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ARTICLES

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LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board, we are proud to present the Spring 2022 issue of the *Columbia Undergraduate Law Review*'s print journal. We are excited to publish the following articles, which offer fresh perspectives on familiar legal problems.

In "Failures in Baghuz and Kabul: Distortions of the Law of Armed Conflict in American Counterterror Operations" Lyndsey Reeve explores domestic interpretations of presidential war powers through case studies of the 2019 Air Strike in Baghuz and 2021 Drone Strike in Kabul. Reeve argues that throughout the "war on terror", these interpretations have facilitated U.S. violations of the Law of Armed Conflict (LOAC).

In the article "Anti-Accommodation Court and the Continued Assault on the Definition of Disability: From 1990 to Now", Marco Uustal investigates the legal question: 'What is a disability?' Uustal explores the legal landscape built by *Toyota v Williams*, *Sutton v United Airlines*, de jure changes made by the 2008 ADA Amendments Act, and post-ADA Amendment continuities.

Sarah Chan, in "Nude Dancing and First Amendment Jurisprudence: How the *Pap's* Court Extended the Secondary Effects Doctrine and Lowered the Evidentiary Bar for a Total Ban of a Form of Constitutionally Protected Speech" examines the interaction between the First Amendment and communicative conduct. Chan explores key cases such as *Young v American Mini Theatres*, *City of Renton v Playtime Theatres*, *Barnes v Glen Theatre*, and *City of Erie v Pap*'s A.M. Decision, along with the *O'Brien* and *TPM* tests.

In "Counter-Intelligence: Examining the Security and Press Freedom Implications of the 2019 Expansion of the Intelligence Identities Protection Act", Anya Howko-Johnson examines the Intelligence Identities Protection Act (IIPA). Howko-Johnson explores the future of national security law, executive accountability, and the modern transborder threat landscape.

Andrew Zach, in "Send Lawyers, Guns, and a Dispersal Notice: An Analysis of the Insurrection Act of 1807 and Its Application to the January 6th Capitol Riots" studies the Insurrection Act of 1807 in light of the January 6th riots. Zach examines whether the act could or should have been invoked, its normative beneficialness, and the future of domestic insurrections and disturbances.

Finally, Theodore Grayer in "How *Brown* Died: An Autopsy into the Causes of Modern Segregation" tackles the central question of why schools continue to be segregated despite the ruling of *Brown v Board of Education*. Grayer argues that it is time to look beyond *Brown* because its trajectory allows Americans to hold on to its story without living up to its promise.

LETTER FROM THE EXECUTIVE EDITOR

With each successive publication, the *Columbia Undergraduate Law Review* strives to cultivate debate and discussion of legal issues, especially among undergraduates. We hope that you enjoy reading our print journal.

Sincerely,
Anushka Thorat & Jeannie Ren
Executive Editors, Print

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.

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Failures in Baghuz and Kabul: Distortions of the Law of Armed Conflict in American Counterterror Operations

Lyndsey Reeve | University of Pennsylvania

Edited by Kate Strong, Gabriel Fernandez, Jinoo Andrew Kim, Kaleigh McCormick

Abstract

Throughout the "War on Terror," broad domestic interpretations of presidential war powers have facilitated two United States military violations of the law of war. Also known as the Law of Armed Conflict (LOAC), the law of war is a set of international legal standards governing the initiation, conduct, and cessation of armed conflict. The LOAC includes the Geneva Conventions and the United Nations (UN) Charter.[1] The first section of this article will explore a 2019 strike in Baghuz, Syria, where a U.S. task force failed to conduct adequate intelligence acquisition and violated the LOAC principles of proportionality, distinction, and precautionary measures. More careful analysis reveals that the strike offered little military advantage with disastrous consequences for Syrian civilians in a nearby camp. I argue the 2019 Baghuz strike reveals the complexity of utilizing military action for self-defense against terrorist actors due to the lack of *post bellum* accountability and stifling of critique within the U.S. military apparatus. Next, I will turn to a more recent drone strike in Kabul, Afghanistan, where a lack of precautionary measures led to unnecessary civilian suffering in violation of the LOAC. Finally, I offer recommendations to the Biden administration: address terrorists within a law enforcement framework, enlist the support of local intelligence and law enforcement whenever possible, and champion more precise LOAC language that captures the complexity of asymmetric warfare and defends human dignity.

I. Violations of the LOAC Proportionality, Distinction, and Precautionary Measures in Baghuz

On March 18, 2019, during the final days of Operation Inherent Resolve (OIR), a U.S. special operations unit called Task Force 9 backed ISIS fighters into a field near Baghuz.[2] High-definition drone footage identified scattered ISIS forces, reporting primarily women and children gathered on a nearby river bank. In spite of this, Task Force 9 fired two bombs, five hundred and two thousand pounds each, killing seventy people. Although an Air Force lawyer tasked with evaluating strikes quickly reported the attack to his superiors as a potential violation of the LOAC, no independent investigation was conducted. Instead, the U.S. Department of Defense (DOD) downplayed the death toll, classifying and concealing the strike from top officials and the American public.[3]

The attack on Baghuz was a continuation of a lawful program, OIR, designed to combat ISIS in Iraq and Syria. Launched in 2014, this U.S.-led coalition was focused on increasing regional stability.[4] The U.S. military's *jus ad bellum* (justification for engaging in hostilities to begin with)[5] was legitimate because it acted in self-defense and combatted a grave terrorist threat that continues to destroy innocent lives in its pursuit of jihadist objectives. OIR was supported by a United Nations Security Council authorization, invites from the Iraqi government for military intervention to destroy ISIS, and the argument that the U.S. exercised its inherent rights for individual and collective self-defense by pursuing military action against ISIS.[6] However, each OIR engagement and conduct decision made by a soldier (or in this case, a task force commander) must be analyzed for its *in bello* (day-to-day operational) legality. Individuals can commit war crimes even if their state is legally justified in the initial engagement.

Military operations, including the Baghuz strike, are

governed by LOAC documents—the 1949 Geneva Conventions, Article 51 of the UN Charter, and customary international law—which describe the lawful deployment and conduct of global armed forces.[7] Judging the legality of airstrikes is complicated because they often asymmetrically target non-state actors or civilians engaged in hostile action without government support. Even if they are financially backed by a state, non-state actors lack legal protections that come from serving as a state instrument, making it difficult to distinguish between combatants and non-combatants. Instead, terrorists are civilian criminals not constrained by international norms who threaten large populations in pursuit of ambitious political goals. Facing an uninhibited enemy—especially one willing to resort to suicide bombing, building headquarters in active hospitals, and training child soldiers[9,10]—can push liberal democracies such as the U.S. to LOAC violations like the 2019 attack near Baghuz.

Article 51 of the UN Charter states, "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[11] It is unlawful to operate *offensively.* While the earlier skirmishes in Syria could be considered an "armed attack," in Baghuz, the "right to self-defense" was regularly stretched to strike back against what the U.S. deemed "hostile intent," such as a car driving near U.S. forces.[12] While the UN Charter permits states to prepare for an *imminent* threat—evidenced by stocking up munitions, mobilization, etc.—reacting to anything loosely deemed "hostile intent" is a distortion of the Charter's language. Loosening LOAC constraints – a broader trend in the war on terrorism – is a predictable yet regrettable consequence of the American understanding of terrorist actors in the aftermath of the terror attacks of September 11, 2001.[13]

Troops are always targetable and both the International Committee of the Red Cross and the Israeli Supreme Court advanced the idea that non-state actors resting between hostilities

are too. They argue, "the rest between hostilities is nothing other than preparation for the next hostility."[14] The few ISIS members targeted in Baghuz were most likely engaging in one of these rest periods, but it is important to consider them within the context of civilian law enforcement. To align with the requirements of the LOAC, deadly force must be based on "the immediacy of the threat that needs to be forestalled or the urgency of acting to forestall it" and only when capture is unfeasible due to the risks to troops.[15] The few straggling members of an almost-defeated cohort in Baghuz, barely distinguishable on the drone footage and not maneuvering offensively, do not pose an immediate threat to U.S. military forces.

The LOAC outlines three key principles to constrain force: military necessity, proportionality, and distinction.[16] Of these, the 2019 strike near Baghuz violated the proportionality and distinction principles. Necessity, the lowest threshold, limits the exercise of military force to what is needed to achieve states' military objectives (or "defeat the enemy").[17] This tenet does not require nations to opt for the *least invasive* mechanism but mandates their activities contribute to an objective grounded in a real threat. LOAC analysts must be careful to avoid *post facto* judgment, evaluating the strike's disastrous outcome in isolation from the context of troop decision-making.

Based on the limited information apparent to Task Force 9 *before the attack*—due to a failure to use all available resources and coordinate with other military teams—the U.S. military believed that this attack would primarily hit ISIS fighters and defend coalition forces. According to the *New York Times*, earlier in the day, "hundreds of Islamic State fighters started firing rifles and grenade launchers and sending forward fighters with suicide vests."[18] Based on context and the fact that the U.S. coalition had used all available drone missiles, one can argue that this strike could prevent serious harm to U.S. forces and civilians, although it would result in the extrajudicial killing of suspects and some

potential civilians. Additionally, these bombs would protect U.S. troops that could be killed in a more invasive, boots-on-the-ground operation.

