilize the user-centric payment model in order to better financially support independent artists for their streams. To incentivize this, the DMCA can limit its safe harbor eligibility requirements and leverage them by encouraging the use of the model.

VII. Conclusion

In conclusion, independent artists face challenges in earning adequate royalties from streaming services. The fixed payout rates and payment models employed by platforms like Spotify and YouTube and legal loopholes in the DMCA have contributed to the meager income independent artists receive from their music. It is imperative to find equitable solutions to support independent artists and foster a sustainable music ecosystem. This may involve reforming copyright laws, promoting fair payment models, and empowering independent artists in their negotiations with streaming services. By addressing the systemic issues that hinder the earning potential of independent artists, a more inclusive and supportive environment for all musicians in the digital streaming landscape can be created. This will facilitate artists being properly compensated for their

creative contributions, which will in turn further enable the music industry to thrive through collaborative efforts and fair practices.

With the rise of artificial intelligence, copyright and intellectual property issues will continue to evolve. Though it will not be possible to fully address these evolving issues in this paper, law and policymakers need to consider how they factor into established legislation. Any reforms to the current DMCA need to keep in mind the role that artificial intelligence will have on copyrighted material on streaming services.

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Is Chevron Deference Constitutional? *Biden v Nebraska* and the Major Questions Doctrine

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Abstract

This paper delves into the paradoxically complex and dry realm of administrative law, particularly *Chevron* deference, its overall limitations and shortcomings, and the Supreme Court's attempt to address the problem posed by administrative deference as it stands. In its attempt to correct the issues that arose from *Chevron USA v Natural Resources Defense Council*, the Court devised the "major questions doctrine," which requires a "clear statement" of congressional intent to enable administrative rulemaking. However, two interpretations of the doctrine have emerged: the broad interpretation—a clear statement rule—and the narrow interpretation, which calls for hesitation before finding implicit deference in questions of law, while allowing room for deference concerning interstitial matters. [1] There are concerns over *Chevron*'s constitutionality, such as its interference with due process, fair notice, and the separation of powers. Perhaps the Major Questions Doctrine attempts to bring the power of legal interpretation back to the courts à la *Marbury*, rather than liberally deferring such powers to the executive branch. A key example is *Biden v Nebraska,* where the Supreme Court ruled that the HEROES Act of 2003 did not confer the authority to cancel student loan debt to the Secretary of Education, setting aside the *Chevron* precedent in favor of the Major Questions Doctrine.

1. Introduction

On August 24, 2022, the Supreme Court struck down a student loan forgiveness program[2] that canceled up to $10,000 in loans for eligible borrowers,[3] totaling $430 billion in debt forgiveness. In support of the move, the Biden administration argued that such cancellation was authorized by the Higher Education Relief Opportunities for Students (HEROES) Act of 2003.[4] The Act's terms to "waive or modify any statutory or regulatory provision," the Secretary of Education argued, were exactly what would authorize the debt forgiveness plan. Six states disagreed, including Nebraska, and in doing so brought the question of whether the Secretary of Education had the authority to cancel debt under the HEROES Act before the Court. At the time, the HEROES Act had never been used to forgive large swaths of debts on the scale that the Secretary of Education had proposed. However, the Act had been used to pause student loan repayment, interest accrual, and involuntary collections during times of national emergencies.[5]

One reason for the court's ruling was the use of a legal theory known as the "Major Questions Doctrine" that has developed over the last 40 years.[6] The Major Questions Doctrine limited the scope and reach of the *Chevron* deference by circumscribing implicit deference to the Executive's interpretation regarding ambiguous statutes that have major political and economic significance.[7] Besides these limitations on implicit deference regarding Major Questions, there are other general limitations to *Chevron* regarding criminal statutes, waivers, and inconsistent interpretations.[8] Furthermore, the rediscovery of *Marbury v Madison* in the administrative state puts *Chevron* at odds with *Marbury*'s main rule: the power to ultimately interpret laws lies with the judiciary, not the executive. Legal interpretation is for the courts, while political questions are left to the branches of government and fall under the separation of powers.[9]

There are also conflicts between judicial deference and the Constitution. *Chevron* forces judges to abandon their duty of independent judgment and defer such powers to the executive branch. This bias creates conflict between the 5th Amendment and due process. As shown by historical precedent, judicial deference was something the framers anticipated. The founding fathers aimed to mitigate such issues through the separation of powers between the legislative, executive, and judiciary, the last of which acted as an independent branch in matters of legal interpretation without intervention from the others. *Marbury v Madison* lays out instructions for the courts in this aspect, instructing judges to independently interpret questions of laws as a nondelegation principle.

In response to *Chevron's* inconsistency with the Constitution and *Marbury*, the Supreme Court introduced the Major Questions Doctrine, which rejects *Chevron's* implicit deference of interpretive powers and reinstates such authority back to the judiciary. The application of the Major Questions Doctrine aims to address the constitutional defects that resulted from *Chevron* deference.

2. Chevron deference and its limitations

We must first independently address the *Chevron* doctrine before we address the Major Questions Doctrine. *Chevron USA, Inc. v Natural Resources Defense Council, Inc.*,[10] a landmark Reagan-era decision, predicated on a doctrine known as "*Chevron* deference," which passes the power to interpret laws to bureaucratic agencies in circumstances where federal legislation is ambiguous.

For instance, any federal legislation passed regarding firearms regulations would be delegated and enforced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Similarly, climate policy regulations would fall under the control of the Environmental Protection Agency (EPA) and the Natural Resources Defense Council (NRDC). If any given policy is considered ambiguous or unclear, courts would defer to an agency's reasonable interpretations of the related statute. This is the command of *Chevron* deference. Many supporters of the doctrine claim that it has a strong backing of *stare decisis*, and since its inception over four decades ago, the courts have repeatedly upheld the doctrine and have relied on it in thousands of cases. Supporters also argue that *Chevron* creates a smoother regulatory system and reduces disagreements between federal courts.[11]

Conversely, opponents of *Chevron* have argued that such a doctrine creates an unfair advantage between litigators and the federal government. For instance, Supreme Court Justice Neil Gorsuch dissented from the denial of *certiorari* in a case[12] regarding the Department of
Veterans' Affairs' (VA) failure to pay for an Air Force veteran's healthcare under the pretext of *Chevron* due to a law's ambiguity. Gorsuch wrote: "We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else."[13]

To those who oppose *Chevron*, such delegation and lack of judicial review has caused major issues for the courts: Justice Gorsuch comprehensively described this issue, stating, "A maximalist account of *Chevron* risks turning *Marbury* on its head."[14] In the context of immigration law, *Chevron* has been used nefariously against migrants and refugees. For example, in *Gutierrez-Brizuela v Lynch,*[15] The 10th Circuit Court ruled that some agency rulemaking must be approved before the courts grant it legal effect. This case starts off with two conflicting statutes in U.S. immigration law: 8 U.S.C. § 1255 and 8 U.S.C. § 1182. The first statute "grants the Attorney General discretion to 'adjust the status' of those who have entered the country illegally and afford them lawful residency."

The second "provides that certain persons who have entered this country illegally more than once are categorically prohibited from winning lawful residency... unless they first serve a ten-year waiting period outside our borders."[16] In an attempt to resolve the conflict between the statutes, the court ruled in *Padilla-Caldera v Gonzales*[17] that the first statute was applicable and the Attorney General could grant lawful residency to migrants. In 2007, though, the Board of Immigration Appeals (BIA) came to the opposite conclusion via *In re Briones,*[18] resulting in a reversal of the first case in 2011,[19] forcing the 10th Circuit court under the guise of *Chevron* and *Brand X,* a logical outgrowth of *Chevron*, to adopt the BIA's newer interpretation, overruling *Padilla-Caldera I.*[20] As the legal gears shifted, Hugo Gutierrez-Brizuela, a citizen of Mexico, faced the two conflicting statutes. In 2009, before the court's ruling in *Padilla-Caldera II,* he sought legal residency through an adjustment of status through the discretion of the Attorney General. In 2013, his application for adjustment of status was pretermitted by an immigration judge.[21] He appealed his case, which was dismissed by the BIA, who reasoned that the *Briones* rule had retroactive legal effect over his application. Thus Gutierrez-Brizuela was ineligible for an adjustment of status and would be forced to "serve a ten-year waiting period outside our borders."[22] To Justice Gorsuch, the inconsistency of agency actions under the rationale of *Chevron* raised several constitutional concerns about due process, fair notice, and equal protection:

> We explained that legislation is presumptively prospective in its operation because the retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law and risks endowing a decisionmaker expressly influenced by majoritarian politics with the power to single out disfavored individuals for mistreatment… There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is Chevron… permits executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.[23]

To Justice Gorsuch, *Chevron* raised several constitutional issues. While *Chevron* has been a crucial aspect of the regulatory process, it has since been limited regarding "major questions."[24] Some have stipulated that the "Major Questions Doctrine" originated with the landmark Supreme Court case *West Virginia v EPA.* The first interpretation, a more flexible form of the Major Questions Doctrine, echoes the limitations on *Chevron* set forth in *Chevron USA v Natural Resources Defense Council,* requiring courts to determine whether or not an agency's interpretation is "based on a permissible construction of the

statute," while leaving room for technical or minor issues that can be handled by agency expertise.[25] This can be described as the two-step framework of *Chevron*. The first step asks: "the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."[26] The second question asks: "If, however, the court determines Congress has not directly addressed the precise question at issue… if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[27]

In recent times, there have been more general limitations on *Chevron* deference, such as in *Cargill v Garland*. This case set out a limitation on *Chevron* regarding criminal liabilities and challenged the ATF's reclassification of bump stocks as machine guns. 26 U.S.C. § 5845(b) and 18 U.S.C. § 921(a)(24) both define what a "machinegun" is. "The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[28] This includes frames and receivers, as well as a combination of parts designed for the use of converting a firearm into a full auto.

The 5th Circuit court explained that bump stocks do not fit this definition of a "machinegun" is because "a bump stock combines with a semi-automatic weapon to facilitate the repeated function of the trigger," and while bump stocks make the process faster, the mechanics are the same of that of a semi-automatic firearm. A semi-automatic weapon requires "the firing of each and every round [through the process of] an intervening function of the trigger."[29]

This case listed a few reasons as to why *Chevron* doesn't apply. First is the waiver rule: when the government fails to invoke *Chevron*, the government waives its right to argue on such grounds. The Court cautioned against interpreting *Chevron* as a standard of review, instead stating that *Chevron* is instead a legal argument the government can use.[30] Furthermore, the Court goes on to explain that the Administrative Procedures Act sets forth its own standard of review: "The APA specifically sets forth standards by which courts must review agency actions—arbitrary and capricious, abuse of discretion, in excess of statutory authority, and so on."[31] However, some courts reject the approach taken in *Cargill*. The D.C. circuits have injected *Chevron* in cases where the government never expressly argued on such grounds, even though the lack of expressly invoking *Chevron* is consistent with waivers: "To be sure, an agency of course need not expressly invoke the *Chevron* framework to obtain *Chevron* deference."[32] However, the Supreme Court cautioned against using *Chevron* as a standard of review.[33]

The second, perhaps stronger, reason as to why *Chevron* didn't apply was due to the agency's interpretations of a criminal statute.[34] Per the 5th Circuit, "*Chevron* deference shifts the responsibility of lawmaking from the Congress to the Executive, at least in part. That tradeoff cannot be justified for criminal statutes, in which the public's entitlement to clarity in the law is at its highest."[35]

Regardless of *Chevron*, the Supreme Court has argued in the past that any form of deference does not apply to a government's interpretation of a criminal statute.[36]

The *Cargill* case also outlines another limitation of *Chevron* regarding criminal statutes. The court explained that inconsistent interpretations of criminal statutes are problematic with respect to fair notice.[37] This refers to a requirement for the government to publicly notify individuals about actions that are considered criminal offenses, it also prohibits the retroactive application of criminal statutes. For eleven years, the ATF had repeatedly claimed that non-mechanical bump stocks were not "machineguns."[38] This was until 2017, when the ATF dramatically reversed its interpretations.[39] Hence, no new laws have been passed; only an agency's interpretation of them has changed. It would only be fair to ask: how could the average American keep up with such bureaucratic inconsistency?[40] This isn't the first time the courts have had to address consistency in regard to agency regulations, and in doing so, concluded that an agency's inconsistent interpretations are entitled to considerably far less deference.[41] This is magnified when inconsistencies arise out of interpretations of criminal statutes.[42] An inconsistency of law is far more problematic when it concerns the interpretation of a criminal statute.

Despite this, some of the sister courts of the 5th Circuit have applied such deference regarding criminal statutes, citing *Babbitt v Sweet Home Chapter of Communities for a Great Oregon* as its justification.[43] The courts reasoned that since some deference was granted regarding criminal liabilities, *Babbitt* would justify setting aside the rule of lenity. Quite the opposite occurred, the court in *Babbitt* upholding the regulations had never conducted a *Chevron* analysis, "concluding that it "owe[d] some degree of deference [to] the [Department of Interior (DOI)] reasonable interpretation," in part because of the "latitude the ESA gives to [DOI] in enforcing the statute."[44] The court also did not determine whether the rule of lenity would apply, or analyze such a challenge.[45] Further court opinions have also cautioned against using *Babbit* to justify deference regarding criminal statutes: "The best that one can say ... is that in *Babbitt* [the Court] deferred, with scarcely any explanation, to an agency's interpretation of a law that carried criminal penalties. ... *Babbitt* 's drive-by ruling, in short, deserves little weight."[46] Some of the lower courts would assert that, in *Babbitt*'s utility of *Chevron* with regard to criminal statutes, it is quite clear *Chevron* does not apply when the statutory questions at hand have criminal implications.[47] As one Justice suggested, "[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake."[48]

On the rule of lenity and its particular importance in the *Cargill* case, one must understand what the rule of lenity means. In theory, it requires courts to rule in favor of the defendant when a criminal statute is ambiguous, where all of the statutory interpretation tools have been exhausted to no avail. Furthermore, the rule of lenity is inherently related to fair notice, where laws carrying criminal

penalties are required to speak plainly to the defendant's conduct.[49] In terms of the *Cargill* case and its peculiar focus on *Chevron* as a crutch for the ATF's reclassification of bump stocks as machineguns operate out of the assumption that the term "machinegun" is ambiguously defined under the National Firearms Act (NFA). However, as the 5th circuit has noted, the term "machinegun" would not cover bump stocks. The 6th circuit would also rule similarly, although it would strike down the ban on bump stocks explicitly with the rule of lenity.[50] Conversely, the DC Circuit Court would take the exact opposite approach, applying *Chevron* to the ATF's reading of an otherwise ambiguous statute upholding the regulation on bump stocks. Either way you slice it, there is no concise agreement on whether or not the NFA's machine gun clause would include bump stocks. This is where the rule of lenity ought to apply.

If *Cargill* is not convincing enough, perhaps the case of *United States v Hoover*[51] is more convincing in outlining the importance of the rule of lenity. Among other matters, this case was one of the first to cite *Bruens* in a criminal proceeding in an attempt to rule unconstitutional the NFA and overrule *United States v Miller*.[52] Mr. Hoover was indicted on multiple counts of transferring machine guns and conspiracy to transfer unregistered machine guns. On the surface, most people wouldn't be concerned about the context of such charges, but upon further investigation, the ATF's conclusion as to what constituted a machine gun was patently absurd. They claimed that a homogenous flat metal card with a drawing on it was a "combination of parts designed and intended, for use in converting a weapon into a machine gun."[53] Let's pause at that: a flat singular metal card with a drawing on it is considered a "combination of parts" to the ATF. So, how did they come to that conclusion? The ATF claimed that if the card were cut out along the lines of the drawing, the parts procured would result in a set of parts that resemble a lightning link, a full auto conversion device. However, the card's thickness and the drawing's specifications would have never worked as an original lightning link. The ATF's own expert witness admitted during cross-examination that when cutting the card apart, he didn't follow the lines drawn onto the card, meaning that the card was arbitrarily cut into to make a full auto conversion device.[54] Even after cutting past the lines and grinding on the metal card with a dremel, the supposed lightning link didn't work as the ATF intended, resulting in a malfunction, which the ATF pointed to as evidence of a machine gun. Despite this, Mr. Hoover was found guilty and was sentenced to five years in prison. To call this a true miscarriage of justice would be a massive understatement. The rule of lenity, once again, should have played its part in this case since no reasonable reading of a "combination" of parts could ever cover one singular part. The law does not speak plainly to the defendant's conduct and, at best, is a manipulated reading
to convict the defendant for something that would otherwise be legal.