While the Baghuz strike fulfilled the proportionality principle based on the Task Force's limited conception of the situation, military forces must choose the least invasive mechanisms with *civilians* on the scene. Proportionality dictates that force employed is proportionate to what is needed for self-defense.[19] While true combatants are always targetable (unless surrendering or injured), proportionality is narrower in a civilian context. Militaries must consider reasonably predictable *collateral damage* from a given attack, such as civilian deaths or the destruction of civilian infrastructure. All killing must be proportional to its anticipated military advantage and be based on countering realistic, activity-based threats. According to the ethical doctrine of double effect, it may be permissible to take prohibited action (i.e., killing civilians) if it is a side effect or unintended consequence of a legitimate operation.[20]

Characterizing the Baghuz deaths as wanton persecution of civilians may be an exaggeration, but this strike certainly represents a rash use of force that violates the proportionality principle. The attack was more than a regrettable side effect of a legitimate operation. Killing a single armed ISIS member (or even several, as claimed on Task Force surveillance footage) is not a sufficient operational advantage to justify striking all civilians on the scene. The DOD reports the bombs allegedly killed sixteen fighters, four civilians, and sixty people of unknown status.[22] Even if this is the case, Task Force 9 could not have anticipated such a significant operational advantage from this attack as only "two or three men" with rifles could be seen on the footage. Additionally, failing to determine the allegiance of sixty individuals is a major oversight, especially considering most are likely unarmed women and children who are doubtfully voluntarily aligned with ISIS, a historically male-dominated organization.[23] Even if analysts excuse

Task Force 9's failure to communicate with units that had more detailed information, their negligent use of deadly force on people of largely unknown status for a limited tangible advantage (a few armed men resting based on visible assessments at the time) fails the proportionality test.

Finally, the principle of distinction requires states to differentiate between combatants and noncombatants, *pursuing* only lawful targets such as representatives of a state in arms, military objectives like munitions factories, or, in this case, actors that pose an imminent threat.[24] Not only did Task Force 9 fail to distinguish between lawful and unlawful targets but they made minimal attempts to glean this available information. *The New York Times* later revealed that Task Force 9 purposefully concealed their failure to investigate the attack in their after-action reports.[25] While the general target area was a potential site of future operations, it also housed a large proportion of civilians and an enemy largely beaten into submission by previous U.S. attacks. The LOAC also promotes avoiding unnecessary suffering for combatants or any civilian suffering. Even if the U.S. military considered ISIS a true combatant in violation of the distinction principle, there are still restrictions on conduct toward opposing forces. As described previously, some degree of collateral damage is permissible, but the "LOAC prohibits attacks that are *calculated* to cause unnecessary suffering."[26] Force sufficient to kill an opponent is allowed, but attacks *designed* to inflict surplus suffering are illegal. Ultimately, it is difficult to prove this case reaches the threshold of willful destruction used as a purposeful military tactic without explicit internal memos affirming a wanton use of force. However, according to Article 7(1) of the Rome Statute of the International Criminal Court, if attacks on the same civilian populations persist, they could be deemed crimes against humanity. Crimes against humanity typically refer to "widespread and systematic attacks… with knowledge of the attack" against civilians.[27] Evaluated alone, this attack may not seem to constitute deliberate destruction.

However, coupled with similar strikes authorized by the executive branch—like the 2021 attack on Kabul which targeted an innocent humanitarian worker and killed several children—this disregard for communities mired in terror, if sustained, could equate to a crime against humanity.

Nations must also take precautionary measures before applying force under the LOAC.[28] Troops are responsible for carefully assessing if a given attack will cause excessive casualties by using tools like surveillance drones and sophisticated cameras. While ground troops may have been unable to see the civilians, they failed to consult the airborne team that could access more accurate intelligence. *The New York Times* reports that, in fact, minutes before the strike, troops in the sky noted "women, children, and a man with a gun" (and no active combat) in their chat log.[29] Central Command has since argued that Task Force 9 was unaware a superior drone was circling above. Likewise, the operation's secrecy meant the drone team was not aware of the coming attack by Task Force 9.[30] This lack of inter-team communication demonstrates a troubling emphasis on extensive operational security concerns over precautionary measures.

Even the Air Force's so-called "kill chain" involves "finding, fixing, and tracking" before targeting enemies and these early steps were not adequately pursued.[31] At the operational level, "higher levels of command establish limits on the maximum number of anticipated civilian casualties a subordinate commander may permissibly risk through a targeting judgment."[32] Task Force 9 did not examine circumstances on the ground to comply with ordinary proportionality determinations. In fact, after the strike, they allegedly "[added] details that would legally justify a strike, such as seeing a man with a gun, even when those details were not visible in the [less precise] footage."[33] Moreover, the LOAC encourages additional measures like a warning or evacuating civilians whenever "operationally feasible."[34] Task Force 9 did not warn civilians or even fellow troops, although some may have been in the camp unwillingly.[35] Although the DOD regrets what they call

an "unintended loss of life," Task Force 9 avoided its due diligence to uphold the rule of law before the strike.[36]

II. Domestic Justification: Presidential Privilege in the "War On Terror"

The U.S. president's authority to authorize the Baghuz air strike rests on both constitutional and statutory law. As the commander in chief of the U.S. military, the president may use military force to serve the American people and their goals abroad. This privilege is designed to be the exception for times of crisis, but throughout the war on terror it became standard.[37,38,] Additionally, the War Powers Act authorizes the president to use force under three criteria, which include a congressional war declaration, specific statutory authorizations, or a national emergency "created by an attack upon the U.S., its territories or possessions, or its armed forces."[39] Moreover, no rule in domestic law mandates that presidential uses of force comply with international law. In the case of Baghuz, presumably, "an attack upon the U.S." was interpreted to encompass the threat of terrorism to American security and U.S. relationships abroad. As seen in the 2001 and 2002 versions of the Authorization for Use of Military Force (AUMF), presidents have extensive executive privilege and a blank check in the wake of September 11, 2001, grounded largely in fears that any constraints would hinder a swift crisis response.[40,41,42]

Another important consideration in the context of the Baghuz strike is statutory domestic law. While Article I of the U.S. Constitution states that only Congress can declare war and raise funding for armies,[43] Congress sometimes fails to exercise its Article I powers. Instead, Congress statutorily delegates authority to the president to handle pressing national security threats in a swift timeframe. For example, while the War Powers Act requires the president to "notify Congress within forty-eight hours of

military action and prohibits armed forces from remaining for more than sixty days," these deadlines have been historically lenient.[44] There have also been shifts in the nature of war. Complexities including fewer geographical limits, advanced technologies, and asymmetric warfare have led to broad interpretations regarding the scope of presidential war powers. As national security law expert Claire Finkelstein argues, "the United States has not established a clear and unequivocal legal framework"[45] for drone strikes (and presumably, bombs dropped on asymmetric actors). This is legally concerning because whenever law is overlooked in one area, Finkelstein asserts, "there will be erosion of legal norms in adjacent areas of practice."[46] Soon it may affect domestic laws including the right to due process.[47] Moreover, the LOAC is subject to domestic interpretation and noncompliance, and domestic law often fails to check executive authority. Broad executive privilege throughout the war on terror and in Baghuz specifically has allowed officials to systematically circumvent a doctrine designed to limit civilian deaths and human rights atrocities.

III. Analysis, Transparency and Accountability in the Baghuz Strike

Perhaps the most troubling aspect of the Baghuz strike is the lack of *post bellum* analysis, leading to low levels of transparency and government accountability that could encourage future violations. The DOD stated the 2019 Baghuz bombing was legal because it resulted in a limited number of deaths while countering ISIS and protecting troops, and "no formal war crime notification, criminal investigation, or disciplinary action was warranted."[48] However, based on a lack of domestic guidance and violations of the LOAC —proportionality, distinction, precautionary measures, and an imminent threat— this strike is a reportable incident. The military is obligated to report any "possible, suspected, or alleged violation of the law of war, for which there is credible information."[49] The testimonies of accomplished officers Gene Tate and Lieutenant Colonel Dean

Korsak and accompanying video footage supported the case for further investigation into the incident by the U.S. military. Not only is reporting encouraged but soldiers are *required* to disobey unlawful orders, bound by their *jus in bello* code of conduct to flag violations and refer them to those higher in the chain of command. Instead of being commended for boldly decrying the strike as a "systematic failure," Mr. Tate was fired.[50]

This attack was more than a regrettable mistake made unavoidable by conflict's chaotic, uncertain nature. After civilians found "piles of dead women and children" in the strike's aftermath, Task Force 9 graded its own performance with decent marks.[51] This positive self-assessment is typical, with 80 percent of all reported airstrikes deemed "self-defense."Those tasked with counting the dead in Baghuz have limited tools and motivation. Moreover, the site of the attack was soon bulldozed, eliminating opportunities for thorough analysis. While its role was complicated by fear and chaos on the ground, Task Force 9 failed to acquire adequate intelligence on its targets. This elite military unit was seemingly endowed with its own sort of "executive privilege," trading the LOAC for operational security and the ability to act quickly. The two need not be mutually exclusive. Military transparency is critical so soldiers know what happened and can improve the processes to reduce future misjudgments. Without an honest presentation and assessment of the rule of law violations in the Baghuz strike, improvement is not possible.

Accountability for Task Force 9 leadership and its supervisors could incentivize better compliance with the LOAC, upholding America's responsibility as a defender of global human rights in future asymmetric conflict. Much like torture at the infamous U.S. detention center at Guantanomo Bay and other unlawful conduct carried out under the guise of national security, the Baghuz strike erodes the trust American citizens have in their leaders and supports a culture where corruption is the norm, damaging government legitimacy. Eventually, "rather than perceive

adherence to the law as mandatory, [American citizens] will come to view the law as merely 'the advantage of the stronger.'"[52] A culture of *lawfare* emerges, where military legal advisers and the Office of Legal Counsel use law to achieve specific executive ambitions, rather than employing law as a constraint on government goals.[53] *If U.S. leaders violate the rule so explicitly, what will stop authoritarian countries from following suit? Will all battlefield conduct shift toward the cruel, unlawful techniques employed by our non-state adversaries?* To prevent this, American policymakers must commit to legal standards and prosecute those responsible for LOAC violations domestically. The U.S. is a global leader, so a domestic shift in U.S. policy procedures could encourage fellow signatories to global human rights treaties to follow suit.

IV. Crisis in Kabul: Continued Distortions of the Law of War in U.S. Drone Strikes

The Baghuz case analysis demonstrates that the rise of conflicts with threatening non-state terrorist actors has prompted some of America's most serious rule of law violations in the name of security and executive privilege. This trend is further exemplified by the Kabul drone strike on August 29, 2021, amidst the U.S. withdrawal from Afghanistan and the rise of de facto Taliban rule. Like the Baghuz attack, this strike violated the LOAC because it failed to properly distinguish between combatants and non-combatants and resulted in the deaths of innocent civilians. The Kabul strike also failed to prevent unnecessary suffering, and intelligence on the strike can be characterized by a lack of precautionary measures.

In late August 2021, U.S. forces in Kabul were on high alert after a recent ISIS suicide bombing killed thirteen American service members and nearly two hundred Afghans.[54] Anticipating another attack, military officials targeted and

killed Zemari Ahmadi, an employee of a U.S. humanitarian organization, believing him to be a member of ISIS-K, or ISIS forces in Afghanistan. After tracking his movements for eight hours, U.S. intelligence forces believed Ahmadi was preparing to attack Hamid Karzai International Airport.[55] In reality, Ahmadi was making routine stops and loading his car with water for his family.[56] Originally heralded by the Department of Defense as a "righteous strike," the August 29, 2021 Hellfire attack on Kabul killed ten civilians, including several children, and did not achieve a legitimate military objective because the attack was based on misleading intelligence.[57] When interviewed, surviving members of Ahmadi's family stated, "We have nothing to do with terrorism or ISIS. We love America. We want to go there."[58] Although the drone operator saw only one man in the target range, surveillance footage revealed children nearby before the strike. This error has been attributed to confirmation bias, wherein troops saw what they expected to see: a member of ISIS loading his car with materials for an upcoming attack. American forces mistook Ahmadi's humanitarian supplies for weaponry and military equipment intended for an attack on Hamid Karzai International Airport. To date, "condolence payments" have been distributed to the families of the victims. However, no U.S. troops will "face any kind of punishment."[59]

The August drone strike on Kabul violated the principle of distinction, failed to protect from unnecessary suffering, and lacked precautionary measures necessary to conduct a precise and effective attack. We must acknowledge the facts presented *before the strike* rather than the tragic outcome to adequately judge its legality. First, it is crucial to understand that the DOD believed it was preventing another large-scale suicide bombing.[60] Moreover, the strike would allegedly protect troops pursuing the suspected terrorist who could be killed in a traditional boots-on-the-ground operation. For these reasons, the drone strike on Kabul passed the military necessity test given officials' limited conception of what

they considered an impending attack. Officials seemingly failed to conduct a thorough review of the target area, resulting in the U.S. military's expectation that the strike would cause minimal collateral damage. According to U.S. military criteria, the attack fulfilled the proportionality requirement based on officials' flawed pre-strike analysis.

However, the military failed to distinguish between lawful and unlawful targets, violating the principle of distinction. This resulted in the killing of innocent civilians, all of which was captured by surveillance cameras. Additionally, the drone strike caused the unnecessary destruction of homes and property, now needing lengthy repairs, and the anguish felt by families of the dead will take much longer to heal. U.S. forces also failed to take sufficient precautionary measures to protect innocent people. A careful background check on Ahmadi, including more on-site human intelligence to verify the suspected attack, and a more thorough analysis of surveillance footage may have prevented this misinformed and tragic strike. This case violated the LOAC's unnecessary suffering, precautionary measures, and distinction principles.

The Geneva Convention outlines "Protection of Civilian Persons" in times of war. While it's unclear whether asymmetric warfare with non-state actors is, or should be, considered a "time of war," the Convention bars "willful killing, torture or inhuman treatment…" including "willfully causing great suffering or serious injury to body health."[61] Unfortunately, this language is vague in the context of drone strikes mistakenly hitting civilian populations. DOD officials may argue that the tragic death of civilians in Kabul was not "willful," but a result of mistaken intelligence and poor situational awareness. However, this failure demonstrates a violation of the due diligence demanded by the law of war.

Violations of International Humanitarian Law (IHL) are also apparent in Convention Three, which protects "persons taking no *active* part in hostilities."[62] This designation seems to apply to

innocent civilians in Taliban-controlled Afghanistan. The Geneva Convention also forbids nations from "[carrying] out executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,"meaning that while it is lawful to kill combatants representing a foreign nation in the context of war, it is unlawful to kill civilians extrajudicially when they pose no immediate threat.[63] A more deliberate analysis of his background and activities or even a trial would have found Ahmadi innocent and prevented needless death and damage to his community. However, Ahmadi was not arrested and tried in court, likely due to the perceived urgency of the circumstances. Thus, in addition to violating the Geneva principle of no extrajudicial execution for noncombatants, the Kabul drone strike exposed a failure to apply traditional law of war principles to suspected terrorist attacks.

V. Combatants vs. Noncombatants in an Asymmetric World

"Just war theory" is another law of war doctrine that merits discussion. This theory outlines the international norms of *jus ad bellum* and *jus in bello*. As described previously, *jus ad bellum* deals with state justification for the use of force, while *jus in bello* refers to combatants' conduct.[64] Traditionally, combatants are not liable for their nation's decision to enter a war. No matter the justice of their states' cause, combatants are allowed to target other combatants on the battlefield. Soldiers have a shared sense of "moral equality" because, like weapons, troops are tools of the country they serve.[65,66,] Unlike terrorist actors, troops do not pursue political aims independently. Before the Kabul strike, neither *jus ad bellum* nor *jus in bello* were properly applied. The U.S. was not justified in attacking Ahmadi under *jus ad bellum* because he was not planning a terrorist attack. Under *jus in bello*, the strike methods were unjustified because they resulted in civilian death beyond any reasonably acceptable amount of collateral damage for

achieving a true military objective.

The distinction between *jus ad bellum* and *jus in bello* morality demonstrates how drone strikes on suspected terrorists muddy the principle of distinction.[67] Since terrorist actors do not represent the political will of a legitimate state on the battlefield, they are not afforded a combatant's privileges, including Prisoner of War Status and the ability kill other combatants without prosecution. Essentially, terrorists are civilian criminals and should be prosecuted in court as such whenever possible. However, suspected terrorists are often described as "unlawful combatants" or even "enemy belligerents" by the U.S. to deflect responsibility for denying suspects the due process rights afforded to ordinary criminals. In *Panetta v Al Aulaqi,* the U.S. District Court in Washington, D.C. ruled that executive officials were not liable for launching a drone strike on an Al Qaeda propagandist due to executive privilege in the face of a pressing national security threat.[68] Al Aulaqi was an American citizen, and his father argued that American officials had violated his right to due process under the Fifth Amendment by killing Al Aulaqi extrajudicially. Likewise, in the case of Ahmadi in the Kabul strike, a similar line of reasoning was used to permit his extrajudicial killing. While Ahmadi was not an American citizen like Al Aulaqi, both instances ignored the universal guarantee of due process to all civilians under the Geneva Conventions.

VI. Faulty Domestic Justifications and Room for Improvement

The U.S.'s justification for drone strikes lies primarily in domestic law, superseding international regulations. The AUMF, signed by President George W. Bush in the immediate aftermath of September 11, 2001, exemplifies how the U.S. uses domestic law to justify drone strikes. Reflecting the nation's fear of future attacks, the 2001 AUMF gave the president expansive authority, or a "blank check," to target suspected terrorists. The 2001 AUMF

also established executive authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" as well as those who harbored them. However, the 2001 AUMF was primarily employed against two other non-state groups: Al Qaeda and the Taliban.[69] In 2002, a second AUMF explicitly authorized force in Iraq to combat ISIS.[70] Historically, there has been bipartisan congressional support for a new, more precise AUMF to curtail limitless executive authority in the name of counterterror and restore Congress' constitutional war powers.[71] However, concerns regarding a Taliban-led Afghanistan may forestall executive restraint in the name of national security.

Signed during a period of anguish and trepidation in the face of a foreign threat of unknown magnitude, the AUMF has a powerful historical significance. In addition to the AUMF, Article II of the Constitution is often cited as a defense of wide-reaching presidential authority in the asymmetric arena. This section declares the president commander in chief of the armed forces, which are often called upon to execute counterterror operations, though civilian agencies like the Central Intelligence Agency can be employed as well.[72] The AUMF and Article II combine to generate a vague domestic legal framework that allows for wide-ranging operations independent of global human rights law.

While the president may retain Article II privileges and can default to them in a large-scale emergency, relying on the AUMF to justify the strike in Kabul allowed inadequate intelligence gathering due to the low threshold of proof needed before carrying out a strike. Congress' impulse not to hinder a swift crisis response or paralyze the president during a time of emergency is legitimate. However, the executive must not pursue limitless action based on counterterror, particularly if, as in Kabul, the targets are unaffiliated with terrorist organizations. Moreover, the description of terrorist apprehension as a strictly *military* operation is worrisome. As discussed previously, terrorists lack the privileges

of lawful combatants who represent legitimate states in the international system. Terrorists are civilian criminals and should be thwarted by law enforcement like ordinary civilians engaged in any nontraditional, warlike activity. While military forces are often necessary during crises, employing local police forces and civilian agencies (who may better understand local contexts) is preferable. This law-enforcement framework encourages due process and careful intelligence gathering in line with the Geneva Conventions.

VII. Conclusion and Recommendations for the Biden Administration

I recommend the Biden Administration focus on ethics, not optics. I suggest public hearings for supervisors implicated in strikes based on limited, rashly justified intelligence. Strikes resulting in civilian tragedies have become a troubling trend before the withdrawal from Afghanistan, but the desire to end asymmetric conflict should not weaken our adherence to the rule of law. Fighting an opponent that uses civilians as shields has caused the U.S. military apparatus to weaken its resolve, striving to cover up misdeeds in violation of proportionality, distinction, and adequate precautionary measures after the fact rather than countering them proactively.