3. Chevron's conflict with *Marbury v Madison* and the Constitution

While *Chevron* might seem like a technical issue of administrative law, it poses serious issues as a conflict between *Marbury* and the Constitution. To understand the issue at hand, we must look back to historical analogies of judicial deference and why the Constitution anticipated and addressed such an issue. During the Roman Empire, many emperors had the power to create law and, as an outgrowth, also reasoned that they had the power to interpret laws in similarly-styled governments, such as monarchies.[55] Civilians had also advocated that kings, such as King James I, had the power to not only create laws but also interpret them.[56] Although the issues that arose from *Chevron*'s judicial deference might seem novel, similar issues had also arisen under King James I in England, who was a strong advocate for "royal absolutism" and had frequent conflicts with an increasingly independent Parliament that acted vigilantly to gain sole power of taxation. In the King's frustration after being rejected by the Parliament for special funds to pay for his extravagances, he placed new taxes without Parliament's consent.[57] In terms of judicial deference, King James I is most notable for his use of prerogative tribunals in an attempt to circumvent Parliament. What we consider "administrative agencies" are the equivalent of what the British referred to as "prerogative courts." Through these courts, the King was able to govern extralegally, not through the creation of new laws, but through edicts.[58] Similarly, the executive branch exercises such powers through the administrative agencies. Both the administrative agencies and the prerogative courts engaged in legal interpretations. The King passionately fought to persuade judges to defer interpretive powers to his prerogative courts. Of course, some judges in the early 1600s protested the King's insistence. For instance, one judge, Sir Edward Coke, whilst on his knees in front of the king, refused to grant the king's wish of judicial deference, exclaiming that "[t]he stay required by your Majesty was a delay of justice and therefore contrary to the law and the Judges' oath."[59] Coke's belief was that law was meant for the courts and judges to determine independently and refused to grant such powers to the king's prerogative interpretations. Similarly, Article III of the Constitution grants the courts judicial power, where judges, independent from the executive branch, come to their own independent judgment of the law.

While judges in England were viewed as servants of the crown, this view would transform so that judges and the executive were seen as two separate co-equal branches of government. John Locke assumed that the judiciary was merely a part of the executive and did not particularly exercise independent judgment.[60] Throughout English history, judges were expected to defer to the crown's prerogative—this could be why philosophers like John Locke viewed the judiciary as merely part of the executive.[61] It wouldn't be until the late seventeenth century that the idea of an independent judicial branch started to form, when Montesquieu's theory of the judiciary being separate from the other branches of government started to catch on within the American colonies.[62] With the colonists' own struggles with loyalist judges who deferred to the crown, and after

independence was achieved, judges within the newly independent United States were treated separately from the executive branch.[63] John Adams, who helped draft the articles of impeachment against loyalist Chief Justice Peter Oliver, explained in his diary the importance of an independent judiciary, and that if judges were to be entirely dependent on the crown, that "the Liberties of the Country would be totally lost, and every Man at the Mercy of a few Slaves of the [Executive Branch]."[64]

Hamilton once wrote, "the interpretation of the laws is the proper and peculiar province of the courts".[65] In *Marbury v Madison,*[66] Chief Justice John Marshall echoed Hamilton, explaining, "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." This is the basis of one of Marbury's main rules, which instructs judges to interpret the law independently and, in doing so, requires that all judges must interpret what the law means and entrust that power solely to the courts.

John Locke believed that the judiciary's purpose was to mitigate and resolve disputes between individuals and the government. In the case that judges were biased in favor of the government and indifference was nonexistent, Locke advocated for individuals to exercise their own judgment, and when judges object, individuals have the right to make an appeal to heaven or in other words, the people have a right to embrace revolution.[67] In turn, judges were expected to practice impartial judgment in cases pertaining to government power or the people's rights. This would be the case for public trust in the courts, assuring that courts would not issue unfavorable rulings in favor of the government, and that disputes between individuals and the government could be handled through litigation, not revolution.[68]

It is also important to note that judicial deference is arguably at odds with the 5th Amendment's due process clause. Where judges defer the power of legal interpretations to the executive branch, it cannot be said that judges are acting impartially and are engaging in systemic bias in favor of the executive. Due process, in theory, would instruct judges not to engage in systemic bias, whether in favor of the government or individuals. It has been said that the origins of the 5th Amendment's due process clause, Article 39 of the *Magna Carta* was created in order to target "arbitrary disseisin at the will of the king," and "arrest and imprisonment on an administrative order."[69] Due process would develop throughout 14th-century common law in response to Edward III's abuse of administrative adjudications and serve as an obstacle to the king's administrative proceedings.[70]

4. The interpretations of the Major Questions Doctrine.

It has been theorized that there are two interpretations of the Major Questions Doctrine.[71]The narrow view of the doctrine allows for deference in regard to technical or minor interpretive issues, allowing the expertise of an agency to prevail in court. However, it limits deferring interpretive powers when dealing with "major questions."[72] In comparison, the broader interpretation of the doctrine explicitly calls for congressional authorization when an agency asserts authority to carry out regulations.

The narrow interpretation of the major questions doctrine limited *Chevron* doctrine in regards to implicit delegations that concern "major questions," while leaving room for agencies to utilize expertise to resolve interstitial legal matters.[73] In cases regarding "major questions," the courts infer that Congress wanted the courts to answer issues of laws independently.[74] In 1986, former Judge Breyer in the First Circuit Court endorsed a narrow view of the Major Questions Doctrine, coining the term "major questions" in an article of the *Administrative Law Review.*[75]He argued for limiting the scope of *Chevron's* main rule that courts should defer to agencies, proposing instead that courts "ask whether the legal question is an important one" before deferring to an agency's interpretation. He further explained that "Congress is more likely to have focused upon, and answered, *major questions* while leaving interstitial matters to answer themselves in the course of the statute's daily administration." The Supreme Court later cited Breyer's article in agreement in the case *FDA v Brown & Williamson:* "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation…A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[76]

To summarize, Justice Breyer says that courts should be hesitant to defer interpretive powers to agencies regarding issues that have vast economic and or political significance. Perhaps the courts shouldn't assume Congress intended such delegation. The courts should deal with significant interpretative issues, while leaving room for minor technical issues to be dealt with through the expertise of an agency. Breyer's proposals would ultimately lead to the limiting of the Chevron doctrine in regard to "major questions."

In order to examine the broader interpretation of the major questions doctrine in its current adaptation, we'll have to address *West Virginia v EPA*.[77] In this case, the Supreme Court held that the EPA did not have the authority to promulgate the Clean Power Plan based on the Clean Air Act. "EPA explained that the Clean Power Plan, rather than setting the standard based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level."[78] Prior to the Supreme Court's ruling in West Virginia v EPA, the EPA had already replaced the Clean Power Plan (CPP) with the Affordable Clean Energy Rule (ACE) under the assumption that the CPP would ultimately fall under the major questions doctrine,

requiring a clear statement concluding congress's intent. The EPA found no examples of a "clear statement" that would indicate that "Congress intended to delegate authority" to the agency instead of the courts. Initially, the EPA decided not to enforce the Clean Power Plan during the Trump administration, reversing the Obama-era CPP. Which resulted in lawsuits filed by multiple states and private parties. After a consolidation of the lawsuits in the Court of Appeals, the lower court "held that EPA's 'repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act'"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111.[79] The Court of Appeals vacated the EPA's repeal of the CPP and ACE for similar reasons. Later on, the EPA moved the court to partially stay its mandates, and the Court of Appeals agreed to stay its vacatur of the EPA's repeal of the CPP.

In a reversal of the Court of Appeals ruling, the Supreme Court held that "Congress did not grant [the] EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan."[80] To further demonstrate this point, the EPA argued that the CPP fell under the major questions doctrine. The EPA went on to explain that the courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance"[81]. The Supreme Court agreed with this explanation.

To conclude on the point of the major questions doctrine, the courts have stated that in order to have permissible agency rulemaking regarding "vast economic and political significance," the agency must show "clear congressional authorization" that indicates Congress's intended to delegate rulemaking authority.[82]

5. *Biden v Nebraska,* Debate over terms "waive or modify"

In August 2022, The Secretary of Education invoked the HEROES Act of 2003 to create "waivers and modifications" to reduce and outright cancel student loan debt. The HEROES Act was first passed in response to the devastation brought forth by the 9/11 attacks and allowed the Secretary of Education to "waive or modify" legal provisions for those affected by the terrorist attacks. The Secretary of Education, in an attempt to cancel student loans in response to
COVID-19, attempted to grant student loan forgiveness for "Borrowers with eligible federal student loans who had an income below $125,000 in either 2020 or 2021 qualified for a loan balance discharge of up to $10,000. Those who previously received Pell Grants-a specific type of federal student loan based on financial need-qualified for a discharge of up to $20,000."[83]The contention in Biden v Nebraska was whether or not the Secretary of Education had the authority under the HEROES Act to cancel about $430 billion in student loan debt. Under the HEROES Act, the Secretary "may waive or modify any statutory or regulatory

provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."[84] While the HEROES act allows the Secretary of Education to issue waivers or modifications to loans, contention between the terms "waive or modify" arose, as it suggests that the Secretary had the power to cancel debt outright.

In addressing Article III standing, Plaintiffs must suffer monetary damage to a legally protected interest.[85] Since MOHELA, a nonprofit created by the state of Missouri to engage in the student loan market, would suffer financial damages, the state reasoned that they had standing to sue because MOHELA is a "public instrumentality" which was created by the state, is supervised by the state, and serves a public function. If the student loan cancellation plan went into effect, it was estimated to cost the state of Missouri around "$44 million a year in fees that it otherwise would have earned under its contract with the Department of Education."

[86] The Supreme Court agreed. If the student loan cancellation plan went into effect, it was estimated to cost the state of Missouri around "$44 million a year in fees that it otherwise would have earned under its contract with the Department of Education."[87]

While the Secretary of Education insisted that the terms "waive or modify" gave them the power to cancel the debt. However, the term's meaning is limited. The term "modify" has held the connotation of "increment or limitation,"[88] and prohibits "basic and fundamental changes in the scheme."[89] Chief Justice John Roberts argued that the Secretary's vast debt cancellation plan was not incremental or minor. Such a policy would change the provisions' meaning and create an entirely new regime. The only way that a borrower's liability would be discharged was under limited and narrow conditions: death, disability, bankruptcy, and other circumstances.[90] For the term "waive," the Secretary argued that such a term granted far more authority than "modify." However, this invocation has been inconsistent with prior instances where the Secretary waived certain legal requirements, such as the waiver of a demand that students provide written request for a leave of absence.[91] The Secretary failed to point to any provision that requires a student to pay their obligation, since such a provision does not exist within the HEROES Act. The Secretary later conceded the argument that the term "waiver" cannot be used within the context of waiving student loan balances.[92]

The main issue for the courts to decide was whether or not the Secretary had the authority to cancel debt. Using the major questions doctrine, the court reasoned that since the plan was economically significant, they had "reason to hesitate before concluding that Congress meant to confer such authority."[93]As such the Supreme Court had to contend with Congress's intent. While Congress has considered bills on student loan cancellation, it has not chosen to enact such

a law, let alone defer such a power to the Secretary when passing the HEROES Act. To justify such authority, the Secretary must point to "clear congressional authorization."[94]

Based on the Supreme Court's interpretation, Congress's intention behind passing the HEROES Act did not justify the cancellation of student debt on such a broad level. The Court's ruling was based on the finding that the terms "waive or modify" do not align with the federal government's argument. Due to the substantial economic impact of this program, the Court deemed it necessary to step in and provide clarity on major legal questions instead of implicitly deferring interpretive powers to the executive. *Biden v Nebraska* outlines an uncertain future for *Chevron*. Rejecting its use where it once would've been applicable means paving the way for a clear statement rule – the *Major Questions Doctrine*

[1] See Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 370 (1986)
[2] The White House, Fact Sheet: President Biden Announces Student Page 2 B-334644 Loan Relief for Borrowers
Who Need It Most (Aug. 24, 2022), available at
https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/factsheet-president-biden-announces-stu dent-loan-relief-for-borrowers-who-need-itmost/
[3] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).
[4] U.S.C. § 1001 - Higher Education Relief Opportunities for Students Act of 2003
[5] Congressional Research Service, Student Loan Cancellation Under the HEROES Act, available at Student Loan Cancellation Under the HEROES Act
[6] *West Virginia*, 597 U. S. at 20 ("an identifiable body of law that has developed over a series of significant cases")
[7] *FDA v Brown & Williamson Tobacco Corp*., 529 U. S. 120, 133 (2000).
[8] *Cargill v Garland*, 57 F.4th 447 (5th Cir. 2023).
[9] *TWISM Enterprises, L.L.C. v State Board of Registration for Professional Engineers and Surveyors*, (Slip Opinion
No. 2022-Ohio-4677).
[10] *Chevron USA, Inc. v Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).
[11] Brief for Law Professors Kent Barnett and Christopher J. Walker as Amicus Curiae, *Loper Bright Enterprises v Raimondo, Docket No.22-451, (2023).*
[12] *Buffington v McDonough*, No. 21-972, (Fed. Cir. Nov. 7, 2022)
(Gorsuch, N., dissenting).
[13] Ibid.
[14] Ibid.
[15] *Gutierrez-Brizuela v Lynch*, 834 F.3d 1142 (10th Cir. 2016).
[16] Ibid, 1144
[17] *Padilla-Caldera v Gonzales (Padilla-Caldera I)*, 426 F.3d 1294 (10th Cir. 2005), *amended and superseded on reh'g by* 453 F.3d 1237 (10th Cir. 2006).
[18] I. & N. Dec. 355 (B.I.A. 2007).
[19] *Padilla-Caldera v Holder (Padilla-Caldera II)*, 637 F.3d 1140 (10th Cir. 2011).
[20] *Padilla-Caldera v Gonzales (Padilla-Caldera I)*, 426 F.3d 1294 (10th Cir. 2005), *amended and superseded on reh'g by* 453 F.3d 1237 (10th Cir. 2006).
[21] *In re* Gutierrez-Brizuela, No. A200 333 099, 2014 WL 4966418 (B.I.A. Aug. 27, 2014)
[22] *Gutierrez-Brizuela v Lynch*, 834 F.3d 1142, 1144 (10th Cir. 2016).
[23] Ibid, 1146-1149.

[24] Cass R. Sunstein, "There Are Two 'Major Question' Doctrines", 73 Admin. L. Rev. 475 (2021).
[25] *Chevron USA, Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).*
[26] Ibid, 842.
[27] Ibid, 843.
[28] *Cargill v Garland*, 451.
[29] Ibid, 454.
[30] Ibid, 466.

[31] U.S.C. § 706

[32] *Guedes v Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 23 (D.C. Cir. 2019).

[33] *Guedes v Bureau of Alcohol*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement respecting denial of certiorari).

[34] *Cargill v Garland,*466.

[35] Ibid.

[36] *United States v Apel*, 571 U.S. 359, 369 (2014)

[37] *Cargill v Garland*, 468 (“a third reason why *Chevron* deference does not apply in these circumstances: that ATF has adopted an interpretive position that is inconsistent with its prior position. To apply *Chevron* here would contravene one of the rule's central purposes: "to promote fair notice to those subject to criminal laws." *United States v Kozminski* , 487 U.S. 931, 952, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988) ; *see also United States v Kaluza*, 780 F.3d 647, 669 (5th Cir. 2015)”).

[38] *Cargill v Garland*, 450 (“When ATF first considered the type of bump stocks at issue here, it understood that they were *not* machineguns. ATF maintained this position for over a decade, issuing many interpretation letters to that effect to members of the public.”).

[39] See *Guedes*, 920 F.3d at 41 ("The ATF's interpretation of ‘machinegun’ gives anything but fair warning—instead, it does a *volte-face* of its almost eleven years' treatment of a non-mechanical bump stock as not constituting a ‘machinegun.’" Henderson, J., concurring in part and dissenting in part).

[40] See *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement respecting denial of certiorari); *see also Aposhian*, 989 F.3d at 900 ("When an agency plays pinball with a statute's interpretation, as the ATF has here, fair notice cannot be said to exist.") (Tymkovich, C.J., dissenting); *Guedes* , 920 F.3d at 41 ("The ATF's interpretation of ‘machinegun’ gives anything but fair warning—instead, it does a *volte-face* of its almost eleven years' treatment of a non-mechanical bump stock as not constituting a ‘machinegun.’") (Henderson, J., concurring in part and dissenting in part).

[41] *INS v Cardoza-Fonseca* , 480 U.S. 421, 446 n.30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) ("conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.")

[42] *Cargill v Garland*, 469 (“The concern is only magnified where, as here, the Government's interpretation of the underlying statute carries implications for criminal liability. As such, *Chevron* does not apply because the Government has construed the same statute in two, inconsistent ways at different points in time.”).

[43] Babbitt v Sweet Home Chap., Coms. for Great Ore, 515 U.S. 687 , 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).