Instead of a heartening victory for liberal democracy, the March 2019 strike on Baghuz and the August 2021 attack on Kabul have become potential weapons for U.S. adversaries, strengthening the argument of jihad as it aims to villainize the American people. Moreover, it represents a dilution of the rule of law that could have a global impact. Security and defending human rights are not mutually exclusive. Moving forward, President Biden must address suspected terrorists within a law enforcement framework, partner with local police to evacuate civilians when necessary, and glean more accurate intelligence before weapons are deployed. The U.S. should champion new, more precise language in the LOAC

that refers explicitly to non-state actors as civilian criminals with warlike aims, rather than calling them "unlawful combatants" to deny their rights to due process. I also recommend the Department of Defense turn to a more egalitarian review process in which multiple teams present during hostilities, and unaffiliated experts draft after-action LOAC reports to increase accountability. I am confident that together, these methods can chart a new course that will increase the U.S.' credibility in the international community, bolster military effectiveness, and defend human dignity.

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Anti-Accommodation Court and the Continued Assault on the Definition of Disability: From 1990 to Now.

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Abstract

This paper looks at the changes and continuities in disability rights case law regarding the definition of disability in the Americans with Disabilities Act (ADA).

First, this paper examines the specific measures the Supreme Court took to limit the number of people who qualify as disabled under the ADA definition: raising the standard for substantial limitation, changing the major life activity requirement, and denying protection on the basis of mitigating measures. It shows that the Supreme Court was intentionally limiting the scope of the ADA's coverage and argues that limits on who received disability discrimination coverage favor corporate rights.

This paper then summarizes the federal reforms to and expansion of the definition of disability in the 2008 Amendments to the Americans with Disabilities Act (ADAAA). Then, it argues that despite the intentions of the amendments to broaden the scope of the ADA definition, the ADAAA has not been completely successful because in many cases the lower courts have ignored key parts of the legislation or entirely disregarded it because they have continued to focus cases on the definition of disability and whether the plaintiff qualifies as disabled. To prove this, this paper examines *Johnson v Wald County* and empirical research of post-ADAAA decisions, revealing that then 10th Circuit Judge Neil Gorsuch's decision was incorrect because it completely ignores the ADAAA's 2008 reforms. This ignorance is not a one-off but a small part of the active and intentional limitation of disability discrimination protection.

I. Introduction

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.
>
> - Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327, 329.[1]

The ADA Title 1's conceptual predecessor was the 1968 Civil Rights Act Title VII.[2] The ADA sought to codify civil rights protections against workplace discrimination for those with physical and mental disabilities.[3] Yet the ADA has not been treated like other civil rights legislation in the courts because of its unique dispute over who qualifies for protection. Ultimately, the adjudication of this dispute in disability rights cases has limited the scope of who can make civil rights claims under the Americans with Disabilities Act of 1990 (ADA), while enhancing employer and corporate rights.

II. What is a Disability? How the Supreme Court used its interpretive powers to limit the breadth of ADA protections

Under the ADA, the definition of disability is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such

an impairment."[4] After the ADA's inception, the Supreme Court reduced the scope of the ADA's protection by limiting the number of people who satisfy the requirements of the legal definition of disability. The Court achieved this by changing the meaning of key words in the ADA definition and focusing disability rights cases on who qualifies as disabled instead of determining whether an employer engaged in disability discrimination.[5]

A. Toyota v Williams

Case law following the implementation of the ADA focused on the minutiae of the definition of disability. The Supreme Court's "parsing" of each word in the ADA's definition of disability led to the exclusion of Americans with a wide range of impairments from making claims under the ADA and receiving protection from employment discrimination.[6]

1. Raising the Standard for Substantial Limitation

In the ADA, Congress did not define "substantially limits" or "major life activity," nor did it delegate authority to an agency to interpret the terms in part (A) of the definition of disability.[7] Thus, it left the interpretation of these terms to the courts. In *Toyota Motor Manufacturing, Kentucky, Inc. v Williams*, 534 U.S. 184 (2002), the Supreme Court used this discretion to raise the standard for *substantial limitation*, which reduced the number of Americans who qualified as disabled.

In *Toyota,* Ella Williams brought a claim against Toyota Manufacturing for failure to provide reasonable accommodation for her disability. Williams claimed she was legally disabled due to her Carpal Tunnel Syndrome and related impairments. The court system focused the question of this case on whether William's impairments fit the legal definition of disability. The Supreme Court decided to hold *substantial limitation* to the

higher requirement used by the Equal Employment Opportunity Commission's (EEOC) definition.[8] In the decision delivered by Justice Sandra Day O'Connor, the Court said, "We therefore hold that to be *substantially limited* in performing manual tasks, an individual must have an impairment that prevents or *severely restricts* the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[9] In later legislation, the 110th Congress said the Supreme Court's interpretation of the term *substantially limits* as *severely restricts* led the lower courts using the *Toyota* precedent to "require a greater degree of limitation than was intended by Congress."[10] This decision resulted in the lower courts dismissing the claims of many people with impairments who should have been protected by disability civil rights legislation.

2. Major Life Activity Requirement

Additionally, the Supreme Court limited the definition of a major life activity by disqualifying intermittent impairments and occupation-specific tasks. By changing the major life activity requirement, the Supreme Court decreased the number of people who qualified for protection under part (A) of the ADA definition of disability.

The *Toyota* decision included the requirement for a disability to be "daily" and "permanent or long term." This made it so the major life activity requirement had to be held to the standard of central importance to someone's "day to day life,"[11] which fundamentally changed the meaning of a major activity to an activity that is "daily."[12] This, along with the Supreme Court's addition of the wording "permanent and long term nature," served to narrow the scope of the definition of disability by disqualifying those with "episodic or intermittent impairments" such as epilepsy or post-traumatic stress disorder.

In *Toyota*, the Supreme Court questioned under what

context the ability to perform manual tasks constituted a *major life activity*.[13] In Justice O'Connor's analysis, she said, "the manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance."[14] This set a precedent that allowed the exclusion of "occupation-specific" tasks from the definition of *major life activity*. The Supreme Court's holding that Williams did not qualify as disabled meant that employers did not have to accommodate employees for disabilities that did not allow them to do a particular task or function of a job if that same disability did not preclude them from major activities in their day to day life or would not exclude them from a wide range of similar jobs.[15] *Toyota*'s decision redefined two key phrases in part (A) of the ADA definition of disability, *major life activity* and *substantially limits*, in a way that greatly limited who qualified for employment discrimination coverage on the basis of disability.

The *Toyota* decision also highlighted the Supreme Court's explicit intent to create a restrictive requirement for qualifying as disabled. O'Connor's opinion stated that the definition of disability "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled."[16] The Court asserted that this restrictive standard kept the original intent and motivation of the ADA. In the legislative finding section of the ADA, Congress listed that 43 million Americans were disabled. The Supreme Court reasoned that if there was meant to be a "low" standard to be considered disabled, Congress would have said a higher number that included millions of more Americans.[17] This was their only evidence for a decision that set a restrictive standard in *Toyota* and the myriad lower court disability civil rights case that use *Toyota* as precedent. This one line defined post-ADA disability rights case law and was used as evidence to reduce civil rights protections for millions of Americans with a wide range of impairments.

B. Sutton*, Mitigating Measures, and the Codification of Corporate Rights*

By focusing the question of Supreme Court cases on defining the term "disabled" instead of on whether or not the employer engaged in ableist discrimination, the Supreme Court's decisions about the ADA reduced protections for the disabled and favored employers' rights.

The Supreme Court aimed to answer the question of whether the status of disability should be made in regard to the effects of "mitigating measures" in two seminal cases, *Sutton v United Airlines, Inc.*,[18] and *Murphy v United Parcel Service*.[19] The Supreme Court's ultimate decision was that people who are in "mitigated states," such as diabetics who are currently taking insulin,[20] would not be considered disabled.

In *Sutton*, the Supreme Court decided two "severely" myopic sisters were not disabled under the ADA due to the existence of "corrective" measures that would be able to improve their vision.[21] The Sutton sisters' applications to be airline pilots were denied because of their level of "uncorrected" visual acuity, despite the fact that with the "use of corrective lenses, each . . . has vision that is 20/20 or better."[22] With mitigating measures, the sisters' visual acuity level was at the standard requisite for the job.[23] Therefore, because the airline disregarded the mitigating effects of the lenses, the airline's employment decision had been made solely on the basis of the sister's impairment and not on their actual ability to do the job.

Yet, due to the exact same mitigating measures that United Airlines disregarded in their hiring process, the Supreme Court held that the Sutton sisters did not have a valid employment discrimination claim under the ADA. Because they were not legally disabled, they did not qualify for the ADA's protections.

Whether the employer was engaging in discriminatory employment practices should be the most important question for

the court in regard to disability civil rights caselaw. The ADA prohibits discrimination by private employers against qualified individuals with a disability.[24] Therefore, the court should question whether the employment requirement was valid, or if the employer's discriminatory behavior was based off the existence of a disability. For example, in *Sutton*, was the employment requirement valid because otherwise the employee in question would not be qualified to perform the necessary functions of the job, or was the employment requirement ignorant of the effects of mitigating measures like contact lenses?

If the Supreme Court examined *Sutton* through the lens of corporate employment discrimination, it would most likely follow that United Airlines must make employment decisions with regard to "mitigating measures" and their "corrective" effects. In Sutton, the Supreme Court reasoned that glasses or contact lenses fully mitigate the effect of the impairment; therefore, the Sutton sisters could not be considered disabled. The Court could have used that logic to say the potential employee's eyesight was qualified for the position because of these mitigation strategies, so United Airlines must factor mitigating measures into its employment decisions. If it does not, its hiring decision discriminates based on the existence of a disability.

This decision illuminates how the limitation of the scope of the ADA's disability coverage favors employer rights. The mitigating measures standard in *Sutton* denied protection for many people based on measures they used to ameliorate the effects of their impairment, while simultaneously decreasing the regulation that the ADA put on corporate hiring practices. It failed to protect fully capable employees that corporations perceived as disabled due to their impairment and protected discriminatory employment behavior.