[44] *Cargill v Garland*, 467.

[45] *Gun Owners of Am., Inc. v Garland,* 992 F.3d 446, 475 (6th Cir. 2021).

[46] *Whitman v United States*, 574 U.S. 1003, 135 S. Ct. 352, 353, 190 L.Ed.2d 381 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of certiorari) .

[47] *Cargill v Garland*, 468 (“As such, *Chevron* does not apply here because the statutory language at issue implicates criminal penalties.”).

[48] See *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement respecting denial of certiorari)

[49] *Wooden v United States*, 142 S. Ct. 1063, 1083 (2022) (“Here again, the connection between lenity and fair notice was clear: If the law inflicting punishment does not speak "plainly" to the defendant's conduct, liberty must prevail.”)

[50] *Hardin v Bureau of Alcohol, Tobacco, Firearms and Explosives*, 65 F.4th 895, 902 (6th Cir. 2023) (“Therefore, even accepting… that the statute could reasonably be read either way as to the legality

of bump stocks, the statute *must* be read under the rule of lenity to exclude a bump-stock rifle from the definition of a machinegun.")

[51] *United States v Hoover*, 3:21-cr-22(S4)-MMH-MCR (M.D. Fla. 2023)

[52] SUPPLEMENT TO MOTION TO DISMISS & TO DECLARE UNCONSTITUTIONAL THE NATIONAL FIREARMS ACT OF 1934, *United States v Hoover,* 3:21-cr-22(S4)-MMH-MCR (M.D. Fla Jul. 1, 2022)

[53]32 CFR. § 552.126 ("combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.")

[54] Jeff Knox,, "Auto Key-Card Case Ruling Is a Travesty of Justice," AmmoLand Shooting Sports News, August 10, 2023, online at https://www.ammoland.com/2023/04/auto-key-card-case-ruling-a-travesty-of-justice/. ("on cross-examination by Hoover's attorney Matt Larosiere, the "expert" admitted that when he followed the lines on the cards, he couldn't make the resulting parts fit into any of the AR's he had for testing… He admitted that he modified the design, ignoring the lines and cutting the parts to different dimensions to get them to fit into a gun, then admitted that he was still unable to get the Lightning Link to actually function – ever – at all. What the BATFE claimed was a "*success*" included "40 minutes of work with a Dremel tool," This was not a functional Lightning Link at all, but rather a couple of pieces of metal ground on and fiddled with for an indeterminate amount of time, and finally crammed into the trigger mechanism of a rifle causing it to malfunction.")

[55] According to Justinian's digest, "whenever a new contingency arises," the emperor, who is the lawmaker, was the "the imperial function" to "correct and settle it." To further Julian's writing, "if anything defective be found, the want should be supplied by imperial legislation." *The Digest of Justinian* ix–x (Alan Watson ed., rev. English language ed. 1998).

[56] Philip Hamburger, *Is Administrative Law Unlawful?,* 51-55 (2014).

[57] D. Mathew, "James I," *Encyclopedia Britannica*, June 15, 2023.

[58] Hamburger, 51-55.

[59] Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke (1552-1634),* 373 (1957).

[60] John Locke, *Two Treatises of Government*, 325 (Peter Laslett ed., Cambridge Univ. Press, student ed. 1988).

[61] Ibid.

[62] Paul Merrill Spurlin, "Montesquieu in America 1760-1801," at 16–17 (2d ed. 1969); Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," 78 AM. POL. SCI. REV. 189, 195–96 (1984).

[63] Philip Hamburger, *Law and Judicial Duty*, 513–14 (2008). (The Massachusetts controversy over Chief Justice

Peter Oliver exemplifies the colonialists' struggles for an independent judiciary separate from the Crown.) John Adams, "Independence of the Judges, 1773–1774" in *Diary of John Adams, volume 3,* 1782-1804, online at https://www.masshist.org/publications/adams-papers/index.php/view/ADMS-01-03-02-0016-0018#sn=1

(John Adams outlines the importance of an independent judiciary, saying that if judges were to be entirely dependent on the crown, "the Liberties of the Country would be totally lost.")

[64] John Adams, "Independence of the Judges, 1773–1774" in *Diary of John Adams, volume 3,* 1782-1804, online at https://www.masshist.org/publications/adams-papers/index.php/view/ADMS-01-03-02-0016-0018#sn=1 ("It was by all Agreed, As the Governor was entirely dependent on the Crown,

and the Council in danger of becoming so if the Judges were made so too, the Liberties of the Country would be totally lost, and every Man at the
Mercy of a few Slaves of the Governor.")

[65] Alexander Hamilton, *The Federalist*
No. 78, supra note 56, at 525.

[66] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[67] Dave Benner, *John Locke's Appeal to Heaven: Its Continuing Relevance*, Tenth Amendment Center (Apr. 16, 2017) online at https://tenthamendmentcenter.com/2017/04/16/john-lockes-appeal-to-heaven-its-continuing-relevance/.

[68] Philip A. Hamburger, "Revolution and Judicial Review: Chief Justice Holt's Opinion in City of *London v. Wood*", 94 COLUMN. L. REV. 2091, 2134–36, 2153 (1994).

[69] J. C. Holt, *Magna Carta* (Cambridge University Press 3rd ed 2015).

[70] Philip Hamburger, The Magna Carta, Due Process, and Administrative Power (American Enterprise Institute, 2016).

[71] Sunstein, "There Are Two 'Major Question' Doctrines".

[72] See Breyer, "Judicial Review of Questions of Law and Policy (Takes the position that Congress is more likely to focus on major questions of law and courts should only defer to agencies for minor and interstitial matters, specifically for questions which can only be answered by an agencies specific expertise).

[73] Ibid.

[74] See *King v Burwell*, 576 US 473, 485–86 (2015) (stating that it was the Court's task to determine the correct reading of statutory language since a major question was at issue and Congress had not expressly assigned that question to the IRS).

[75] Breyer, "Judicial Review of Questions of Law and Policy".

[76] *Food & Drug Administration v Brown & Williamson Tobacco Corporation*, 529 US 120, 159 (2000)

[77] *West Virginia v Environmental Protection Agency*, 597 US __ (2022)

[78] *West Virginia v EPA*, No. 20-1530, at *3, June 30, 2022

[79] *West Virginia v Environmental Protection Agency,* 597 U.S. ___ (2022)

[80] No. 20-1530, at *4

[81] No. 20-1530, at *17

[82] *Utility Air Regulatory Group v EPA*, 573 U.S. 302, 324

[83] *Biden v Nebraska*, No. 22-506, at *2 (June 30, 2023)

[84] The Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003)

[85] *Lujan v Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)

[86] *Biden v Nebraska*, 13.

[87] Ibid.

[88] Ibid, 18.

[89] *MCI Telecommunications Corp. v American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994)

[90] *Biden v Nebraska*, 19 ("The affected statutory provisions granted the Secretary the power to "discharge [a] borrower's liability," or pay the remaining principal on a loan, under certain narrowly prescribed circumstances. 20 U.S.C. §§1087, 1087dd(g)(1). Those circumstances were limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school. See §§1087(a)-(d), 1087dd(g).")

[91] See 77 Fed. Reg. 59314

[92] *Biden v Nebraska*, 21 (“So as the Government concedes, "waiver"-as used in the HEROES Act-cannot refer to "waiv[ing] loan balances" or "waiving the obligation to repay" on the part of a borrower.”).

[93] *Biden v Nebraska*, 25, quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000).

[94] *Biden v Nebraska*, 29-30 (“"[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U.S., at (slip op., at 26). In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program.”).

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Breaking The Grounds For Those Growing up Behind Bars

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INTRODUCTION

This article aims to establish a federal regulation providing a cohesive framework for all States to abide by, regarding raising the juvenile age from 18 to 25 years and prohibiting life without the possibility of parole (LWOP) sentences for juveniles in all states. The U.S. Department of Justice defines a juvenile as a "person who has not attained his eighteenth birthday" and juvenile delinquency as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult."[1] However, there have been several studies conducted on the brain development of adolescents, showing that "the human brain continues to develop and mature throughout adolescence, even into the 20s."[2] Understanding the results of these studies is helpful in explaining how, in comparison to adults, youth are more susceptible to outside influences, including various risk factors, because their prefrontal cortex is not fully developed. The Department of Justice classifies risk factors into two categories of Early Onset (ages 6-11) and Late Onset (ages 12-14) with the following five domains: individual, family, school, peer group, and community.[3] Individual risk factors for the early onset and late onset ages include aggression, Low IQ, being male, general offenses, and problem (antisocial) behaviors.[4] Family risk factors for both age groups include low socioeconomic status/poverty, broken home, antisocial parents, and abusive parents.[5] School and peer group risk factors for both age groups include poor attitude, poor performance, weak social ties, and antisocial peers, whereas the community risk factors apply to late onset juveniles that can experience the following factors: neighborhood crime, drugs, and neighborhood disorganization.[6] When prosecuting juveniles, the Courts need to recognize these psychological factors to ensure the juvenile justice system brings positive outcomes and rehabilitation. This article, therefore, draws on such psychological and scientific research to evaluate the purpose behind raising the age of a juvenile delinquent.

Sentences such as LWOP for a juvenile have been described as "cruel, inhumane, and denies the individual's humanity."[7] The Court "holds that life without parole shares key characteristics with the death penalty,"[8] which was not decided as a violation under the Eighth Amendment standard of prohibiting cruel and unusual punishment for youths until 2012. In sentencing youth, the Courts also held in the 2021 decided case of *Jones v. Mississippi* that to sentence a juvenile to LWOP, "a separate finding of permanent incorrigibility is not required."[9] In other words, proving that the juvenile is incapable of reform is unnecessary because any child could be found to be permanently incapable of change. Corresponding with a previous

case, the U.S. Supreme Court decided that, "only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing" a life-without-parole sentence."[10] The rule of permanent incorrigibility does not allow for proper youth sentencing and does not consider the individual and their circumstances; instead, it enforces a punitive approach to dealing with juveniles in the justice system. This article draws on five significant court cases and relevant statutes imposed by states that have set standards for sentencing juveniles to reevaluate efforts in determining the unconstitutionality of sentencing juveniles to life without parole.

In critiquing the state of the law regarding juvenile sentencing, this article focuses on court case rulings, state statutes, and research articles that have contributed to the progression of the juvenile justice system. Part II of this article provides necessary background information about the juvenile justice system, including the fundamental flaws of sentencing juveniles and how these flaws should be addressed in hopes of altering juvenile sentencing. Part III goes on to discuss the impacts of prosecuting youths, ages 18 to 25, in adult courts, and how the system fails to serve justice under the rule of permanent incorrigibility. Part I relates the decision which declared LWOP sentences for juveniles in violation of the Eighth Amendment as a basis for understanding the importance of changing the age of a juvenile delinquent. This relation can be seen through five different cases that set the standards for trying juveniles. Lastly, Part V also analyzes the decision made in *Jones v. Mississippi* and provides my suggestion on how this decision should have been different. The Court's decision in this case is essential to understanding how reform efforts have been pushed aside and how the rules of permanent incorrigibility in correlation to sentencing youth should be reconfigured.

II. THE CREATION OF THE JUVENILE JUSTICE SYSTEM & ITS SYSTEMIC FLAWS IN SENTENCING JUVENILES

The United States established a separate court system meant to help young people "avoid future delinquency and mature into law-abiding adults."[11] However, despite these intentions, there are serious issues and challenges within the juvenile courts and treatment of juveniles that continue to be overlooked. These flaws in treatment and sentencing expose the need for change in who should be regarded as a juvenile and how they should be convicted. This part of the article provides an overview of the juvenile justice system, including the purpose of creating a separate justice system from adults for juveniles and the drawbacks of the juvenile justice system. It will go on to explain how this system fails to meet its intended purposes of "skill development, habilitation, rehabilitation, addressing treatment needs, and successful reintegration of youth into the community."[12]

A. The Intended Purpose and History of Creating a Separate Court System for Youths

In the late 1800s, in efforts to reform U.S. policies that pertain to youth offenders, the juvenile justice system was created.[13] At the time of its development, no formal process recognized the differences between crimes committed by children and adults. These early juvenile courts would establish a probation system and facilities used for rehabilitation, supplying youth with supervision, guidance, and education.[14] Additionally, the doctrine of *parens patriae* was implemented, which gave the government the power to intervene in families to protect children who may be at risk, turning the state into a 'parent.'[15] By 1925, only two states did not have a juvenile court or a probation service; these institutions operated less formally than the adult judicial system.

In 1966, the U.S. Supreme Court decided that "a juvenile is entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the juvenile court's decision."[16] However, it wasn't until 1967 that the U.S. Supreme Court determined that the "due process of law is the primary and indispensable foundation of individual freedoms."[17] This decision formally provided due process rights for juvenile offenders that were upheld by the constitutional standards guaranteeing due process.[18] By 1974, the Juvenile Justice and Delinquency Prevention Act was enacted, which provided a unified national program that dealt with the prevention and control of juvenile delinquency "within the context of total law enforcement and criminal justice effort" for the first time.[19] For states that participated in the Act, it was mandated to separate juveniles from having regular contact, in any institution, with adults who were convicted of criminal charges.[20] (*I reference the Juvenile Justice and Delinquency Act further in Section IV)*.

By the early 1980s, the Courts found that the offender's youth is a "mitigating circumstance,"[21] allowing the judge to consider the age of the juvenile before imposing sentences as harsh as the death penalty. Juvenile crime spiked between the late 1980s and mid-1990s, creating the "get tough on crime" legislature that included "term sentences longer than fifty years, life (with or without parole), or death."[22] The public perception of juvenile offenders changed drastically, and youth began to be seen as predators in need of punishment rather than rehabilitation. Most of the harshest punishments imposed during this time remain in place in the sentencing of juveniles.

B. The Juvenile Justice Systems Failure for Reform

Youth experience many injustices even prior to arrest, particularly with law enforcement encounters. Since the implementation of School Resource Officers (SROs), or law enforcement officers, in the 1950s, the rate of incarceration amongst youths increased and aided in the development of the school-to-prison pipeline. Schools have been an increasing gateway into the justice system for youths due to the zero tolerance policies, which set punishments for various behaviors that are one-size-fits-all approaches. These policies encourage the presence of police at schools, including harsh tactics like "physical restraint and automatic punishments that result in suspensions and out-of-class time."[23]

Furthermore, most juveniles brought into the criminal justice system have dealt with a variety of risk factors, such as "substance abuse, academic failure, emotional disturbances, physical health issues, family problems, and a history of physical or sexual abuse."[24] Failure to address and consider the risk factors that contribute to a youth's delinquency has generated further issues in the treatment of juveniles in the system. In the United States, "juvenile corrections institutions subject confined youth to intolerable levels of violence, abuse, and other forms of maltreatment."[25] For example, one report by the Annie E. Case Foundation found that almost one in every ten incarcerated juveniles had reports experiencing sexual abuse in juvenile corrections facilities.[26] Sexual abuse has become so prevalent in juvenile facilities that there were standards and guides made to help with the Prison Rape Elimination Act as a part of the Office for Juvenile Justice and Delinquency Prevention.[27] The implications of such abuse cause permanent trauma like causing post-traumatic stress disorders (PTSD) in juveniles.

A large percentage of juveniles within corrections facilities do not pose any risk to public safety but continue to endure the same psychological and physical traumas as if they were a safety risk. In 2007, out of 150,000 delinquent youths, only 12 percent were placed into a residential program by juvenile courts for delinquency offenses that the FBI defined as "violent index offenses," including murder, rape, robbery, or aggravated assault.[28] During this time in New York, 53 percent of youth, all of whom were under the age of 16 at the time of their offense, were placed into the state's juvenile corrections facilities for a misdemeanor. In Arkansas, only around 15 percent of the youths placed in the state's youth corrections facilities was involved in a serious felony crime, whereas 42 percent of the youths in the facilities were charged with misdemeanors.[29]

Despite posing a low-risk to public safety, juveniles greatly suffer following their sentencing in their education and future employment success. In 2019, a study conducted by the U.S. Office of Juvenile Justice found that, nationwide, the estimated school re-enrollment rate of youths returning from residential facilities was only around 33 percent.[30] Moreover, a study that tracked over 7,000 youths in 2008 from a nationally representative survey

found that "incarceration before the age of 17 reduced the likelihood of teens graduating from high school by 26 percent," which is a far higher rate compared to youths who were arrested or involved in the juvenile court but were not incarcerated.[31] Furthermore, the Sentencing Project examined a National Longitudinal Youth Survey, which found that incarcerated youths experienced "lower wages, fewer weeks worked, and less job experience by age 39," along with a reduced labor force participation rate.[32]

There is an alarming racial disparity within the pipeline, as African-American students are 3.5 times more likely to be suspended or expelled compared to their white classmates.[33] Between 2015-2016, of the 15 percent of U.S. students who were arrested or referred to police for "in-school behavior" 31 percent were Black children.[34] Beyond the school system, these racial disparities persist as African-American youths make up about 30 percent of juvenile arrests nationwide despite only representing 17 percent of the overall youth population.[35]

These records also highlight the importance of how geography plays a role in the treatment of juveniles in the system, where the laws vary by state.[36] Processing in juvenile courts varies by geographical location since juvenile court systems are country-based, resulting in the manifestation of geographic disparities in sentencing between due process or traditional orientation of procedural rights and court functions.[37] Juvenile courts in urban regions tend to place a greater emphasis on "formal, bureaucratized social control with a resulting due process orientation" that often leads to more severe dispositions. Whereas nonurban courts are more homogeneous and rely on informal social control methods, meaning less of an emphasis on procedural formalities such as the presence of a legal counsel in dispositions and traditional orientation that is associated with greater leniency in dispositions.[38] Typically, traditionally oriented courts stress the informal procedures that focus on the decision-making process for juveniles that would be in the best interest of the juvenile.[39] Depending on the geographic location of the juvenile court, a youth sentence can vary in severity, and the race of the youth can play a factor in how they are convicted as minority youth have a greater chance of "falling into police custody, getting pre detained, receiving a formal petition to juvenile court, and facing more severe outcomes postconviction,"[40] compared to white youths. The intersection between racial and geographic disparities has also found that in more urban-courts, non-white youths tend to receive an out-of-home placement at a higher rate than white youths, reinforcing the statistics of African American youths being overrepresented in the juvenile justice system.

With every state having different juvenile laws, racial disparities are more apparent as the average incarceration rate across the country exposed the fact that Black youths serving life without parole sentences well exceed LWOP sentencing to white youths.[41] State laws, policies, and procedures

within the juvenile justice system in the U.S. do not follow a cohesive framework since each state has its unique approach.[42] A federal standard that would require all states to work under the same framework, which wouldn't differ based on geographical location would sanction fairer grounds for sentencing juveniles and create the opportunity for decreasing unfair sentences based on race.

III. RAISING THE FLOOR: INCLUDING 18-25 YEAR OLDS UNDER THE TERM "JUVENILE"

As of 2020, forty-seven states have already amended laws that define "minors" for juvenile court jurisdiction as persons up to age 18.[43] Juvenile justice legislation and policymaking have evolved alongside a growing understanding of adolescent development and criminal culpability of youth.[44] Criminal culpability refers to the legal responsibility of an individual's criminal act, and it refers to the mental state, or the mens rea, that needs to be proven in order for the defendant to be criminally liable for a crime.[45] An increase in research and case laws that have attributed emotional and mental states, as well as physiological, and interpersonal immaturity to juvenile criminal behavior that spurred this shift in approaches to juvenile justice policy. Reform efforts, such as accountability for youth offenders without criminalization, have been made to avoid the "collateral consequences of adjudication" through public releasing of juvenile records.[46] This had shown to improve the juvenile justice system by encouraging youth to accept and learn responsibility while protecting their legal rights.[47] However, efforts to raise the age past 18 have not been as progressive. While certain states are making progressive movements towards raising the age of jurisdiction, the majority of states remain stagnant in their efforts.[48]

This section will utilize recent studies on the psychological development of the adolescent brain as it relates to the causation of juvenile delinquency. These studies will explain the purpose of raising the age of jurisdiction in juvenile courts to incorporate individuals up to 25 years of age. Furthermore, this section will discuss how raising the age would impact sentencing juveniles in criminal court. Part A of this section will provide background information about how juveniles differ from adults developmentally. It will elaborate on the factors that should be considered as justifications for raising the age to 25 in juvenile court jurisdiction. Part B will discuss changes states have made to the juvenile justice system while detailing detrimental impacts on juveniles if no changes were to occur.

A. Developmental Research on the Psychological Importance of Raising the Age

The U.S. justice system has recognized the fundamental differences between an adult offender and a juvenile offender since the early 1800s.[49] Under the Court's Eighth Amendment analysis on sentencing juveniles, the understanding that juveniles differ from adults directly impacts the constitutionality of juvenile punishment.[50] Just as the age of a minor is an essential mitigating factor to sentencing, the mental and emotional development of a youth defendant should be equally considered.[51] These developmental processes are supported by neuroscience research, which has shown that "key areas of the adolescent brain continue to develop until the mid-twenties."[52] Research has proven that youth have less impulse control compared to adults, and their brains are continuously developing and maturing until the age of 25.[53] The lack of maturity and the underdeveloped sense of responsibility within juveniles leave them more susceptible to negative influences such as peer pressure, which is a risk factor for youths since it prohibits proper character development.[54] Using neuroscience findings to understand the key differences between the adult and the adolescent brain has demonstrated how the lack of prefrontal cortex development in adolescents may have less criminal culpability compared to adults. The adolescent prefrontal cortex has not developed the full capacity to perform various vital decision-making processes, such as delaying and reflecting. Referring to "the lack of development limits the amount of time juveniles will think before they act," considering all options, contemplating risks and consequences, and obtaining enough social-emotional intelligence to be empathetic and not susceptible to peer pressures.[55]

One can further understand the susceptibility of the adolescent brain through studying their social-emotional and cognitive control brain systems The social-emotional system develops faster than the cognitive control system and controls the emotional state of the brain by increasing sensation seeking, reactive emotional responses (negative and positive), attentiveness to social cues, and the need for a sense of reward.[56]
Whereas the cognitive control system provides impulse control, emotional regulation, foresight and detection of options, planning and anticipation of outcomes, and resistance to stress and peer pressure.[57] Since the cognitive control system takes longer to develop and it provides regulation to the social-emotional system, there is a delay in the developmental process that controls impulses and allows for better decision-making, leading to juvenile delinquency acts.

B. Altering the Juvenile Age Jurisdiction & the Detrimental Impacts of No Change

Neuroscientific research forced the constitution to reconsider how youth are sentenced during prosecutorial procedures in the justice system. It also required the adoption of new rules and standards for law enforcement

when interrogating youth.[58] Studies have shown that 18 to 25-year-olds are "more developmentally similar to adolescents than to mature adults."[59] The outcomes of a system that does not effectively apply these studies and research that tells us about how to address the needs of youths and young adults will continue to lead to poor public safety.[60] Several states have taken progressive measures towards raising the age and applied research to aid youths in their developmental needs. For example, Vermont proposed a bill to eliminate life without parole as a sentence option and to "prohibit consecutive sentencing for individuals who were 25 years of age or younger at the time they committed the offenses."[61] States have mentioned those who committed offenses at the age of 25 or younger and how to proceed in sentencing youths.[62] Yet, most states continue to misguide youths in the system and sentence them as adults, which leads youth to more significant dangers in adult jails and prisons. They become five times more likely to be sexually assaulted, nine times more likely to commit suicide, and about 34 times more likely to recidivate after coming in contact with the adult criminal justice system.[63] Efforts to "raise the age without exception" have started to cause changes in state statutes with Vermont, Michigan, and New York progressing to increase the age cutoff. However, 47 states have not shown the same efforts.[64] The differences in sentencing statutes for juveniles across the United States have created inconsistencies in the treatment of juveniles, halting the progression of prohibiting LWOP for juveniles under the Eighth Amendment.

IV. COURT DECISIONS AND LEGISLATURE DEMONSTRATING CHANGES IN THE TREATMENT OF JUVENILES IN THE COURT SYSTEM

Under criminal law and procedures in sentencing, courts have described the following, under cruel and unusual punishment of youths: "life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and places in society, at odds with a child's capacity for change."[65] Recently, courts have been increasingly concerned with the Eighth Amendment, which prohibits cruel and unusual punishment in the "context of juvenile sentencing."[66] Within the past two decades, there have been several reform efforts in juvenile justice that have focused on reducing the use of institutionalization or excessive sentencing for juveniles.[67] The U.S. Supreme Court's decisions in *Roper v. Simmons, Graham v. Florida, Miller v. Alabama,* and *Montgomery v. Louisiana* broke new grounds under the Eighth Amendment for the sentencing of juvenile delinquents. However, *Jones v. Mississippi* (2012) regressed these recent efforts. Despite the growth in reform from several cases, the complete prohibition of life without parole sentences for juveniles continues to stall.

In this section, the article will highlight the importance of creating a cohesive federal standard for all state courts to follow that prohibits such sentencing. Part A of this section provides a brief overview of the unconstitutionality of sentencing juveniles to life without parole (LWOP) under the Eighth Amendment. Part B discusses the beginning of reform efforts in the juvenile justice system by the Juvenile Justice Delinquency Prevention Act (JJDPA) of 1974 and how it does not fully allow for monumental reform. Part C analyzes four Supreme Court cases that have broken the ground for reform efforts but were insufficient in altering the system.

A. Unconstitutionality of Life Without Parole Sentencing for Juveniles Under the Eighth Amendment

Under the Eighth Amendment, incarcerated juveniles have the "right to meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation," deemed by the courts under the parole review process.[68] While the Eighth Amendment provides protective clauses to all individuals, the Court has created a "special status for juveniles through doctrinal moves that had little precedent in its earlier Eighth Amendment cases."[69] Special statuses were made to understand that "children are different from adults,"[70] where severe adult sentences are seen as excessive for juveniles. However, sentences like life without parole are still allowed for juveniles because a judge can deem a juvenile incapable of change and rehabilitation and thus, eliminate the opportunities a juvenile has for possible reentry into society. Under the Eighth and Fourteenth Amendments, there is a requirement for the judge to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[71] Sentencing a juvenile to LWOP is similar to deciding that a juvenile offender will be a danger to society, requiring making a judgment that the individual is incorrigible- when a child is repeatedly disobeying the directions of their parents/ guardians/ legal custodians.[72] However, incorrigibility is inconsistent with youth as it "reflects an irrevocable judgment about an offender's value and their place in society," which is at odds with a child's capacity for change and rehabilitation.[73] Furthermore, the Eighth Amendment holds a precedent that "prohibits punishments that enact a mismatch between the culpability of a class of offenders and the severity of the penalty."[74] However, mandatory life without parole violates such precedents since it "poses too great a risk of disproportionate punishment" by placing a judgment on a youth that they are unable to be rehabilitated, which prevents them from the opportunity to change.[75]

B. Reform Efforts & Failures of the Juvenile Justice and Delinquency Prevention Act (JJDPA)

The Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974 supported delinquency prevention programs to "improve state and local justice systems, a juvenile planning and advisory system in all states; and operation of the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP)."[76] The OJJDP was meant to dedicate proper training, technical assistance, model program development, research and evaluation, and to support any/all state and local efforts.[77] The JJDP Act has the following four core requirements: deinstitutionalizing status offenders to focus on alternatives to detention facilities for juveniles, removing juveniles from adult jails and detention facilities, keeping certain juveniles separated from adult inmates in any institution, and helping states address and eliminate racial disparities within the juvenile justice system.[78] In 2002, the JJDP Act was reauthorized before it was amended in 2018, which made the Juvenile Justice Reform Act (JJRA) of 2018 into law.[79]

While the JJRA led to sizeable progress in juvenile reform and considerable improvements in juvenile treatment when the requirement of annual reporting of the OJJDP was put in place, there are several states that do not participate in the annual reporting: American Samoa, Connecticut, Nebraska, Texas, and Wyoming, including four eligible states and territories: New Mexico, New York, Puerto Rico, and the Virgin Islands.[80] Additionally, several eligible states were non-compliant with at least one of the core requirements of the act. If reform movements are to progress into courts and create long-lasting impacts in the justice system, all states should be required to follow the same government-mandated processes and legal standards. Federal regulations would create a cohesive framework for all states to accurately measure and enforce the law,[81] allowing for further reform. At the current federal level, the primary statute for juvenile justice is the JJDP, and since state laws govern juvenile justice, juvenile treatment falls within state police power with limited federal government interventions.[82] With expanding the statute to implement further federal regulations regarding equal state resources for juveniles, nationwide standard court procedures, and determination of incorrigibility of a juvenile, state laws would hold less governance over determining a youth's future and unify a structural framework on the federal level.

C. Relevant Supreme Court Case Rulings That Led to Reform Efforts in Sentencing

When sentencing a juvenile offender, "life imprisonment without parole is the second most severe penalty permitted by law."[83] Since, on

average, a juvenile will serve more years and serve a more significant percentage of their life in prison compared to an adult offender receiving the same sentence.[84] Decisions made in *Roper, Graham,* and *Miller* led to the expansion of the Eighth Amendment protections for juveniles in severe sentences.[85] This section will discuss these cases, as well as *Montgomery,* by analyzing how the court's decisions have shown reform efforts for sentencing juveniles and understanding that "children are constitutionally different from adults for purposes of sentencing."[86] However, despite each case's impact on state courts and changes in constitutional law, there is no cohesive framework for all states to follow, resulting in stagnant changes to the juvenile justice system.

a. Prohibition of Executing Juveniles Who Were Under 18 At the Time of The Crime Committed under *Roper v. Simmons*

Until 2005, the death penalty for juvenile offenders was still a possible sentence; although, imposition of the death penalty on offenders who were younger than 18 at the time they were charged with homicide was directly prohibited under international human rights laws, specifically the Abolition of the Death Penalty in International Law 87 (1997).[87] *Roper v. Simmons* made the imposition of the death penalty on juvenile offenders under 18 unconstitutional, rendering the sentence as prohibited not only under international human rights laws[88] This came around two decades after *Thompson v. Oklahoma,* which prohibited the "imposition of the death penalty on persons under 16" under the Eighth and Fourteenth Amendments.[89] In this case, the court held that the Eighth Amendment should be applied to all offenders under 18, considering the immaturity of youth under 16. The *Thompson* plurality recognized important factors such as juvenile vulnerability, the lack of control over their immediate surroundings, and the struggle to define their identities, which "means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[90] *Thompson* recognized these characteristics concerning juveniles under the age of 16, whereas *Roper v. Simmons* applied the same reasoning to all juvenile offenders under 18. The Court held that there was sufficient evidence that juveniles are "categorically less culpable than the average criminal," less culpable than an adult, based on the three reasons provided in *Thomas*—lack of maturity, vulnerability to outside pressures, and lack of character development.[91]

b. Prohibitions of Life Without Parole Sentencing For Non-homicide Crimes Committed By Juvenile Offenders under *Graham v. Florida*

Graham v. Florida also challenged the constitutionality of the cruel and unusual punishment clause under the Eighth Amendment. The courts deemed that the imposition of a life without parole sentence (LWOP) for juveniles denies the right of the defendant to reenter the community where "the State makes an irrevocable judgment about that person's value and place in society."[92] Ultimately, forming an inappropriate judgment about the juvenile's capacity for change and determining their incorrigibility as citizens prevents the ultimate goal of rehabilitation.[93] When *Roper v. Simmons* started to lead the way for sentencing reforms for juveniles, the Supreme Court ruled that "life-without-parole sentences for juveniles convicted of nonhomicide offenses are unconstitutional."[94] The Court also created a categorical rule against LWOP sentences for juveniles, as opposed to a case-by-case approach, since "existing state law protections did not prevent judges from imposing these sentences on juveniles."[95] The categorical rule in *Graham* would give juvenile offenders the proper chance to start over and demonstrate maturity and reform, which LWOP sentences do not allow for. While the ruling from this case created new grounds for life without parole sentences for juveniles, its holdings were relatively narrow and only applied to non-homicidal offenders, which still allowed for LWOP sentences to be implemented.[96] The Supreme Court held in *Graham* that "while the defendant need not be guaranteed eventual release from the life sentence, he must have some realistic opportunity to obtain release before the end of the life term."[97] The Court reasoned that it could not be determined whether a juvenile defendant, at the time of their sentencing, would be a danger to society for the rest of their life. Therefore, LWOP sentencing would deny the juvenile the chance to demonstrate their capacity to grow and rehabilitate. Nevertheless, the state does not need to guarantee the offender any eventual release.[98]

c. Judge Discretion to Determine if LWOP Sentencing is Appropriate for An Individual under *Miller v. Alabama*

The decision held in *Graham v. Florida* did not extend to prohibiting mandatory LWOP sentencing under the Eighth Amendment. The further progression of jurisprudence against juvenile LWOP sentencing was made possible in *Miller v. Alabama,* which held that "the Eighth Amendment barred the use of mandatory juvenile LWOP sentences."[99] *Miller* pushed the Court to analyze *Graham* beyond nonhomicide crimes, reassessing what the case had previously said about the child's moral culpability and the harm as a consequence of a LWOP sentencing. They came to a further understanding that "juveniles' incomplete physiological and psychological development made them less likely to be irredeemable."[100] In addition to the understanding of juvenile psychology provided in *Graham* regarding sentencing, *Miller* assessed how the background of the juvenile defendant should also be taken

into consideration during the sentencing process. The imposition of "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and their wealth of characteristics and circumstances."[101] Consequently, every juvenile will inevitably receive the same sentence, whether it be a child from a stable household or a child from a chaotic, neglectful, and abusive household. In *Miller*, it was evident that the crime committed was a "vicious murder." However, there was no examination of Miller's background during sentencing: physical abuse by his stepfather, neglect from his alcoholic and drug-addicted mother, multiple placements in foster care, and even his four suicide attempts, one of which occurred during kindergarten.[102] Hence, *Miller* advocates for a requirement in sentencing that considers the environment and background of the juvenile before sentencing them to LWOP.