In conclusion, instead of creating precedent that aimed to stop employment discrimination, the Supreme Court's decisions in *Sutton* and *Toyota* regarding the definition of disability excluded

many people with impairments from the legal identity of disabled and the civil rights protections that came with it. The decision to actively limit the broad scope of disability coverage, which was based on flawed reasoning and an insignificant statistic in the original ADA rather than the true intent for the ADA's creation, resulted in increased protection of employer's rights because of the decreased ADA regulation of hiring practices and the lower standard for employment accommodation.

II. The Americans with Disabilities Act Amendments Act of 2008

In 2008, in response to the Courts' attack on the 1990 ADA, Congress drafted a new bill to include more people under the definition of disability. Congress amended the verbiage of the ADA and expanded on the original definition of disability by defining key phrases to be more in line with Congress' original intent.[25] This response was not completely effective; many cases have ignored the ADA as amended (ADAAA) and lower courts have continued to issue decisions with the intention of limiting the scope of who qualifies as disabled under the ADA definition.

A. Dejure changes made by the ADAAA

The ADAAA addressed the Supreme Court's flawed idea that Congress had intended for them to purposefully restrict coverage under ADA.[26] The ADAAA laid out rules for how the definition of disability should be construed by the courts. The first rule of construction said that the definition of disability should provide "broad coverage" to "the maximum extent permitted" by the ADAAA's guidelines.[27] The ADAAA explicitly included "episodic" impairments under the definition of disability as long as the impairment "*substantially limits* a *major life activity* when active."[28] The amended definition of disability also said the

mitigating effects of treatment do not factor into qualifying as disabled, with the exception of eyeglasses, contact lenses, or "low vision devices."[29]

Another part of the purpose of the ADAAA was to "reject the standards enunciated by the Supreme Court in *Toyota,*" specifically *Toyota'*s interpretation of the terms "substantially" and "major."[30] For *major life activitie*s, Congress created a standard, non-exhaustive list of major life activities to serve as examples and listed a number of "major bodily functions," which if substantially limited would also fall under this definition of disability.[31]

In regard to *substantial limitations*, the ADAAA held that the Court's standard of *significant restriction,* which was set by *Toyota* and applied in lower court decisions, had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[32] This legislation did not lay out specific examples for something to be considered a *substantial limitation*. Instead, the ADAAA delegated authority to the EEOC to interpret the meaning of *substantially limits* with the guidance set out by the ADAAA,[33] and explicitly required the EEOC to remove regulations holding "*substantial limitation*" to the *significant restriction* standard.[34]

This new definition of a substantially limiting disability has since been applied by the lower courts, and in certain cases, has successfully lowered the bar for a substantial limitation.[35] The Third Circuit Court of Appeals in *Medvic v Compass Sign Co.*[36] held that the ADAAA superseded *Toyota*'s and *Sutton*'s decisions and that stuttering was a disability because it "substantially limits [the plaintiff's] major life activity of communication."[37] The amendments successfully targeted many of the major flaws in the Supreme Court decisions, and when applied correctly, have resulted in a significant expansion of the number of people who qualified under the ADA definition of disability.

B. Johnson v Weld County: Post-ADAAA Continuities

Even after the passage of the ADAAA in 2008, the court system continued to focus on the definition of disability instead of on the act of discrimination, and in many cases lower courts misapplied or largely ignored the ADAAA by wrongly citing pre-ADAAA caselaw. This has resulted in the ADAAA failing to expand the scope of the definition of disability to everyone it originally intended to cover.

1. Courts Continue to Focus on Who Qualifies Under the Definition of Disability

Although in some circumstances the ADAAA was effective in lowering the standard for an impairment to be considered under the legal definition of disability,[38] the ADAAA statute and EEOC regulation that calls for courts to focus primarily on disability discrimination before disabled status has been largely ignored. Congress wanted courts to focus on an employer's motivation for employment discrimination against someone, and not on if someone qualified as disabled. The EEOC specifically clarified that "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred."[39]

Johnson v Weld County,[40] laid out a commonly used test for disability discrimination cases. This test has been used by myriad decisions post-ADAAA to determine if there has been an ADA violation.[41] The first question is whether the plaintiff "is a disabled person as defined by the ADA."[42] This test immediately focuses the case on whether the plaintiff is disabled instead of on employer action. Only in the third and final question of the test does it ask whether the "employer discriminated against [the plaintiff] because of her disability." *Johnson* exemplifies how the courts have continued to focus first on who qualifies under the definition of

disability, and on the discriminatory employment action second.

2. Wrongly Applied Precedent (Keeping the Sutton and Toyota Standards)

Johnson v Weld County is an example of post-ADAAA decisions that have erroneously continued to limit the scope of who can make disability discrimination claims under the ADA. *Johnson* only reached the first part of the test listed above. The first question to test the legality of the disability discrimination claim was whether the plaintiff was "a disabled person within the meaning of the ADA."[43] The court determined that Ms. Johnson was not disabled under the ADA. *Johnson* does not mention the ADAAA anywhere in its decision. Its reasoning is based on *Sutton v United Air Lines, Inc.*, 527 U.S. 471, 489 (1999), and other precedent set before the ADAAA was enacted.

Johnson's reasoning was flawed and not in accordance with the ADAAA because it cited the *significant restriction* standard. Ms. Johnson was not considered disabled under the ADA definition of disability because her multiple sclerosis did not meet the standard that "an impairment is substantially limiting when it renders an individual either unable or *significantly restricted* in her ability to perform a major life activity."[44] The ADAAA explicitly said *significant restriction* was too high of a standard for qualifying as disabled.[45] *Johnson* was decided in 2010 in the 10th Circuit Court of Appeals by current Supreme Court Justice Neil Gorsuch, two years after the ADAAA's implementation. The authors of this opinion should have taken that legislation into consideration, but instead chose to limit the scope of disability discrimination coverage by erroneously applying precedent.

This decision is not the only mistake in a sea of case law that overwhelmingly supports disability employment rights. It is part of a large number of cases that actively ignore the ADAAA in whole or in part and that collectively perpetuate the trend of our

courts purposefully limiting the number of Americans that qualify for disability discrimination protection under the ADA. Extensive research of post-ADAAA case law published by Georgetown Law Center (GULC). The author of the study, Nicole Porter, found that 54 cases concerning the definition of disability completely ignored or did not mention the ADAAA.[46]

Furthermore, the narrow construction of the definition of disability continued to be applied after the ADA. A multitude of post-ADAAA cases acknowledge the ADAAA while ignoring specific statutes that expanded the breadth of the ADA definition of disability. The GULC study found cases that ignored ADAAA statutes attempting to protect a variety of impairments. The study also uncovered many cases where protections for intermittent or temporary impairments, impairments whose effects can be mitigated by modern medicine, and impairments that affect "major bodily functions" were ignored. Ignoring statutes specifically aimed at expanding who qualifies as disabled under the ADAAA reduces the breadth of the definition back to the limited and restricted pre-ADAAA definition of disability.

In the GULC study, Porter cites 3 possible reasons for the errors in post-ADAAA caselaw: ignorance, incompetence, and animus.[47] Two explanations are unintentional mistakes, albeit mistakes with large negative implications on the lives of the claimant. Porter's first explanation blames the lower court's ignorance of how the ADAAA has affected just adjudication of disability employment law,[48] and her second explanation blames incompetence of the plaintiff's lawyer about which legal arguments to pursue.[49] Her last explanation for the Court's errors explores the possibility of intentional animus, but Porter ultimately could not determine intent. She said, "There were many cases where the court's legal analysis is plainly wrong, but it is not clear to me whether the errors were unintentional or whether the court was deliberately trying to dismiss the plaintiff's claims because of animus against the ADA."[50]

It is unsure whether *Johnson* and cases like it are due to an antipathy towards disability rights, a pro-business bent of the court, or pure ignorance of the ADAAA, but either way they have the same effect of stopping qualified individuals from justly making discrimination claims under the ADA.

IV. Conclusion

In 1990, Congress intended to solidify civil rights protections for the disabled in the workplace. Our democratically elected legislators' actions were thwarted, and intentionally interpreted by the Supreme Court to reduce the scope of protections for the disabled. In the Supreme Court's crusade for corporate rights, the civil rights protections granted to disabled Americans were significantly restricted. In 2008, Congress tried to reverse the precedent that set a demanding standard for qualifying as disabled, but they were still not able to guarantee protection to every person they intended to protect because of the courts' resistance and/or ignorance of the statute. Despite successes, in part this legislative solution has failed due to the lower courts' ignorance of the amendments, and the Supreme Court's inaction in correcting flawed post-ADAAA decisions.

The anti-disability rights trend has continued despite congressional action. Many cases still focus on the definition of disability rather than the existence of discrimination. People who are facing discrimination on the basis their disability are first asked whether they are truly disabled before the court investigates whether discrimination is taken place. To reverse this trend limiting the scope of disability rights, there must be a concerted legal advocacy for disability employment rights. Legislation has been proven ineffective. Thus, these issues must be addressed by the legal community.

This advocacy needs to be a collective effort by the legal community, including targeted education reform and efforts to

spread awareness to more tenured law makers, legal scholars, and judges. Education reform must highlight the noticeable role disability plays in modern employment law and advocate for the inclusion of disability law courses in the standard legal curriculum.

Furthermore, this advocacy must target those who are years removed from their legal education, as well. Maybe, such changemaking can take a page out of the Federalist Society and pay judges and law makers to attend forums and workshops. But truly, it is incredibly paramount that advocates educate judges on changes in post-ADAAA precedent. We must prove why rulings that use old case law like *Sutton* and *Toyota* are not only incorrect but harmful to people who have already been marginalized and ostracized from their workplace.

These issues are critical, and the fight will not end with legislation. If we want just employment laws in the United States, the legal community must take action.