Furthermore, the reasoning that the court presented in *Graham* is that each juvenile would receive the same sentence as the majority of adults that commit a similar homicide offense: LWOP. However, by doing so, the State would be imposing its harshest penalties on a juvenile. *Graham* and *Roper* indicate that when a juvenile confronts a sentence of life (and death) in prison, they are serving a greater sentence than that of an adult LWOP sentence.[103] Since juveniles who get sentenced as adults, which diminishes the idea of rehabilitation by denying their individual right to re-enter the community, they face greater consequences by spending more time behind bars compared to an adult.[104] *Miller* insists that sentencing ought to include the extent of the defendant's participation in the criminal act in accordance with how mitigating factors such as familial and peer pressures may have affected the defendant to act before considering a longer and harsher sentence than that of an adult.

d. Permitting Juvenile Homicide Offenders to Be Considered for Parole From *Miller* under *Montgomery v. Louisiana*

The conclusion in *Miller* about sentencing juvenile offenders left courts divided over whether the new constitutional law qualified for retroactivity.[105] *Montgomery v. Louisiana* addressed this divide by holding that "states are constitutionally required to give retroactive effect to new substantive rules and that *Miller* announced a substantive rule."[106] Allowing consideration for parole for juvenile offenders ensures that juveniles who committed crimes that purely reflected immaturity will not be serving a disproportionate sentence in violation of the Eighth Amendment. The Supreme Court, in this case, also stated that "*Miller v Alabama* did not impose a formal fact-finding requirement and added that a finding of fact regarding a child's incorrigibility is not required."[107] The decisions made

between *Miller* and *Montgomery* led to statute changes in several states. However, by giving Miller a retroactive effect, this decision did not set the requirement for states to relitigate sentences in all cases. Instead, it permitted states to remedy Miller's violations by allowing consideration of parole for juvenile homicide offenders.[108]

V. STEP BACK IN REFORM EFFORTS UNDER *JONES V. MISSISSIPPI* RULING & WHAT COULD HAVE BEEN ACCOMPLISHED

With the decisions made from the previous four cases, namely, *Roper, Graham, Miller,* and *Montgomery,* reform efforts have been made to rethink the treatment of juveniles in the justice system. This created a momentum for change, which was later undermined by *Jones v. Mississippi.* Part A of this section introduces the newest case, *Jones v. Mississippi,* regarding a juvenile's LWOP sentence following the four previous case holdings. Part B then discusses how this case has created a step back in reform efforts and how the ruling could lead to confusion. Lastly, Part C explains the importance of all states working together under the same federal regulation following the decision in *Jones.*

A. The Breakdown of *Jones v. Mississippi*

Following the decisions from *Miller* and *Montgomery,* thousands were considered eligible to apply for a new sentence. Brett Jones was one of those thousands. Despite the progress he had made while imprisoned, Mississippi decided to reissue his LWOP sentence in 2015. Initially, the Court's "precedents did not require an on-the-record sentencing explanation of the sentence given to Jones with an implicit finding of permanent incorrigibility.[109] Following the decision of *Miller v. Alabama,* in which there was no requirement to make a separate finding of permanent incorrigibility before sentencing to LWOP, *Montgomery* did not add to the requirements for such sentences.[110] *Montgomery* did not interpret *Miller* to require a finding of fact on a particular juvenile's permanent incorrigibility." Instead, *Montgomery* explained that the Supreme Court ultimately leaves it to the states to develop and implement constitutional restrictions on criminal sentencing.[111] However, *Montgomery* did express that while *Miller* did not institute a formal fact-finding requirement during sentencing, it does not allow states to freely sentence a youth "whose crime reflects transient immaturity to life without parole."[112] Due to the lack of a fact-finding requirement, *Miller* did not find a constitutional distinction between children whose crimes reflect transient immaturity and irreparable corruption. However it distinguished transient immaturity as a separate category from

juveniles that are irreparably corrupt, or permanently incorrigible. Furthermore, *Montgomery* expressed that the decisions in *Miller* did more than require a sentencer to consider the age and distinctive attributes of the juvenile offender. It rendered that the "sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'"[113]

Under the Eighth Amendment, a sentence of LWOP is disproportional for a juvenile whose crime is a reflection of transient immaturity since only those who are found to be permanently incorrigible may receive such a sentence. Since, for a juvenile, LWOP is the harshest penalty imposed by law, judicial review of such a decision can be enhanced "by the presence of fact findings on each *Miller* factor and on the ultimate question of whether the juvenile's crime reflects transient immaturity or permanent incorrigibility."[114]

In the case of *Jones*, the defendant was fifteen years old when he was convicted of murdering his grandfather after stabbing him, and received a LWOP sentence in 2004. *Jones* argued that the circuit court's decision on his sentencing did not comport with *Montgomery* and *Miller* because the court "did not make an express finding that Jones is one of the rare, permanently incorrigible juvenile offenders for whom life without parole is a proportionate sentence under the Eighth Amendment."[115] Mississippi should have exercised its authority to impose a formal fact-finding requirement for the decisions in *Miller* since Jones had not been found to be permanently incorrigible, yet he received a life without parole sentence.

B. Troubling Regression of Previous Court Rulings

Jones did not fully take into account the previous rulings in juvenile cases that addressed the issues of rehabilitation and the constitutional status of children under the age of 18. The Supreme Court had retreated in its efforts to evolve towards integrating developing research on juvenile crime by not regarding Jones's long history of parental neglect, abuse, and the environment of crime, all of which had influenced him to commit a juvenile homicide crime.[116] The broader legal concern with the decision in *Jones* stemmed from the lack of finding of permanent incorrigibility in Jones before resentencing him to life without parole with no regard for evidence indicating the possibility for rehabilitation while incarcerated. Jones had obtained a GED at the juvenile detention facility while performing janitorial services and staying out of gang activities by keeping to himself while incarcerated.[117] In doing so. Jones showed he had the potential for rehabilitation, to which a permanently incorrigible juvenile would not have had the capability to portray such change.

The case raised questions in the juvenile justice sentencing process regarding how a sentencing judge could "lawfully impose such a sentence without actually deciding if the juvenile before the court is permanently incorrigible."[118] Whereas the Supreme Court had previously ruled that LWOP sentences should only be reserved for rare cases of permanently and irreparably corrupted youth offenders, their ruling in *Jones* held that trial courts are not required under the Eighth Amendment to make such a distinction.[119] This decision created a drawback from prior efforts of sentencing reform in the justice system, which worked towards disallowing life sentences.[120]

C. Failure In Attaining Justice & What Should Have Been Done

State supreme courts have shown various interpretations of constitutional laws, leaving gaps in the understanding of the Eighth Amendment and the use of LWOP sentences. This case was an opportunity to enforce the prohibition of life without parole sentences for juveniles under the Eighth Amendment clause of cruel and unusual punishment. Poor justification for resentencing Jones and labeling him as permanently incorrigible has held the juvenile justice system back from a movement toward reform. Contrary to the holdings from *Miller* and *Montgomery,* without additional safeguards and considerations for youth offenders, *Jones* reaffirmed the permission to sentence juveniles to life without parole.[121] Whereas Alabama and Louisiana courts have generally made progressive decisions that aid in the prevention of such sentences, other state courts continue to have children sentenced to life without the possibility of parole.[122] If the decision in *Jones* had been altered to find that an explanation of permanent incorrigibility before sentencing or a determination of permanent incorrigibility is required, this would have taken into account research on the adolescent development process that previous cases had touched upon. However, to the Restore Justice Foundation, which is an organization that examines the extreme sentences that are imposed upon youth in Illinois, *Jones* did not result in such a ruling, instead putting a focus back on states, forcing them to "look at their systems and decide if they're fair and decide if they're moral."[123] Under the current justice system's disunified framework, proper actions to further reform efforts for future cases and sentences are not possible without a federal statute requirement.

VI. CONCLUSION

Unlike anywhere else in the world, the United States's criminal justice system has legalized sentencing an individual under the age of 18 to life in prison, even before that individual can "legally buy alcohol, can

legally buy cigarettes, can legally rent a car, [and] can legally drive a commercial vehicle across state lines."[124] The court's decision of condemning them to die in prison with no possibility of review makes such a sentence seem constitutional. It is time for all states to work under the same sentencing and juvenile justice system framework to permanently ban LWOP sentences. Individual efforts to push for reform have not broken enough ground for substantial and long-term change. Today, there are still three states that do not have Raise the Age laws: Georgia, Wisconsin, and Texas.[125] In these states, 17-year-olds can be considered adults in the eyes of the juvenile court and tried as such. Developments in research and studies that show the importance of raising the age must be considered and adapted into the sentencing standard for all states to abide by. Until federal regulation is implemented that requires all States to adhere to developmental research, recognition of mitigating factors, and proper sentencing of juveniles, progress will not break enough ground for justice to occur.

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Taking Climate Change to Court: How A Human Rights Framework Can Help Plaintiffs Overcome Power Asymmetries in Climate Litigation

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Abstract

This paper addresses a critical gap in the existing body of legal scholarship on climate change by examining the often-overlooked issue of power asymmetries in climate litigation. Power asymmetries caused by economic imbalances, political challenges, and legal limitations limit the potential of legal actions to adequately address the needs of the world's most vulnerable populations in the face of climate change. Despite these asymmetries, some climate litigation has proven successful for vulnerable plaintiffs, including those in the Global South and young people. Through an analysis of numerous recent climate cases, this paper identifies a recurring trend: successful cases often leverage human rights and international law frameworks alongside domestic legal considerations. The incorporation of the human rights framework in climate litigation emerges as a potent strategy for addressing three power asymmetries that impact climate litigation: (1) asymmetries in Global South cases, (2) jurisdictional and procedural disparities, and (3) intergenerational asymmetries. This paper underscores the importance of utilizing a multidimensional legal approach to counteract power asymmetries and enhance the efficacy of climate litigation, ultimately fostering a more equitable and impactful legal response to the challenges posed by climate change.

I. Introduction

For decades, legal scholars have studied how communities experience and contribute to climate change differently due to differences in power, wealth, and geography. Many scientific and legal studies have demonstrated how the countries most responsible for climate change fail to provide an adequate remedial response, leaving nations with minimal contributions to the crisis to endure the majority of its repercussions. To increase responsibility for climate change and limit future emissions, citizens and legal groups across the world have brought thousands of cases in recent decades that fall under the category of "climate litigation."

According to the Sabin Center for Climate Change Law, climate litigation refers to "cases that raise material issues of law or fact relating to climate change mitigation, adaptation or the science of climate change." The body of global climate litigation has doubled in the past five years and encompasses diverse issues and angles.[1] Plaintiffs have brought suits addressing issues including fossil fuel infrastructure projects (*EarthLife Africa Johannesburg, Centre for Oil Pollution Watch, Milieudefensie)*, government inaction on climate change (*Iten ELC Petition, Leghari, Urgenda)*, deceptive and misleading advertising (*Greenpeace Canada v Pathways Alliance, Carbon Market Watch v FIFA)*, improper risk assessment and planning (*Leghari),* and breaches of human rights obligations (*Urgenda, Future Generations).* The total number of climate change cases around the world now amounts to over 2,000, with a quarter of the cases filed between 2020 and 2022.[2] In some recent cases, plaintiffs have achieved the relief they sought, including decisions that changed national policy and fossil fuel infrastructure development. Climate litigation does not always result in a decision in favor of plaintiffs, but every case serves an important purpose. Cases can set legal and procedural precedents, validate climate science in a legal framework, and increase international attention on the harms climate change is causing today.

The body of legal scholarship around climate change has largely overlooked a key issue: how power asymmetries manifest in climate litigation. Due to power asymmetries, most climate cases are brought only by those with

financial resources, power, and time, thereby diminishing the potential to address the needs of the world's most vulnerable.[3] Some climate litigation succeeds despite these power asymmetries, and it is important to analyze the causes of this success so that it can be replicated. In my analysis of recent climate cases, I found that successful cases often leverage human rights and international law frameworks alongside domestic legal considerations. The human rights framework can be a valuable tool for remedying three pervasive power asymmetries in climate litigation: (1) asymmetries in Global South cases caused by judicial and political instability (2) jurisdictional and procedural asymmetries, and (3) intergenerational asymmetries.

II. Background on climate litigation and human rights

Successful climate litigation often relies on human rights treaties and international legal theories that link the damages caused by climate change to specific rights-based violations. To analyze how the human rights framework has been deployed in climate litigation, I will first provide some background on the development of human rights and international law in relation to climate change.

The foundational document of the human rights framework is the 1948 UN Declaration of Human Rights (UDHR), a non-binding document intended to set a global standard of human rights and the protections they provide. The UDHR does not mention climate change, but it provides important framing around equality and human rights that set the precedent for future climate law and litigation. It states, for example, that "all are entitled…to equal protection before the law" and has the "right to an effective remedy…for violat[ions of] fundamental rights."[4] The UDHR, as a seminal human rights document, emphasizes the principle of equality and the concept of universal human rights. By asserting that all individuals have equal rights, the UDHR lays the groundwork for arguing that disparities in the impacts of climate change are violations of these equal rights.

More recently, UN resolutions began to more directly link justice, human rights, and climate change, a combination that is a key component of

rights-based climate litigation. The UN Framework Convention on Climate Change (UNFCCC), a 1994 treaty designed to stabilize greenhouse gasses through international collaboration, serves as a foundational document of international climate legal theory. The treaty is a binding "framework" treaty that lays out broad goals, and it was designed to be supplemented by protocols to update the treaty and set internationally monitored emissions limits, a tool that was utilized in successive decades. The UNFCCC did not mention human rights but called for Parties to "protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities" (CBDR).[5] The concept of CBDR, enumerated in the UNFCCC, laid the legal foundation that more powerful, developed countries have a larger share of the burden of climate change and a responsibility to protect future generations from their climate impact.

The Paris Agreement of 2015 furthered the linkage between human rights, responsibility, and climate change and strengthened rights-based arguments in climate litigation. It requires countries to submit nationally determined contributions (NDCs) that publicly communicate how they intend to curb their emissions, with the goal of significantly limiting global CO2 concentrations and global warming in the coming decades.[6] The agreement took a direct rights-based approach, requiring all parties to "consider their respective obligations on human rights, the right to health, the rights of indigenous communities…and people in vulnerable situations" in determining their NDCs.[7] By framing the responsibility to protect human rights, indigenous communities, and vulnerable people as an *obligation* on parties, the agreement solidified the possibility for rights-based climate change legal arguments.

The Paris Agreement also reiterated the UNFCCC connection between higher emissions and increased responsibility, a key element of rights-based climate litigation. The Agreement declared that every party's NDCs must "reflect its common but differentiated responsibilities" to "formulate and communicate long-term low greenhouse gas emission development strategies."[8] Tying CBDR into the NDC mechanism provided one of the most concrete methods yet for connecting the responsibility to remedy climate change with international legal obligations to lower emissions.

In 2022, the UN General Assembly further validated rights-based climate arguments by declaring a universal human right to a "clean and healthy environment."[9] This explicit right, grounded in international human rights law, gives plaintiffs more potential to bring cases that link climate policy to their direct injuries and violations of their human rights.

From the UDHR to the declaration of a right to a clean and healthy environment, the connection between rights and climate change has grown increasingly concrete and explicit over the past few decades. As this linkage has grown stronger, the use of rights in the context of climate litigation has gained more normative power within the international community, making it more legally impactful on an international scale. This shift, often referred to as a "rights turn," is characterized by cases increasingly relying on rights-based arguments to challenge governments and corporations on behalf of larger groups of people.[10] Prompted by developments in international and human rights law, the rights turn in climate litigation helps explain some of the recent successful cases, particularly their ability to challenge government policy in the courts and to overcome power asymmetries.

III. Power asymmetries and the human rights remedy

Given the recent growth of climate litigation, it is important to examine how power asymmetries impact plaintiffs' access to courts and the remedies that judges assign. In the realm of climate change, inequality and asymmetry are intricately linked; those with the fewest resources bear the brunt of climate change impacts and face the greatest challenges accessing theinstitutions that could alter climate policy for their protection. The trajectory of climate litigation hinges on grasping how power asymmetries and inequality have played out in recent cases, and how litigants have leveraged the human rights framework to overcome these obstacles.

A. Asymmetries in the Global South

Limitations on locations in which plaintiffs can bring cases create power asymmetries between plaintiffs in developed countries (the "Global

North"), and those in underdeveloped or developing countries (the "Global South"). Out of the 2,000 climate-related cases worldwide, just 88 have been in the courts of the Global South, 46 of which were filed after 2018.[11] Of these 88 cases, 28 were filed in Asia Pacific and 13 were filed in Africa, and only 13 cases have been brought in the Global South seeking to change domestic climate policy.[12] The immediacy of issues beyond climate change in the Global South often makes it difficult for litigants to bring mitigation-focused cases against governments. Many Global South countries must focus on immediate threats including poverty reduction, safe drinking water, war, famine, and agricultural conditions. While many of these issues will likely be worsened by climate change in the near future, climate change litigation is a luxury that many countries in the Global South cannot afford.[13]

A human rights framework would help to combat power asymmetries created by judicial and political instability in the Global South. Two cases, *Leghari v Federation of Pakistan* and *Centre for Oil Pollution Watch v NNPC*, demonstrate how human rights and international law can favor plaintiffs and combat power asymmetries. The success of the rights-based framework in the Global South may be due to the fact that vulnerable populations in the Global South can better show the immediate impacts of climate change on their lives, and many countries in the
Global South are open to incorporating human rights into domestic law (Rodriguez-Garavito,
Setzer, 3).[14,15]

Leghari v Federation of Pakistan, a 2015 public interest case, demonstrates that by utilizing human rights legal theory on a domestic level, courts can combat power asymmetries and inequality in the Global South. Asghar Leghari, a Pakistani farmer, brought a case against Pakistan's Federal Government and the Government of Punjab to "address the challenges and meet the vulnerabilities associated with climate change."[16] Leghari argued that by failing to carry out the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy, the government had threatened citizens' right to life and caused immediate damage to Pakistan's food, water, and energy security.[17] By directly linking the right to life to

domestic energy security, Leghari compelled the courts to address the global issue of climate change on a local level. Utilizing a rights-based framework rooted in Pakistan's constitution, the court determined that "fundamental rights, like the right to life (article 9) which includes the right to a healthy and clean environment and right to human dignity (article 14) read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine."[18] The court's use of international principles including sustainable development, equity, and equality to strengthen rights already rooted in Pakistan's constitution helped Leghari's case gain domestic legitimacy and overcome power asymmetries in accessing the court system.

The *Leghari* court explicitly acknowledged power asymmetries in litigation, resulting in a decision favorable to the plaintiff that strengthened climate adaptation policy. The court determined that "climate change is a defining challenge of our time" and "on a legal and constitutional plane, this is a clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court."[19] By acknowledging power asymmetries, the court helped ensure that those most impacted by climate policy have a voice in the court to address their claims.

Three years after Leghari filed his case, Pakistan had made significant strides toward strengthening its climate adaptation policy. The court noted that "during the period from
September 2015 to January 2017 66% of the priority actions from the Framework for Implementation of Climate Change Policy have been implemented."[20] Pakistan did not improve its climate policy solely as a result of *Leghari*, and courts are not designed or permitted to overtake the role of elected legislators. Nevertheless, the case's success in addressing power imbalances in the Global South, utilizing the human rights framework, and aligning domestic climate policy with Pakistan's declared intentions underscores the efficacy of implementing rights-based legal theory at the domestic level.

Furthermore, cases in the Global South have found some success in utilizing the human rights framework to bring cases against corporations that bear climate change responsibility. In *Centre for Oil Pollution Watch v NNPC,* a 2018 Nigerian case, the Centre for Oil Pollution Watch (COPW) won a case against the Nigerian National Petroleum Corporation (NNPC), a government-established company, arguing that an oil spill allegedly caused by NNPC's negligence contaminated two streams. The streams served as major sources of water for two communities, so COPW argued that the oil spill damaged natural resources and threatened human health.[21] Though the impetus for the case was restricted to negligence and statutory interpretation regarding the oil spill, the Supreme Court of Nigeria utilized the human rights framework to broaden the scope of the case and consider power asymmetries and the threat climate change poses to vulnerable communities.

Within an international human rights framework, the court determined that the State and the defendant owe a duty to protect citizens' environmental rights against powerful corporations. The court ruled that under article 24 of the African Charter on Human and Peoples' Rights, to which Nigeria is a signatory, and the Nigerian Constitution, the citizenry have a protected "fundamental right…to a clean and healthy environment to sustain life."[22] The court then went a step further, writing that "the State, including the defendant, a Statutory Corporation, owes the community a duty to protect them against noxious and toxicant pollutants and to improve and safeguard the water they drink, the air they breathe, the land and forest, including wildlife in and around the two rivers, they depend on for their existence, living, and economic activities."[23] The court rooted this duty to protect in international law, writing that "It is the notion in international law that gave rise to the principle of state responsibility to prevent pollution in its own territory."[24] By acknowledging the legitimacy of the human rights framework within domestic law, the court made environmental protection a guaranteed right, thereby going far beyond the scope of a single oil spill.

The COPW case also directly acknowledged the impact of power asymmetries in the court and determined that public interest litigation is a viable method for mitigating them. The court found that "the communities affected by the spillage leading to the environmental degradation may not muster the financial muscle to sue and if good spirited organizations such as the plaintiff is

denied access to sue, it is the affected communities that stand to lose."[25] To remedy the asymmetry caused by lack of "financial muscle," the court decided to "relax the application of the rule of *locus standi* in cases founded on public interest litigation, especially in environmental issues" since "no particular person owns the government."[26] This means that the court grants legal standing to plaintiffs automatically, without having to meet certain preconditions. By allowing plaintiffs to bring a public interest environmental case, granting them standing, and siding on their behalf, the Nigerian court somewhat remedied power imbalances that often limit the ability of powerless plaintiffs to bring climate cases in the Global South.

The decisions on behalf of plaintiffs in *Leghari* and *Centre for Oil Pollution Watch* demonstrate that the human rights framework can be a viable method for remedying power asymmetries in Global South countries where justice may otherwise be out of reach. The human rights framework can be an effective method for broadening the scope of cases, challenging corporations and governments, and solidifying the place of environmental rights and protections within domestic law.

B. *Justiciability asymmetries*

Another major power asymmetry that can negatively impact climate litigation is justiciability, whether a court is capable of deciding on a matter. In climate change cases, three justiciability arguments are commonly raised by defendants or courts.[27] The first is the causal chain argument, suggesting that the injuries caused by climate change are too far removed from the initial sources of pollution to assign responsibility to individual companies for a global phenomenon. The second argument is redressability: defendants and courts often argue that even if specific injuries could be linked to specific emissions sources, providing a remedy to halt climate change would exceed judicial mandates. The third argument involves the separation of powers: it posits that, given the vast economic and industrial policy questions raised by climate change, such issues are beyond the courts' capacity and should be addressed by legislatures.[28]

Justiciability varies by country, but generally, it poses a significant challenge to plaintiffs, often leading to the dismissal of compelling cases and

disproportionately favoring defendants seeking to avoid responsibility. The complexities of climate change, including long time horizons, complex causation, and scientific intricacies, make proving causation and redressability difficult for plaintiffs. In countless climate cases, defendants and courts have employed justiciability arguments to dismiss or attempt to dismiss cases, thereby reinforcing power asymmetries and perpetuating a precedent of judicial non-action. However, the human rights framework has offered some relief from these justiciability challenges, as illustrated in the cases *Urgenda Foundation v. State of the Netherlands* and *Milieudefensie et al. v. Royal Dutch Shell plc.*

Urgenda Foundation v State of the Netherlands was a 2015 case brought by a Dutch environmental NGO representing 886 citizens to challenge the Dutch government's failure to significantly limit CO2 emissions to protect Dutch citizens from the harms of climate change.[29]In *Urgenda,* the Dutch government tried to get the case dismissed via separation of powers, redressability, and causation arguments, though their arguments failed to convince the court. The defendants argued that the remedy the plaintiffs were seeking, a court order mandating that the Netherlands limit greenhouse gas emissions, is of great economic and political importance and therefore belongs in the hands of Dutch elected leaders rather than unelected judges.[30] The government also argued that Articles 2 (right to life) and 8 (right to a private life and family life) of the European Convention on Human Rights (ECHR) do not compel individual states to offer protection against climate change since climate change risks are dispersed and not particularized.[31] The defendants argued that the environment was not directly protected under the ECHR and therefore not applicable to the plaintiffs.[32]

Through the strategic use of international human rights law, the *Urgenda* court rejected the justiciability arguments raised by the defendants, ensuring that the case could proceed in court. In response to the Dutch government's claim that the plaintiffs lacked standing and that the ECHR did not apply to the case, the court drew on the UNFCCC to argue that each state has "common but differentiated responsibilities" to do its part even though climate change is a global issue.[33] Through the "no harm principle" of international human rights law, the court reasoned that the Netherlands is obligated to prevent activities in its borders that may cause cross-border environmental harm.[34] The court also

invoked human rights principles including the doctrine of hazardous negligence, the duty of care, the principle of fairness, and the precautionary principle.[35] The court's use of the UNFCCC and international human rights law principles helped mitigate the Dutch government's power asymmetry by emphasizing the Netherlands' responsibility to respond to climate change.

The *Urgenda* decision, issued in 2019, is a landmark of climate change law. Under human rights legal theory and domestic law, the Netherlands Supreme Court sided with the plaintiffs and mandated that the Netherlands reduce greenhouse gas emissions to 25% below 1990 levels by 2020 in order to be in line with its NDC under the Paris Agreement.[36] By utilizing a rights-based approach to jurisprudence rather than solely relying on domestic law, the plaintiffs overcame justiciability asymmetries regarding causation and redressability and altered domestic policy without violating the separation of powers.

In 2019, Dutch environmental groups brought another case in the Netherlands, *Milieudefensie et al. v Royal Dutch Shell (RDS) plc.* to try to apply the duty of care and rights-based arguments from *Urgenda* to RDS, a multinational company. When the plaintiffs argued that as a major emitter, RDS owed a duty of care to reduce its greenhouse gas emissions under Article 6:162 of the Dutch Civil Code and Articles 2 and 8 of the ECHR (the same ECHR clauses used in *Urgenda*), RDS utilized causal chain and redressability arguments to try to get the case dismissed.[37] In its defense, RDS argued that the plaintiff's claims were too broad to fall within the scope of ECHR and that "under Articles 2 and 8 of ECHR, states have wide discretion to determine which measures to take and courts must not pre-empt that prerogative in the adjudication of the present dispute."[38] RDS utilized separation of powers arguments, writing in its defense that "states have already drawn up legislation aimed at regulating [climate change]" and "it is not for the courts to pre-empt the States' considerations in that regard by imposing specific measures in the context of private law litigation such as in the case at hand".[39] Through redressability, causal chain, and separation of power arguments, RDS attempted to get the case dismissed, but they could not overcome the power of the human rights framework and the precedent set by *Urgenda* regarding responsibility for emissions.

The court ultimately accepted the legitimacy of Milieudefensie's rights-based arguments and determined that RDS owes Dutch residents a "duty of care" to reduce CO2 emissions regardless of the actions the state is taking on climate change. The court concluded that even though RDS cannot solve climate change on its own, "this does not absolve Shell of its individual responsibility to do its part," reflecting the CBDR framework of the UNFCCC and Paris on a corporate level.[40] Building on the *Urgenda* precedent, the court also found that Article 2 and Article 8 of the ECHR, the right to life and the right to a private and family life, include protection against climate change.[41] Through the duty of care and human rights obligations, the court mandated RDS to reduce its emissions across its energy portfolio by 45% by 2030, relative to 2019 levels.[42] It acknowledged that this ruling might require RDS to "forgo new investments in the extraction of fossil fuels or will limit its production," thereby demonstrating the power of the human rights framework to influence the economic restrictions of a private company.[43] RDS recently appealed the decision, and the case is pending.

Mileudefensie serves as an example of a case against a corporation, rather than against a government like in *Urgenda,* in which plaintiffs have so far successfully utilized the human rights framework to challenge corporate emissions within their country's borders.

The decisions in *Milieudefensie* and *Urgenda* demonstrate the power of the human rights framework to overcome justiciability asymmetries. The human rights framework strengthened both cases because it required the Netherlands to acknowledge the impacts of its climate policy on a local and national level. In general, it is understandable that many courts utilize justiciability and separation of power arguments to send cases to other branches of government. Energy and environmental policy should be made by legislatures, as they represent the people and generally have expertise on policy issues. Yet as the effects of climate change worsen, and identifiable individuals can show that they are suffering emotional, financial, and physical harm, plaintiffs deserve redress in the courts just like any other injured party. And if plaintiffs can show, in particular, that their own government's actions violate a recognized human right (or a right under domestic law), their claim for relief is even stronger. Most plaintiffs bring climate litigation precisely because the executive and legislative

branches failed to protect them against climate change. When courts accept the justiciability of a case based on the human rights framework, they break a cycle that tends to favor the interests of the powerful over the vulnerable.

It should be noted, though, that *Urgenda* and *Mileudefensie* succeeded in no small part due to well-funded NGOs, functioning court systems in the Global North, and domestic law that incorporates human rights law. As underscored in part one, much of the Global South lacks these privileges, presenting another potential hurdle to plaintiffs in the Global South toward bringing cases as impactful and far-reaching as *Mileudefensie* and *Urgenda*. Nonetheless, these two cases demonstrate the potential of human rights law to overcome deeply-rooted power asymmetries and hold major governments and companies accountable for climate change.

C. *Asymmetries that favor current interests over future generations*

Climate litigation faces yet another power imbalance: while future generations will bear the brunt of climate change's effects, they lack representation in court. To remedy this intergenerational asymmetry, young people have recently begun bringing cases to argue for their immediate future and the future of their direct descendants who cannot stand in court. According to the Intergovernmental Panel on Climate Change, without strengthening climate policies, greenhouse gas emissions could lead to a median global warming of 3.2 degrees Celsius by 2100, far surpassing the 1.5-degree goal set by the Paris Agreement.[44]At these global temperatures, many parts of the globe, especially in the Global South, will be ravaged by drought, hurricanes, famine, and sea level rise severe enough to render them uninhabitable.[45]Young people alive today, many of whom risk living on an inhospitable planet, come to the courts in desperation for themselves and their children, yet often, justice systems still tell them to wait.

The human rights framework can be a viable method for remedying intergenerational asymmetries and giving children a stronger voice in climate litigation. Three recent cases, *Sacchi, et al v. Argentina, et al, Future Generations v. Ministry of the Environment and Others*, and *Held v. Montana,*

demonstrate that the human rights framework has the potential to remedy intergenerational asymmetries.

A 2019 rights-based case brought before the UN Committee on the Rights of the Child, *Sacchi, et al v. Argentina, et al.,* demonstrates the power of the human rights framework to overcome intergenerational asymmetries and the shortcomings of the framework at the UN level. In *Sacchi,* sixteen young people filed a petition alleging that Brazil, Argentina, France, Germany, and Turkey had violated their rights under the United Nations Convention on the Rights of the Child (CRC) by failing to reduce greenhouse gas emissions.[46] The petition was filed with the Committee on the Rights of the Child (the "Committee"), and the young plaintiffs sought a declaration that state parties to the convention had violated their rights and that state parties have a responsibility to address climate change mitigation and adaptation. The petitioners argued that "the climate crisis is a children's rights crisis" and the state parties had failed to uphold their obligations under the Convention to "(i) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (ii) cooperate internationally in the face of the global climate emergency; (iii) apply the precautionary principle to protect life in the face of uncertainty, and (iv) ensure intergenerational justice for children and posterity."[47] The petitioners also sought to hold the parties to their commitments under the UNFCCC, the Kyoto Protocol, and the Paris Agreement, noting that no party had "reduced carbon emissions enough to avert further disaster and widespread human rights violations."[48] By connecting the rights of children to a habitable climate within the UN framework, the petitioners highlighted their unique vulnerability and the commitments that state parties have made to protect them under international law.