[1] 42 U.S.C. § 12101 (2000).
[2] Michael Ashley Stein and Michael E. Waterstone, "Disability, Disparate Impact, and Class Actions," *Duke Law Journal* 56, 861-922 (2006).
[3] 42 U.S.C. § 12101 (1990).
[4] 42 U.S.C. § 12102.2 (2000), and in *Raytheon Co. v Hernandez*, 540 U.S. 44 (2003) where Justice Thomas wrote "The Americans with Disabilities Act defines the term "disability" as: …" proving that the court has taken this section of the ADA as the definition of disability.
[5] Michael Ashley Stein, "The Law and Economics of Disability Accommodations," *Duke Law Journal* 53, 79-19 (2003).; entities under Title I of the ADA, includes private employers with more than 25 employees, employment agencies, labor organizations, and joint labor-management committees
[6] Kiren Dosanjh Zucker, "The Meaning of Life: Defining "Major Life Activities" Under the Americans with Disabilities Act," *Marquette Law Review* 86, 957 (2003).
[7] *Sutton v United Airlines*, 527 U.S. 471 (1999). "No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§12101—12102, which fall outside Titles I-V Most notably, no agency has been delegated authority to interpret the term *disability*."
[8] The ADA's definition of disability is rooted in the definition of Section 504 of the HEW Rehabilitation Act, so the Supreme court usually used section 504 as precedent for cases involving the definition of disability, but the Rehabilitation Act did not have a definition of *substantial limitation.* 29 U.S.C. § 798 (1973). So the Supreme Court had more freedom in this decision and it chose the more limiting standard of "significant restriction" set by the EEOC.
[9] "Unlike 'physical impairment' and 'major life activities,' the HEW regulations do not define the term 'substantially limits.'... The EEOC, therefore, has created its own definition for purposes

of the ADA. According to the EEOC regulations, 'substantially limit[ed]' means '[u]nable to perform a major life activity that the average person in the general population can perform '' See *Toyota. v Williams*, 534 U.S. 184, 195 (2002).
[10] ADA Amendments Act, Pub. L. No. 110-325, S. 3406 § 2, *Finding 7*, (110th Congress 2008).
[11] *Toyota. v Williams*, 534 U.S. 184, (2002): 195
[12] Katherine R. Annas, "Toyota Motor Manufacturing, Kentucky, Inc. v Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA," *UNC Law Review* 81, (2003): 835
[13] *Toyota. v Williams*, 534 U.S. 184, (2002): 195.
[14] Ibid, 201.
[15] Ibid, 198.
[16] Ibid*,* 185.
[17] Ibid, 192. Was this valid legal reasoning or another excuse to validate the Supreme Court's pro-corporate rights bent?
[18] 527 U.S. 471 (1999).
[19] 527 U.S. 516 (1999). *Murphy* held that the plaintiff did not meet the standards set by the ADA's definition of disability because when mitigating measures were taken the plaintiff's high blood pressure did not substantially limit him in any major life activities.
[20] Amy M. Kimmel, "Insulin: Can't Be Disabled with It--Can't Live without It: Creative Solutions for Employees with Diabetes Claiming Disability Discrimination in a Post-Sutton World," UC Hastings Law Review 52, (2001): 749.
[21] *Sutton v United Airlines, Inc.*, 527 U.S. 471, (1999): 474.
[22] Ibid, 475. The Court held "that plaintiffs were not disabled within the meaning of statute because in their mitigated states, they were not substantially limited in a major life activity" Michael Ashley Stein & Michael E. Waterstone, "Disability, Disparate Impact, and Class Actions," Duke Law Journal 56 (2006): 861-922.
[23] Ibid, 475-476. United had originally invited the sisters to interview for the position. United then withdrew the interview, and

told them directly that the reason for this was due to their disabling condition Myopia.

[24] 29 CFR Part 1630 (2021).

[25] The ADAAA used the same 3 Term framework set by the ADA of 1990. ADA Amendments Act, Pub. L. No. 110-325, S. 3406, § 3, rule 1 (110th Congress 2008).

[26] In enacting the ADA of 1990, Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" Ibid*,* § 2.

[27] Ibid*,* § 4, rule 4 A.

[28] Ibid*,* § 4, rule 4 D.

[29] Ibid*,* § 4, rule 4 E.

[30] Ibid*,* § 2 b, *Purpose* 4.

[31] "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.": Major life activities also include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. § 12102, Section 2.B (2021).

[32] Ibid*,* § 2 b. *Purpose* 5.

[33] The EEOC guidance on determining what a substantial limitation is includes: "Substantially limits does not mean prevents or severely restricts" "Substantially limits is not meant to be a demanding standard" and that "[T]he threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis." 29 CFR Section 1630.2(j)(1)(iii) (2021).

[34] ADA Amendments Act, § 2 b 6 (110th Congress 2008).

[35] Although the plaintiff's motion was denied, the court recognized that the ADAAA had "lowered the bar" for claiming disability

status, and held that Carpal Tunnel Syndrome "substantially limited ability to perform manual tasks." *Gibbs v ADS, Inc.,* No. 10-2421-JWL (10th Cir. 2011), other examples of lower courts upholding legal validity of "major life activity" in new definition of disability: *Kinney v Century*, (7th Cir. 2011), *Feldman v Law Enforcement,* 79 F. Supp. 2d 472 (E.D.N.C. 2011)

[36] 2011 WL 3513499, (E.D. Pa. Aug. 10, 2011)

[37] Ibid*,* at 8

[38] Example of lower court weighing both employer and disability rights interests in: *Ortega v Due Fratelli*, WL 269812, 2-3 (USDC East Illinois 2015).

[39] 29 CFR Section 1630.2(j)(1)(iii) (2021).

[40] 94 F.3d 1202 (10th Cir. 2010)

[41] Test first appears in *MacKenzie*, 414 F.3d 10th Cir. (2005): 1274. Post-ADAAA the test appears in more 10th Circuit cases such as *Thomas v Avis*, 10th Cir. (2011), *Fryer v Coil Tubing Services*, 10th Cir. (2011), and the test appears in other circuit court cases in similar manners in cases like *Chambless v Developmental Opportunities*, D. Colo. (2011)

[42] Part 2 of the test is is the plaintiff "qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired" 594 F.3d 1202, 10th Cir. (2010): 1217

[43] Ibid, Section V.

[44] Ibid, Section V Part A

[45] ADA Amendments Act, § 2 b 6 (110th Congress 2008).

[46] Nicole Porter, "Explaining 'Not Disabled.'" *Georgetown Journal on Poverty Law and Policy* XXVI, no. 3. (Spring 2019): Section III A.1

[47] Ibid, 392.

[48] Ibid, 393.

[49] Ibid, 398.

[50] Ibid, 402.

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Nude Dancing and First Amendment Jurisprudence: How the Pap's Court Extended the Secondary Effects Doctrine and Lowered the Evidentiary Bar for a Total Ban of a Form of Constitutionally Protected Speech

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Introduction

The First Amendment protects the freedom of speech. It prohibits Congress from making laws that would abridge an individual's right to express him or herself, whether that is through literal speech (in verbal or written form) or communicative conduct. Yet, this liberty does not import an absolute right for each person to always be exempt from specific restrictions. There has been exhaustive debate on how to balance the fundamental right of speech with measures the government must take for the common good. Adult entertainment is a particularly contentious subject; however "debasing," it is inherently expressive and falls within the outer ambits of First Amendment protection.

This paper will address the Supreme Court's alarming steps over the last forty years on the topic of nude dancing. The Court has continually modified and expanded a line of doctrine, granting local governments an ever-widening faculty to suppress individual expression. In *Barnes v Glen Theatre, Inc.*, doctrinal debate brewed to an ideological tipping point. While the Court answered the threshold question of whether nude dancing constitutes a form of protected speech in the affirmative, it nevertheless upheld Indiana's public indecency law, which prohibited nude dancing performed as entertainment, by a 5–4 vote.[1] The five justices who voted to uphold the ordinance as constitutional were split across three different opinions. Most notably, Justice Souter, in his concurrence, contended that Indiana could ban public nudity on merits of curbing negative "secondary effects."[2] A decade of confusion ensued as lower courts struggled to extract a cohesive framework for determining the constitutionality of laws that limited adult expression.

Ten years later, the Court revisited the secondary effects doctrine in *City of Erie v Pap's A.M.* when Pennsylvania modeled a nearly identical ordinance after Indiana: banning public nudity and, as a result, nude dancing. Instead of redressing its heavily

criticized, fractured decision in *Barnes*, the Court, for the first time in legislative history, extended the secondary effects doctrine to justify restrictions beyond the location of commercial enterprises. This extension permitted a total ban on nude dancing.[3] Moreover, in Justice O'Connor's delivery of the majority opinion, she dismissed the need for independent evidentiary record in support of the secondary effects associated with protected First Amendment conduct.[4]

Part I of this paper will introduce the "nude dancing doctrine." Part II will distinguish content-based from content-neutral restrictions and the level of scrutiny applied to each. Part III will examine the development of the "secondary effects doctrine." Part IV will summarize the decision in *City of Erie v Pap's A.M.* and highlight its dramatic expansion of the secondary effects rationale.[5] Part V will canvass the implications of the *Pap's* holding. Ultimately, this paper seeks to shed light on how the landmark decision in *Pap's* sets a disconcerting precedent for protected speech. The upshot of this case reaches beyond a simple regulation of nudity; it enables local governments to ban entire forms of constitutionally protected speech under a secondary effects claim without proof of those effects.

I. Development of the Nude Dancing Doctrine

Freedom of speech under the First Amendment extends beyond spoken and written word to protect expressive conduct.[6] Pure conduct, actions that comprise small amounts or have no communicative intent, is not subject to First Amendment protection. This is because "it is possible to find some kernel of expression in almost every activity a person undertakes."[7] For example, a person walking down the street does not demonstrate a sufficient amount of expression for this act to be considered a form of "speech" within the ambit of the First Amendment.[8] In contrast, a person who marches down the street and waves a rainbow flag

during an LGBTQ+ pride movement likely would demonstrate sufficient expression.

In *United States v O'Brien*,[9] the Court established a two-step assessment to evaluate whether a conduct contains enough "communicative elements" to satisfy the definition of "speech" under the First Amendment.[10] The Court held: (1) "an intent to convey a particularized message [must be] present" and (2) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[11] In its ruling, the Court held that taping a peace symbol to a U.S. flag and hanging it out of a window satisfies both clauses and is therefore protected by the First Amendment. The Washington statute in question "forbid the exhibition of a United States flag to which is attached or superimposed figures symbols, or other extraneous material" and impermissibly infringed upon the appellant's activity.[12]

Although the Court has not expressly applied the *O'Brien* Test to determine whether nude dancing is sufficiently expressive to warrant First Amendment protection, it has consistently implied that nude dancing counts as expressive conduct entitled to some level of protection. First, in *California v LaRue*,[13] a case which determined if state officials possess the power to regulate the sale of "liquor" and "lewd entertainment," Justice Marshall explicitly dissented that "[sexual] live performances and dance have, in recent years, been afforded broad prima facie First Amendment protection."[14] Others, who joined Justice Rehnquist's majority opinion, agreed that "at least some of the performances to which these regulations address themselves are within the limits of the constitution protection of freedom of expression."[15] Three years later, in *Doran v Salem Inn, Inc.*,[16] Justice Rehnquist expressed the view of eight members of the court, again hinting at constitutional protection for nude dancing. He noted "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in

California v. LaRue…that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances."[17]

Six years following *Doran*, the Court buttressed the implication that nude dancing constitutes First Amendment protection in *Schad v Mount Ephraim*.[18] The defendants, who were operators of an adult bookstore that allowed customers to patronize nude dancers and watch them perform behind a glass panel, successfully challenged New Jersey's ordinance that banned all live nude entertainment. Justice White, who delivered the majority opinion, not only struck down the ordinance, claiming that it was overboard, but also cited *LaRue* and *Doran*, writing: "nude dancing is not without its First Amendment protections from official regulation."[19]

The Court finally specified nude dancing as protected expression in *Barnes v Glen Theatre Inc*.[20] In Justice Rehnquist's majority opinion, he cited earlier statements from *LaRue*, *Doran*, and *Schad* to conclude that "nude dancing…is expressive conduct within the outer perimeters of the First Amendment."[21] Justice Souter, in concurrence to the judgment, expressed that "nude dancing as a performance carries an endorsement of erotic experience and thus is expressive activity that is subject to a degree of First Amendment protection."[22] Justice White, joined by Justices Marshall, Blackmum, and Stevens, in dissent to the judgment, explicated that "nude dancing performed as entertainment enjoys First Amendment protection."[23] They also quoted the Seventh Circuit's observation: "dancing is an ancient art form and 'inherently embodies the expression and communication of ideas and emotions.'"[24] Justice Scalia was the only Justice who rejected First Amendment scrutiny. He reasoned that the Indiana statute was "not specifically targeted at expressive conduct"[25] but "a general law regulating conduct,"[26] or the act of appearing in a public place in a state of nudity.

II. Level of Scrutiny Applied to Ordinances that Infringe on First Amendment Rights

If a conduct is expressive and constitutes a form of speech secured by the First Amendment, the next step is to decide the level of scrutiny applied to an ordinance that limits or prohibits that expressive conduct. The Court often applies a "government purpose inquiry" to gauge the motivation for regulation: whether the statute (i) restricts speech because of its content (content-based) or (ii) restricts speech because the government has an interest in preventing something unrelated to speech, but the law itself may have inadvertent constraining effects on expression (content-neutral). Content-based restrictions receive stricter scrutiny than content-neutral restrictions.

A. Content-Based Restrictions are Presumptively Unconstitutional and Subject to Strict Scrutiny

Content-based statutes restrict speech specifically for the message it intends to convey. These statutes constitute laws that "restrict a specific subject matter on their face (e.g. banning the publishing of a magazine on the subject of guns)" or laws that "narrowly proscribe a particular viewpoint (e.g. banning pro-gun control magazines)."[27] Such laws directly target the communicative impact of speech. The First Amendment stipulates that "Congress shall make no law…abridging the freedom of speech."[28] Hence, a content-based law is presumptively unconstitutional unless it survives strict scrutiny, the highest standard of judicial review. To pass the strict scrutiny test, an ordinance must (i) "further a 'compelling government interest'" and (ii) be "narrowly tailored… to achieve that interest."[29]

B. Content-Neutral Restrictions are Generally Held as Constitutional if They Survive Intermediate Scrutiny

Content-neutral statutes, in contrast, do not intend on their face to suppress a particular message but may have such an effect because of their interest in regulating a general subject matter. Hence, a lower level of scrutiny (intermediate level of scrutiny) is applied. The two most common forms of content-neutral laws are "time, place or manner restrictions" and "incidental regulations of symbolic speech."[30] An ordinance can constitutionally infringe on an individual's First Amendment right if it passes the "Time, Place or Manner Regulation Test" (TPM), which by definition is *not* a total ban. The criteria[31] of the TPM is three-part:

(i) the regulation must be content-neutral;
(ii) the regulation must be narrowly tailored to serve a significant government interest; and
(iii) the regulation must leave open ample *alternative* channels of communication

The "Incidental Burden, or Symbolic Speech Test" uses a four-part standard originated from *United States v O'Brien*[32] to determine whether an incidental restriction is constitutionally permissible:

(i) the regulation must be within the constitutional power of the government;
(ii) the regulation must further an important or substantial governmental interest;
(iii) the governmental interest is unrelated to the suppression of free expression; and
(iv) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

C. Doctrinal Collapse of the TPM and O'Brien's Test in Young,Renton, and Barnes

Over the years, there has been a doctrinal collapse of the TPM and *O'Brien's* test, especially in cases involving nudity. Following *Miller v California*,[33] which established a three-prong obscenity test and held that pornography is not ipso facto obscene, local governments began regulating adult entertainment establishments under the TPM framework.

First, in *Young v American Mini Theatres,*[34] the Court found Detroit's ordinance, regulating the location of adult establishments, constitutional. While Justice Stevens, who delivered the majority opinion, admitted that the law "is based on the content of communication protected by the First Amendment,"[35] he acceded to the City of Detroit's argument: the statutory intent was not to limit the freedom of expression but to prevent the deterioration of the city's neighborhoods caused by an aggregating number of adult entertainment businesses. Hence, the Court did not apply strict scrutiny required for content-based restrictions but, instead, opted for a lower-standard, content-neutral analysis.

Following *American Mini Theatres*, the Court reaffirmed its content discrimination analysis in *City of Renton v Playtime Theatres*.[36] Justice Rehnquist similarly recognized that Renton's zoning ordinance "prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school"[37] facially discriminated against adult theaters but evoked the TPM test for content-neutral restrictions. In applying the TPM test, he also ignored the Court of Appeals's finding that much of the 520 acres in Renton available for adult theater sites "was already occupied."[38] As Justice Marshall, in his dissent, pinpointed: "these facts serve to distinguish [*Renton*] from *American Mini Theatres*, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses."[39] To further

state interest in crime protection, the *Renton* majority capitalized on the ambiguity of the TPM's "ample alternative channels" prong and left Playtime Theatres the most inaccessible areas of the city.

The Court's lenient interpretation of "ample alternative channels of communication" in *Renton* foreshadows the slippery slope *Barnes v Glen Theatre* would head down. In dealing with a general law that made public nudity a summary offense and, in effect, prohibited all establishments that offered nude dancing, the *Barnes* plurality applied the *O'Brien* test.[40] Dissimilar from the TPM test, the *O'Brien* test does not require alternative channels of communication and admits the possibility of a total ban. To achieve this shift, the Court departed from precedents that recognized entertainment as protected speech for its communicative nature (i.e., *American Mini Theatres* and *Renton*). It classified nude dancing, performed as a type of entertainment, under "symbolic speech."[41] Symbolic speech consists of non-inherently expressive activity (such as flag-burning). By legitimizing an exclusive focus on conduct and circumventing the communicative aspect of nude dancing, Justice Rehnquist echoes the erroneous opinion in *Clark v Community for Creative Non-Violence*[42] that the TPM and *O'Brien* test embody many of the same standards. He blatantly disregards the TPM test's stricter "alternative channels" prong. The decision to apply the "legislature-friendly" *O'Brien* test in *Barnes* sanctioned the total prohibition of nude dancing as protected expressive conduct.

III. Development of the Secondary Effects Doctrine

A. Young v American Mini Theatres

In *American Mini Theatres*, the City of Detroit (plaintiff) passed ordinances that regulated the location of adult businesses.[43] The Supreme Court upheld the judgment of the trial court and found that the laws were not aimed at suppressing the content

of speech but a "reasonable attempt to regulate social problems ["secondary effects"]—such as crime—which occurred around adult theaters."[44] As Justice Stewart, joined by Brennan, Marshall, and Blackmun, dissented, "the First Amendment required that time, place, and manner regulations that affected protected expression…be content-neutral…[and] thus the Detroit zoning ordinance violated the First Amendment."[45] It remains unclear how statutes passed with the intent to restrict conducts such as nude dancing—whose very communicative impact is thought to produce distasteful effects—are content-neutral.

In addition, the "offensiveness" of the kind of expression at issue should not diminish a conduct's First Amendment protection. The plurality's claim "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice"[46] is imbued with personal bias and precisely undermines the founders' intent to "protect [the freedom of speech] against…majoritarian limitations on individual liberty."[47] The Court's line of reasoning sets a dangerous precedent. It misdirects the focus from the abridgment of expression by overplaying what society deems as an "appropriate" form of expression.