In 2021, the Committee deemed the children's claims inadmissible, thereby reinforcing an intergenerational power asymmetry that fails to acknowledge the urgency of the climate crisis for children. The Committee argued that the case may not be heard until the petitioners "exhausted domestic remedies."[49] Exhausting domestic remedies would take time, financial muscle, and global coordination, which is something to which few young people have access. For petitioners from countries most vulnerable to climate change,

especially those from Small Island Developing States (SIDS), waiting years or decades is not an option, as some SIDS will be underwater within decades. [50]

The case did set three important precedents for linking children's rights and climate change, creating the possibility for remedying intergenerational asymmetries in future cases. First, the Committee found that the potential harm of the States' actions regarding their carbon emissions was "reasonably foreseeable to the States." This legal precedent has the potential to be used in future cases to challenge arguments about justiciability, causal chain, and attribution. Second, the Committee determined that States' carbon emissions contribute to climate change beyond a state's individual borders. This principle of "transboundary harm" can be utilized in future children's rights cases to hold states accountable for emissions that harm young people beyond their borders. Third, the Committee validated that the youth had experienced "significant harm" due to climate change and had sufficient facts to establish a violation under the CRC due to States' carbon emissions. By holding States accountable to their climate and children's rights obligations under international law, the Committee strengthened the applicability of the human rights framework to future cases at an international level.[51]

The Committee's multi-layered determination regarding inadmissibility, transboundary harm, attribution, and children's rights demonstrates that on an international level, cases have the potential to both mitigate and reinforce intergenerational power asymmetries. The CRC lacks enforcement mechanisms that are comparable to domestic law, so the Committee's requirement for petitioners to exhaust domestic remedies may reflect a recognition of its own limitations.

Recent domestic cases have shown some signs of success in validating children's rights in the context of climate change and mitigating some intergenerational asymmetries.

In *Future Generations v Ministry of the Environment and Others,* a 2018 Columbian case brought by 25 youth plaintiffs, plaintiffs demonstrated how a rights-based approach can be an effective method for remedying intergenerational asymmetries on a domestic level. The plaintiffs argued that Columbia's failure to reduce deforestation in the Columbian Amazon by 2020, as agreed upon in the Paris Agreement, violated their constitutional rights to a

"healthy environment, life, health, nutrition, and water," and had failed to protect future generations.[52] In its decision on behalf of the plaintiffs, the court utilized future generations and human rights arguments, writing that "fundamental rights of life, health…and human dignity are substantially linked…by the environment and the ecosystem".[53] It also utilized a "rights of nature" approach, recognizing the Columbian Amazon as a "subject of rights" that is entitled to "protection, conservation, maintenance, and restoration."[54] The court ultimately ordered the government to implement action plans to address deforestation in the Amazon on behalf of living and future children. By utilizing multiple rights-based frameworks including the Paris Agreement, the right to life, and the rights of nature, the *Future Generations* court mitigated power asymmetries that tend to favor current interests over the interests of young people who will be uniquely harmed by climate change in the coming decades.

A ground-breaking rights-based climate case in the US, *Held v Montana,* demonstrates the power of domestic legal systems to overcome intergenerational power asymmetries. In August 2023, a Montana judge determined that Montana's fossil fuel extraction had violated 16 youth plaintiffs' right to a "clean and healthful environment" enshrined in the Montana constitution in 1972.[55] The court determined that this right "includes climate as part of the environmental life-support system." In its conclusion, the court ruled that the state must now examine greenhouse gas pollution and climate impacts wherever it evaluates permits for fossil fuel infrastructure.[56] By linking climate change to Montana's actions and constitutional obligations to young people, the court incorporated a human rights-based approach to climate change on a state level. The fact that young people brought forward this case and played a pivotal role in the court's decision demonstrates the potential for youth to remedy intergenerational asymmetries within the domestic sphere. The judge determined that children require special consideration as a vulnerable group, writing that "all children, even those without pre-existing conditions or illness, are a population sensitive to climate change because their bodies and minds are still developing."[57] She also found that "the physical and psychological harms are both acute and chrome and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices

and tradition."[58] The court's ruling in *Held* sets an important precedent for future rights-based cases brought by children, especially in the US, as it acknowledges that children are uniquely vulnerable to climate change and therefore have a valid and pressing argument to bring before a court.

It must be noted, though, that *Held* succeeded in no small part due to the Montana Constitution's clean and healthy environment provision, which few other US states have. Because of Constitutional supremacy in the US, human rights law must be implemented domestically in order to have enforcement power. Going forward, lawyers and activists may see some success in advocating for similar state constitutional amendments to set the groundwork for future US cases. When human rights are incorporated on a domestic or state level, as they are in Montana's state constitution, the framework can be valuable for children seeking to bring rights-based climate cases.

The court's decision in *Future Generations* and *Held* demonstrates that many domestic systems are well equipped to address cases brought by children that challenge climate policy. Since the international legal framework has fewer enforcement mechanisms than domestic legal systems, future children have prospects for success in "exhausting domestic remedies" to more directly hold countries accountable for their investment in fossil fuel infrastructure and their contributions to climate change. The aforementioned cases including *Future Generations, Held, Urgenda, Milieudefensie,* and *Leghari* demonstrate that when implemented in domestic law, the human rights framework is a viable method for remedying asymmetries in climate litigation that favors current interests over future interests.

IV. Fault lines in the human rights framework and prospects for future rights-based climate litigation

While the discussion in Part III shows that a human rights framework can be a powerful method for remedying asymmetries in climate litigation, it does suffer from some weaknesses that diminish its efficacy.

First, few rights-based cases provided the immediate financial relief required by the world's most vulnerable communities. While some plaintiffs have been successful in utilizing rights-based approaches to convince courts to

grant policy-changing declaratory relief (ie. *Urgenda, Milieudefensie, Leghari),* there is a notable lack of success in obtaining compensatory relief for the impacts of climate change or funds to adapt to climate change.[59] This shortfall is likely due to the international contention and complexity surrounding the awarding of financial compensation for 'loss and damage' from climate change, a task for which courts are often ill-equipped.[60] Consequently, cases focusing on declaratory relief are more likely to succeed at present. Nonetheless, addressing the compensation issue is crucial for assisting vulnerable people in managing the impacts of climate change.

Second, on a similar note, the setup of court systems naturally favors those who have time, money, and power, and the human rights framework has yet to overcome this issue. Bringing a case and carrying it through an appeals process against companies and governments who have time and money to spend requires an enormous amount of funds and expertise. Cases can last years or decades, with defendants often purposefully extending the length of cases to burn out plaintiffs. Only the most powerful have the resources to outwit and outlast governments and corporations. This asymmetry restricts who can bring cases and often leaves out those most impacted by climate change who need the most relief. Even the strongest human rights law would struggle to overcome this asymmetry, as it is deeply entrenched in societal and judicial structure.

Lastly, some scholars argue that the nature of the human rights framework is not set up to deal with an issue as broad and far-reaching as climate change. They contend that the dominant paradigm in human rights advocacy is the “liability model of responsibility” that looks to hold past violators accountable for individual rights violations.[61] Since climate change is global and future-focused, the human rights system often struggles to place blame and hold individual actors accountable. The UN Committee on the Rights of the Child ruling demonstrates this fault line because the Committee mandated that plaintiffs bring this issue in domestic courts since it could not address or solve an issue of such a global scale.

Climate litigators have recently begun to overcome this weakness in the human rights framework. By incorporating the human rights framework into domestic law and highlighting the stories of people who are being actively harmed by climate change, litigators have started to bring a lens of “liability”

and "responsibility" to climate litigation. The potential for such an approach will grow more powerful as climate science continues to improve the link between emissions and specific injuries to citizens. Improved climate attribution science will make it increasingly challenging for corporations and countries to use causal chain arguments and rights-based cases will be more successful in holding violators accountable for individual rights violations.

Going forward, leaders could potentially remedy the aforementioned weaknesses in the human rights framework by drafting new human rights treaties to provide leverage for plaintiffs in courts and assign more future-focused responsibility. These could include treaties demanding harsher restrictions on CO2 emissions, increasing international focus on intergenerational justice, defining the status of climate refugees, and explicitly granting rights to future generations. These provisions would strengthen the ability of plaintiffs, and especially youth plaintiffs, to bring rights-based climate cases.

The success of the *Held* case in particular demonstrates that it is valuable for lawyers to invest in innovative methods of incorporating human rights principles into domestic and state law in the US. New treaties and constitutional amendments would undoubtedly strengthen the viability of rights-based climate litigation in the long term, and in the immediate future lawyers should continue to focus on utilizing existing treaties and human rights principles to bring rights-based climate litigation cases under domestic law, especially since plaintiffs are seeing success in bringing rights-based cases.

Like any legal framework, the human rights framework is imperfect. It cannot always provide the relief that plaintiffs urgently require, overcome the procedural setup of the court system, or address an issue as far-reaching and global as climate change. Nevertheless, the human rights framework has been one of the most effective avenues for addressing power asymmetries in climate litigation thus far, and its efficacy will increase as the human rights framework continues to develop. Given the nature of a problem as large as climate change, any progress toward reducing emissions and protecting future generations is vital. Climate litigation should be viewed as a multi-decade effort, and the next decade will set all of the precedents for the rest of the century. It is vital that

lawyers and plaintiffs utilize every tool at their disposal, including the human rights framework, to fight climate change in every branch of government.

V. Conclusion

In examining the role of the human rights framework in climate litigation, this essay has highlighted the significant contributions of the framework, particularly in addressing the power asymmetries that have historically hindered progress in this domain. The analysis reveals that while the framework has been effective in empowering vulnerable groups and challenging old, entrenched power structures, these successes also bring to the forefront the inherent complexities and limitations of applying human rights law to climate litigation. It is in this context of measured success that we must consider the future of the human rights framework in this evolving legal landscape.

In particular, I have demonstrated how rights-based frameworks can help climate litigants mitigate three power asymmetries: (1) asymmetry in the Global South that diminishes the efficacy of cases and judicial mechanisms,(2) justiciability asymmetries and separation of powers arguments that favor the powerful over the vulnerable and pass responsibility to other branches of government, and (3) intergenerational asymmetries that favor the current interests over the needs of young people and future generations. The human rights framework, especially when incorporated into domestic law, can provide plaintiffs with additional leverage in court to personalize the global issue of climate change and require governments to take more broad-reaching actions. The framework has helped vulnerable people in the Global South bring powerful cases (*Leghari, Centre for Oil Pollution Watch, Future Generations),* prompted courts to push for policy change (*Urgenda),* challenged private companies and polluters
(*Milieudefensie),* and gave a voice to children and future generations (*Future Generations, Held, Sacchi).* Across the globe, courts have intertwined human rights and domestic policy to make unprecedented rulings on behalf of plaintiffs.

While the human rights framework has prompted some change, many aspects of asymmetry in climate litigation are deeply entrenched and impact every aspect of trade, policy, governance, and law. There is not a single solution

to asymmetry or climate change, but as the body of climate litigation continues to grow rapidly, with hundreds of cases currently pending today, the human rights framework can be an important mechanism to push for progress and hold governments and companies accountable for their damage to the climate and to future generations.

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Investigating Progress: The Complicated History of Title IX and the Difficulties in Legislating Equality

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Abstract

This paper brings to light the negative implications that Title IX has had on women athletes, challenging the notion that discrimination can be addressed entirely through legislation. By examining three cases citing Title IX from the 1990s to the present, this research illuminates the challenges of trying to legislate equality. In connection with affirmative action policies, this paper demonstrates that true equality demands attention not only to access, but also to experience.

I. Introduction

When considering the history of victories for women in athletics in the United States, Title IX is arguably the first example that comes to mind. Signed into law in 1972 by President Nixon, the policy states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[1] The passing of this legislation marked a turning point in collegiate athletic programs, as female[2] athletes across the country took one massive step closer to receiving the same access and opportunities to sports that their male counterparts had long enjoyed. Women's athletic programs transformed as a result of Title IX. Before 1972, about fifteen thousand women across the country participated in college athletics at NCAA schools.[3] Fifty years later, that number was over fifteen times higher, with nearly 230 thousand female NCAA student-athletes in 2022.[4] At first glance, it is quite apparent that the passing of this law led to incredible progress in gender equality and in women's ability to represent themselves in the world of sports. However, the law has not come without criticism.

A common theme throughout the scholarly narrative on the history of Title IX is an acknowledgement of the difficulties and challenges that arise in the actual attempt of creating non-discriminatory law. In her *Gender Issues* article, "Title IX and the Problem of Gender Equality in Athletics," Kimberly A. Yuracko attempts to answer the question of why it is so difficult to define what "distribut[ing] college varsity athletic positions in a way that does not discriminate on the basis of sex" might look like.[5] Yuracko argues in favor of Title IX's solution in the form of proportional funding, and acknowledges that while it is not without flaws, it is the best avenue for creating the most equal opportunities for young boys and girls entering athletics.[6] By exploring alternative avenues by which Title IX could be implemented and executed, Yuracko highlights the great difficulties that arise in any viable response to the legislation, bolstering her argument that proportionality, though imperfect, is the best available solution.

Debates over funding are merited in the discussion of Title IX, as its enactment in 1972 resulted in massive shifts in the funding of men's and women's athletics. While the law itself does not reference budgetary or financial specificities, the data proves that tackling the financing disparities between men's and women's athletic programs has been a top priority since the policy became law; and though the gap has not yet been closed, women receive approximately 40 percent of college athletics funding today, compared to the 2 percent share of the annual budget that women's athletics received in 1972.[7]

Other critics have gone further in their judgments, deciding that Title IX's method does not go far enough in its attempt to right the wrongs of gender

inequality's deeply ingrained history. Elizabeth A. Sharrow takes this position while evaluating Title IX in her article, "Sex segregation as policy problem: a gendered policy paradox."[8] Here, the political scientist and historian takes a sociological approach to challenge the perceived sacrosanctity of Title IX, pushing back against proponents of the policy.[9] She argues that the policy itself reinforces discrimination on the basis of sex by categorizing groups according to the principle of a gender binary in athletics, but integrating students completely in academics.[10] According to the author, women are restricted to limited recognition for their competitive abilities when barred from competing with men, especially when it is implied that men champions represent the very best of all athletics, while women champions merely represent the best of women.11 Sharrow asserts that by explicitly creating policy that serves to bridge the gap between differences, those very differences are reinscribed in the law and reinforced in society.

While these two authors both provide valuable criticisms of the policy, they offer distinct perspectives on the matter and stand in stark contrast to one another in their proposed remediations: Yuracko endorses proportional funding, while Sharrow advocates for the dissolution of gendered categorizations in sport. The comparison of these two scholars' approaches sheds light on the existing debate of how to strive for the most equitable solution, and what is the most effective mandate to achieve equal opportunity through the channel of the law. The nature of this discourse focuses greatly on the categorization of teams, and operates within the limits of a realm largely confined to discussions about the distribution of funding. Economic transformations have been critical to progress in gender equality in sports. However, this discussion should extend beyond purse strings alone.

I aim to challenge the premise of the ongoing debates about the efficacy of Title IX today, and to complicate the understanding of the policy and its implications. To do so, I will investigate the ways that inequalities manifest beyond the budgeting department. There is no denying that Title IX has opened the door for many female athletes. Yet it is unclear if the same praise can be extended to what happens once these women are inside. By analyzing the wide range of effects that Title IX has had on women in sports, this research intends to illuminate the less-celebrated consequences in which the law has resulted.

In this article, I seek to respond to the following question: What does the complicated history of Title IX's impact on women in athletics reveal about the difficulties of legislating equality?

I will examine three instances in which Title IX was used to adjudicate cases of gender based discrimination involving coaches. These three cases exemplify the complexities of antidiscriminatory laws, and work to challenge the extent to which Title IX has benefitted women athletes. Each example centers a lawsuit wherein Title IX was invoked for an issue that specifically involved coaches, and demonstrates Title IX's potential to perpetuate harm against women

athletes—the very group that has experienced the greatest overall positive impact from the legislation. The cases are diverse in nature—the first was brought forth by a male coach; the next by two high school boys; and the third by a female coach—all claiming a violation of Title IX. While each case differs in its details, an examination of the results juxtaposed with one another reveals a deep undercurrent of contradiction that pushes against the flow of the supposed progress that Title IX has carved into the landscape of the law.

II. *Medcalf v Trustees of University of Pennsylvania*: Women Athletes Need Women Role Models

In October of 1998, the *Daily Pennsylvanian* (the University of Pennsylvania's school newspaper) reported that Andrew Medcalf, an accomplished rowing coach, had filed a complaint against the University of Pennsylvania for violating Title IX.[12] The year prior, Medcalf had applied to the head coaching position for the women's rowing team at Penn, which had seen little competitive success and dealt with high head-coach turnover in the preceding years.[13] When the program saw yet another head coach resignation in May of 1997, Medcalf, then an assistant coach, decided to apply for the position.[14] In addition to his self-proclaimed extensive qualifications as compared to the other candidates, he was also recommended to the position by the men's heavyweight crew coach and titan in the rowing community, Stan Bergman.[15] Medcalf's resume was stellar, apart from one glaringly detrimental quality: his gender. Upon expressing his interest in the role, he was allegedly told by a Penn Athletics Administrator that they had every intention of hiring a woman.[16] Subsequently, the department appointed Barbara Kirch to the job in July of the same year. In response, Medcalf sued the University under Title IX, arguing that he had been discriminated against in the hiring process on the basis of sex.

The case was brought to trial in a federal district court five years after the hiring dispute unfolded, and the majority of the case was argued in the Court of Appeals from 2002-2003. In the Brief for the Appellee, Medcalf's counsel outlined the discrepancies in Medcalf's qualifications compared to all other applicants, including those possessed by Kirch.[17] According to the brief, Kirch had an unimpressive record of some wins and mostly losses at Dartmouth College's rowing program compared to Medcalf's history of producing winning boats and nationally-ranked athletes.[18] According to Bergman, the female candidate "lacked sufficient experience to be qualified as a head coach," and Senior Associate Athletic Director Carolyn Femovich admitted to never having looked at Kirch's win-loss record during the application process.[19]

In the court's opinion, the qualifications for a "reverse discrimination" case are outlined, stating that the plaintiff, Medcalf, had to first establish that he had experienced unlawful discrimination on the basis of sex, which is considered

a protected trait under Title IX.[20] The plaintiff must also refute the defense's argument that employment decisions were made for reasons not qualifying as discriminatory.

In this case, the tension between the bi-directional nature of anti-discrimination law and attempts to diversify leadership positions rose to the surface. While the evidence clearly showed that Medcalf had a powerful argument against the Board of Trustees, the University's efforts to acquire a female head coach were not without merit.

Although Title IX revolutionized access to the world of sports for women, the policy has led to a massively unequal field of coaching opportunities. Women's athletics, a field once dominated by women coaches, has undergone a dramatic transformation as men coaching women has become the new norm. Since 1972, the percentage of women's teams led by women coaches has experienced a staggering drop from 90 percent to less than half; only 46 percent of women's teams are currently coached by women.[21] Undoubtedly, Title IX's call for an equal distribution of resources across men's and women's programs within federally-funded schools led to women's teams seeing a huge increase in both players and budget, tremendously expanding the opportunities for female athletes to compete at a high level. But it is difficult to consider this an all-out victory when the majority of the profitable positions in charge of those women have gone to men.

Regardless of whether the men coaching, who contribute to this statistic, possess the most impressive resumé for the position or not, there is sufficient evidence to support the incomparable value that women role models serve for other women. In their 2004 article, "To Do or Not to Do: Using Positive and Negative Role Models to Harness Motivation," a group of psychology scholars researched the impact that role models have on individuals and their motivation to either follow or reject certain behaviors in their own lives.[22] The authors ultimately found that role models matter.[23] According to their findings, people select role models to motivate positive behavior in themselves when they want to see a change, underscoring the intrinsic nature of people to find role models for themselves in their surroundings.[24] Not only do role models serve as powerful motivators, they can directly contribute to one's decision-making process in determining current interests and future goals. In "The Motivational Theory of Role
Modeling: How Role Models Influence Role Aspirants' Goals," Thekla Morgenroth, Michelle K. Ryan, and Kim Peters break down the mechanisms through which role models influence those around them.[25] They argue that role models serve three primary functions: "behavioral models; [...] representations of the possible, [... and] inspirations" that "make a goal desirable."[26] With the field of coaching so heavily saturated with men, it is easy to imagine that female athletes would not be encouraged by their environments to pursue a career in the industry themselves. The authors argue that it is not any advantage in men's

talent or ability that results in male-dominated fields, but rather a lack of role models for women that fails to invite women's interest or inspire long-term pursuit.[27]

Studies across fields have emphasized the value of having members of an underrepresented community serve as representative role models for other members of that community. Evidence supporting that Black children are more successful in school when they have Black teachers dates back to 1995, while a 2005 study in *The American Economic Review* found that female students greatly benefit from female teachers.[28] The impact of women professors on women college students was discovered to have excessive influence in the classroom, even shown to influence the likelihood that women would pursue certain majors, with particularly noticeable effects for STEM courses where women are vastly underrepresented.[29] With the overwhelming benefits that role models serve to similarly underrepresented individuals, it follows that those same benefits apply to women student-athletes under a women head coach. In their article "The Importance of Role Modeling in Mentoring Women," researchers at the University of Tennessee found that women athletes under a woman head coach experience a greater emphasis on career inspiration and psychological connection in their bond than in crossgender relationships.[30] In particular, the study found that women have an important takeaway from women coaches: inspiration in "successfully overcom[ing] discriminatory barriers to career advancement."[31] While preferential treatment toward women coaches when deciding who should be hired to lead women's teams may not be celebrated by all, the benefits of this approach for the athletes are hard to ignore.

In the midst of Medcalf's lawsuit, students on campus were engaging in the discourse surrounding the case. One student writer for the *Daily Pennsylvanian* argued in a 1998 opinion article that despite the differences in qualifications of individual coaches, female coaches should be prioritized in the hiring process for women's teams.[32]

Despite the benefits of female leadership of women's teams, the court ruled in favor of Medcalf, awarding him $115 thousand in damages from the university.[33] The outcome of this case reveals that the scope of protection under Title IX applies to every individual, even when they are a part of an overrepresented group. This case also illuminates the difficulties in righting the wrongs manifest in present-day coaching statistics. Even though women would likely benefit from women coaching, schools that act on this principle make themselves vulnerable to a Title IX lawsuit. When balancing the benefits of women coaches versus the payout of a lawsuit, women coaching women just might not be worth it under Title IX.

III. *Chisholm v St. Marys City Schools District Board of Education*: The Preservation of Coaches' Rights to Degrade Women as a Means to Motivate Boys

In 2020, former student-athletes Dane Chisolm and Reid Linninger found themselves in United States Appeals Court, arguing that their former high school football coach, Paul Douglas Frye, had violated Title IX and discriminated against them on the basis of sex.[34] The young men leveraged a unique claim, contending that their coach had been sexist and negatively impacted their experience on the team by calling them demeaning names. The details of the names used were critical to their case, as the plaintiffs argued that the nature of the words constituted gender-based harassment.[35] According to the case, Frye regularly used derogatory gender-based language as a means to antagonize and belittle the players, including common terms such as 'pussy,' 'bitch,' 'pretty boy,' and 'soft'.[36] Chisolm and Linninger hinged their entire argument for sex-based discrimination on the gendered connotations of the specific words that Frye employed, citing "pussy" in particular for its slang reference to female genitalia.[37] Because the coach often referred to his players using such language, the plaintiffs argued that "the term portrayed them as 'feminine' and thus seemingly less valuable teammates in the 'masculine' setting of football, revealing Frye's favoritism of one sex over the other."[38] Further, the young men argued that the coach had caused "severe emotional distress," a violation of Ohio tort common law.[39] As a result of Frye's sexist name calling, Linninger reported accounts of bullying and a depression diagnosis, while Chisolm experienced psychological problems that made it difficult for him to trust adults.[40] The plaintiffs' argument prompted the court to consider if implicit sexism toward women on an all-boys team can be used as an example of discrimination on the basis of sex.

Chisholm offers a distinctive example of the invocation of Title IX by male athletes. While the plaintiffs' argument may be unique, the use of misogyny from male coaches to male athletes is very common. In a journal article in *Sociological Forum*, sociologist Eric Anderson explores how the concept of masculinity instilled in men through team sport reproduces "socionegative" effects.[41] He describes the transmitted perspectives as "sexist, misogynistic, and antifeminine" conceptions of women.[42] Anderson states that the normalization of violence in team sports could be a potential contributor to the ingrained attitudes of violence against women in society.[43] This argument is supported by other scholars, such as public health researcher Kathleen E. Bachynski, who in a paper published in the *Journal of History of Medicine and Allied Sciences* examines the socionegative effects of youth football in the context of post-war America.[44]

Such themes of intimidation and domination of women remain fundamental components of football culture today. Even the language used to reference football in Judge Chad Readler's decision in *Chisholm* expresses reverence for its moral foundations, underscoring the patriotic and masculine values still present in much of the American sentiment towards youth football. In the first line of his decision, Judge Readler writes, "Playing football is not for the fainthearted."[45] Continuing his praise for the sport, he goes on to cite two

reasons that have contributed to football's massive popularity in the US:
[Football] draws upon the combative nature of its participants and their coaches, with the sport enjoying a competitive, confrontational, and motivational foundation not seen in other team activities. Second, football's popularity feeds a strong desire for team success…[46]

The tone with which Readler describes football is indicative of commonly held sentiments about American society, suggesting that football both cultivates masculinity through violence and willpower, and rejects those who lack the necessary characteristics to meet these criteria of the sport. Employing this view, student-athletes Chisolm and Linninger failed to meet these standards and were consequently met with verbal harassment and social ridicule by their coach and their teammates.[47] Frye's behavior only reinforced the cultivation and reproduction of dangerous conceptions of masculinity, thus reproducing harmful attitudes toward women.[48]

In the end, Judge Readler ruled in favor of Coach Frye.[49] He argued that the boys not only failed to meet the requirements for a Title IX case because there was no evidence of sexbased discrimination, but also that they failed to substantiate claims of "intentional infliction of emotional distress."[50] The only concession made by Judge Readler was a statement that Frye's conduct was "distasteful," though not in violation of any law.[51]

Although the claim of a Title IX violation was rejected in *Chisholm*, the details of the final decision shed some light on the views held regarding men and women in sports today. The use of derogatory terms towards women and the aim to reduce women to sexual objects is widespread in men's sports for its ability to 'motivate' teams and channel aggression in players.
The message that such language sends to young, impressionable athletes—both men and women —is an alarming misogynistic undercurrent that holds true across sports. While this case did not constitute sex-based discrimination against Chisolm and Linninger, the case's events still highlight gendered issues in athletics today. The ruling of this case asserts that football players must possess an innate masculinity, degrading women in the process. Thus, while this was a case that resulted from the events that took place among only men, female athletes still lost.

IV.*Tracey Griesbaum v The University of Iowa*: The Feminization of Toxic Masculinity

In 2014, University of Iowa head field hockey coach Tracey Griesbaum alleged that the school had discriminated against her when she was fired in 2014 for reports of verbal abuse directed at her players.[52] She insisted that her coaching methods were common practice among the male coaching staff, and that her dismissal was not because of her actions, but because the expectations for a woman coach did not match up with her technique.[53]

In a 2017 interview with ESPN, athletic director Gary Barta defended the University's position and argued that complaints of Griesbaum's behavior dated back to 2007, seven years before her ultimate dismissal.[54] Such allegations of abuse and difficulty included complaints from players, parents, and two male coaches at the school who headed the football and wrestling programs.[55] In one account, a player complained that Griesbaum notably told her that, "If I were you, I would kill myself."[56] Barta reported that Griesbaum denied any wrongdoings and refused to alter her coaching methods when confronted about the abuse allegations, which led to a threemonth investigation resulting in her firing.[57]

In her statement detailing the cause of action behind her lawsuit, Griesbaum cites a history of double standards for male and female coaches at the University, along with her own gender and sexuality, as the causes behind her termination.[58] One part of Griesbaum's argument about permissible behavior for male coaches is found on line 37, where the plaintiff writes that "a male coach is permitted to yell, curse, threaten, throw things, be ejected from games, and push athletes to the edge of their ability, even if it sometimes results in injury."[59] This line stands out as an explicit example of behavior that, while deemed unacceptable for Griesbaum, was allegedly business as usual for her male colleagues. The language of the plaintiff implies that aggressive outbursts by a coach toward their players are conducive to producing the highest level of performance and success from the athletes, despite the potential for inducing injuries. The argument that Griesbaum levied in her case did not address whether verbally abusive coaching tactics were right or wrong; rather, that she was unfairly punished for them on the basis of her sex.

Griesbaum's complaints of discriminatory practice are not without merit, and are certainly not a unique observation from women in the workforce. In "Double Standards for Competence: Theory and Research," sociologist Martha Foschi explores how double standards between men and women affect a range of judgments that people cast on one another, including those regarding one's professional competence, moral character, and personal worth.[60] The author unpacks how narrow standard constraints on women's personality attributes can have drastic material consequences, impacting one's ability to attain benefits ranging from work salaries to citizenship status.[61] Foschi's findings support Griesbaum's argument that she was likely held to a higher standard in her coaching etiquette than her male colleagues, receiving harsher consequences from the school when administrators did not see her subscribe to the stereotypically feminine characteristics of shyness, restraint, or politeness.

However, while Griesbaum was likely held to a higher standard, this does not erase the probability that she was also verbally harassing her players. In an internal NCAA report obtained by a local newspaper just after the termination took place in 2014, investigators concluded that while Griesbaum did not explicitly violate any university policies, there was sufficient reason to believe

that she promoted a hostile environment where athletes were afraid, intimidated, mistreated, and pressured into playing while injured.[62] While these findings may not have been enough to constitute a formal violation, they undoubtedly contributed to conditions where students were put under additional stress with the potential for very real, harmful consequences, especially since student-athletes face their own brand of mental health challenges.

The mental health of individual adolescents and young adults can be impacted by a wide range of factors, but research has shown that mental illness manifests in distinct ways for student-athletes. In "Depression in Student-Athletes: A Particularly At-Risk Group? A Systematic Review of Literature," four doctors collaborated in an exercise-science program study to examine the particular barriers to receiving help experienced by student-athletes suffering from depression.[63] The doctors found that although student-athletes reportedly have lower rates of depression compared to their non-athlete peers, they face unique obstacles in accessing treatment due to the nature of their roles and identities.[64] Although the team communities and social interactions that are built into the daily rituals of the student-athlete experience are understood as positive factors that reduce feelings of isolation, these same elements of day-to-day life can also work against individuals.[65] Because of the tight-knit community that often comes with being a part of a sport, athletes struggling with depression can feel like the whole world is watching them and are thus disincentivized from seeking help for fear of judgment, shame, or detriment to their social or team standing.[66] The researchers highlight that depression may also manifest in different areas of one's life, as student-athletes—particularly female athletes—have higher rates of alcohol abuse and eating disorders compared to their peers.[67] These practices are not only unhealthy, but potentially deadly: as a result of obstacles discouraging student-athletes from seeking help for these problems, they are also at greater risk of suicide than their peers.[68] The researchers acknowledge the heightened influence that coaches have on the environment in which the players operate, serving a critical role in athletes' feelings of fear or safety in their decision to speak up or not.[69] Hence, the severity of consequences that a coach's behavior can carry should not be understated, regardless of the coach's gender.

Tracey Griesbaum's case never went to trial. In May of 2017, the University of Iowa paid $6.5 million in a settlement that awarded $1.49 million to Griesbaum and $2.33 million to her partner and former athletic administrator, Jane Meyer.[70] This case demonstrates that harmful behavior from a woman coach is permissible under Title IX, so long as a man is doing the same thing. On the surface, Griesbaum's win may appear as a win for women, challenging double standards and being rewarded generously for doing so. However, one must also consider the message being sent to the young women who spoke up against the alleged abuse. Although Title IX has granted access and dignity in opportunity to so many female athletes over the last fifty years, it is difficult to

find dignity in the same law's protection of an abusive coach tormenting those very athletes.

V. Title IX as Affirmative Action: Is it Possible to Achieve True Equity Through the Channel of the Law?

While it is apparent that Title IX has achieved significant strides in the number of opportunities for women in sports, the law has also had a contradictory, almost counterintuitive impact on the quality of the experience to which these women have gained access. This opens up a broader discussion of the ways in which policy can impact equality.

Through the examples of Title IX cases and coaches' involvement, a pattern arises: those arguing against events of sex-based discrimination are not always acting in athletes' best interest, and might actually harm the very audience the law strives to protect. The product of this research is not meant to be an argument against Title IX, but rather a recognition of the mixed implications it has had for female athletes. While the legislation itself aims to protect against sexbased discrimination, the law has had a muddied impact across sports, sexes, and years. These three cases and the accompanying scholarship demonstrate that equity transcends far beyond economics, and demands attention beyond that which is quantifiable. Role models, empowering language, and a supportive environment can be transformative for one's participation in athletics, while the absence of these can undermine the experience entirely.

Title IX is an example of an affirmative action-style legislation that has had great success in expanding access, but has met with difficulty in universally ensuring that institutions are working in the best interest of their athletes. The complicated history of the policy's applications and impact on women in athletics reveal that legislating equality must be a continuous, holistic process that analyzes equity far beyond the initial guarantee of admission. The defining factors of equity must go beyond the numbers, and take into account the lived experiences of every individual. While the spirit of Title IX champions a groundbreaking response to gender inequality, a textualist application of the law has made way for an environment in which cases may prioritize equality (as understood by the law) to the detriment of empowerment and opportunity. The consequences of these three cases reveal that when it comes to ensuring equity in experience, current approaches to legislating equality just might not be enough.

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