B. City of Renton v Playtime Theatres

Despite Justice Stewart's warning and characterization of the Court's decision as "an aberration"[48] from precedent, the plurality in *Renton* continued to use the secondary effect analysis in defending the content-neutrality of laws that infringe on free speech. *Renton* similarly dealt with a zoning ordinance that limited the establishment of adult motion picture theaters.[49] While the plurality explicitly recognized the ordinance to facially discriminate against adult theaters, it claimed that the ordinance is content-neutral. That is, the purpose is "aimed not at the *content* of the films shown at "'adult motion pictures theatres,' but rather

at the *s*econdary effects[50] of such theaters on the surrounding community"[51] (i.e., preventing crime and maintaining the "quality" of a city's "neighborhoods, districts, and…urban life"[52]). As Justice Brennan refutes, while harmful secondary effects "may arguably give Renton a compelling reason to regulate [adult movie theaters]…it does not mean…that such regulations are content-neutral."[53] The ordinance still targets the *content* of expressive conduct and, as such, should be subject to strict scrutiny.

Renton also alarmingly expands the scope of the secondary effects doctrine from *American Mini Theatres*. Even if the secondary effects doctrine could be used to justify the content-neutrality of a facially discriminatory law, there should be—at the bare minimum—a standard requiring the city to provide sufficient evidentiary basis in support of its secondary effects purpose claim. Yet, the plurality reversed the appeals court's finding and advanced the rationale: Renton "[does not need to] show specific adverse impact from the operation of adult theaters but could rely on the experiences of other cities."[54] Renton, at the time of trial, did not even "have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials."[55]

In addition to such a slipshod judgment, the Court transgressed the TPM test. The third prong of the TPM test demands government restrictions that infringe on speech to "leave open ample alternative channels of communication."[56] The plurality in *Renton* maneuvered around the Court of Appeals's finding that "much of [the] land [available for adult theater sites] was already occupied"[57] and "Many 'available' sites are also largely unsuited for use by movie theaters."[58] This perspective deviates from *American Mini Theatres*, which rested, in part, on the "myriad locations"[59] available for adult theaters to operate without contravening the statute. In other words, the Detroit zoning ordinance in *Renton* fails to satisfy the TPM test. The ordinance does not leave open "ample" alternative channels of communication and makes it unreasonably difficult for adult

theater businesses to even find a location for their operations.

C. Barnes v Glen Theatre

The expansion of the secondary effects doctrine in *Renton* directly influenced Justice Souter's concurrence in *Barnes v Glen Theatre*. Aforementioned, the plurality in *Barnes* applied the *O'Brien* test over the TPM test. The *O'Brien* test does not require a regulation to "leave open ample alternative channels" so long as "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [an important government] interest."[60] Justice Souter contended that Indiana's statute, which banned all nudity in public and thus involved an incidental restriction on nude dancing, is constitutionally permissible because:

> The state's interest justifying the statute was not society's moral views, but rather the interest in combating the secondary effects—such as prostitution and other criminal activity—of live nude dancing in adult entertainment establishments; and…this interest was unrelated to the suppression of free expression, since such secondary effects would not necessarily result from the persuasive effect of the expression inherent in nude dancing.[61]

Justice Souter implicitly sanctioned *Renton's* secondary effects rationale for the TPM test by extending it further to the *O'Brien* test. More disturbingly, he parroted the needlessness of drawing on local evidence.[62] There is no requirement to demonstrate the association between nude dancing establishments and their alleged "harmful" secondary effects on neighborhoods in Indiana. This opinion, if adopted, would enable Congress to pass general laws that have the potential to "incidentally" suppress entire forms of expressive conduct without a detailed framework for evaluating secondary effect claims. Justice Souter's line of reasoning would

unconstitutionally expand the government's power in undermining personal liberties secured by the First Amendment.

IV. Summary of *City of Erie v Pap's A.M.* Decision

In *City of Erie v Pap's A.M.*, the plurality directly adopted Justice Souter's opinion in *Barnes* and applied the secondary effects doctrine to justify Pennsylvania's Ordinance 75-1994, which banned public nudity and, therefore, all nude dancing performances.[63] Four main legal issues were reviewed: (i) whether the ordinance violates an individual's right to freedom under the First Amendment; (ii) whether the issue is moot given that respondent, Pap's, a Pennsylvania corporation, has ceased to operate its establishment "Kandyland" which featured female erotic nude dancing; (iii) whether the ordinance is content-neutral; and (iv) if the ordinance is content-neutral, whether it satisfies the *O'Brien* test.[64]

Two days after the ordinance went into effect, Pap's filed a complaint and "sought declaratory relief and a permanent injunction against [its] enforcement."[65] The Court of Common Pleas of Erie County granted the permanent injunction and ruled the ordinance as unconstitutionally overbroad. On cross-appeals, the Commonwealth Court cited Justice Souter's concurrence in *Barnes* as binding precedent and reversed the trial court's order. The Commonwealth Court held that (i) the ordinance is not overboard and (ii) the ordinance did not unconstitutionally suppress an individual's freedom of speech.[66]

On appeal, the Pennsylvania Supreme Court granted review on both grounds and found the ordinance to violate the First and Fourteenth Amendments. The court reached this decision by first evoking *Barnes*, an earlier case that dealt with a "strikingly similar" Indiana ordinance, and noted that eight of the nine Justices in *Barnes* endorsed nude dancing as an expressive conduct "entitled to some quantum of protection under

the First Amendment."[67] Then, the Pennsylvania Supreme Court inquired whether Congress's interest in passing the ordinance was content-based. Citing *Marks v United States*,[68] it found the four "splintered…non-harmonious opinions"[69] in *Barnes* too "fragmented"[70] to serve as precedent. The Pennsylvania Supreme Court proceeded by conducting an independent examination of the ordinance and its relation to the suppression of expression. It concluded: "although one of the purposes of the ordinance was to combat negative secondary effects, 'inextricably bound up with this stated purpose is an unmentioned purpose…to impact negatively on the erotic message of the dance.'"[71] The ordinance should be categorized as content-based, not content-neutral. Content-based laws must meet the narrow tailoring requirement under strict scrutiny. The government could have imposed "far narrower [and more productive] means of combating secondary effects"[72] such as "criminal and civil sanctions on those who commit sex crimes"[73] than to require dancers to wear pasties and G-strings. Hence, the Pennsylvania ordinance banning public nudity unconstitutionally infringes on protected speech.

On writ of certiorari, the U.S. Supreme Court reversed the Pennsylvania Supreme Court's judgment, holding that the ordinance did not unconstitutionally burden expressive conduct; it is content-neutral and passes the *O'Brien* test. Like *Barnes*, the Court struggled to reach a consensus on the reasoning behind the decision. Both Justice Scalia and Justice Souter in their concurrence expressed skepticism towards the majority opinion of Justice O'Connor, Justice Kennedy, and Justice Breyer.[74]

In Justice O'Connor's delivery of the majority option, she buttressed the content-neutral analysis in *Barnes* and adopted Justice Souter's secondary effects rationale. Justice O'Connor first clarifies that "Being 'in a state of nudity' is not an inherently expressive condition,"[75] but nude dancing is. She identifies the issue as "whether…[Pennsylvania's] regulation is related to the suppression of expression"[76] and foregrounds that statutes

"[generally] prohibiting"[77] public nudity—a non-expressive conduct—only need to satisfy the "'less-stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech."[78] This is because "the ordinance does not attempt to regulate the primary effects of [nude dancing] i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects such as the impact on public health, safety, and welfare… previously recognized…[as an effect of] the presence of [nude dancing] establishments."[79] Having argued for content-neutrality, the plurality applies the *O'Brien* standard and finds the ordinance constitutionally valid for the reasons below:[80]

(i) The city's efforts to protect public health and safety were within the city's police powers;
(ii) the ordinance furthered the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing;
(iii) the government interest was unrelated to the suppression of free expression; and
(iv) the restriction was no greater than was essential to the furtherance of the government interest.

The plurality advanced that Erie "[can] reasonably rely on the evidentiary foundation outlined in *Renton* and *American Mini Theatres*"[81] to fulfill the second substantial government interest prong of the *O'Brien* test. Moreover, city council members have "sufficient leeway"[82] to make judgments about the harmful secondary effects that expressive, "immoral activities"[83] produce. Empirical data or concrete proof of the association between the presence of live nude dancing establishments and "public health, safety, …welfare…debasement of both women and men… [promotion of] violence, public intoxication, prostitution, and other serious criminal activity"[84] in Erie is dismissed as "unnecessary."[85]

V. The Implications of *Pap's*

A. Problematic Content-Discrimination Analysis and Total Ban of a Protected Form of Speech

The Court strengthened its content discrimination analysis in *Pap's* despite clear evidence that the statute was passed for the express purpose of limiting nude dancing establishments. As succinctly presented by law professor Erwin Chemerinsky, a restriction is content-based "if its application depends on the message of the speech."[86] Over the years, the Court has demonstrated an increasing willingness "to find clearly content-based laws to be content-neutral because they are motivated by a permissible content-neutral purpose."[87] Beginning with *American Mini Theatres*, the Court rejected a First Amendment challenge to Detroit's zoning ordinance that regulated the location of "motion picture theaters that exhibit…sexually-oriented films."[88] The Court categorized the restriction as content-neutral "because… the city's interest in planning and regulating the use of property for commercial purposes"[89] is not an attempt to restrict speech but, rather, the communicative impact (or secondary effects) the content of the speech produces. Then, in *Renton,* the Court applied the same analysis to a similar zoning ordinance, treating a content-based restriction—one that only extended to theaters displaying films with sexually explicit content—as content-neutral.[90] Justice Rehnquist, in his delivery of the majority option, even noted that "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters."[91] Despite this, Rehnquist argues that "the Renton ordinance is completely consistent with [the Court's] definition of 'content-neutral' speech regulations as those that 'are justified[92] without reference to the content of the regulated speech."[93] This reasoning further transmutes the standard in determining whether a law is content-based or content-neutral. Instead of focusing on the substance of the law itself, the Court

erroneously relied on the government's justification of passing the law. Five years later in *Barnes*, the Court applied this government "purposive" analysis and found Indiana's public indecency statute banning public nudity and, in effect, all establishments that offer live nude dancing, content-neutral.[94] By applying the less stringent *O'Brien* test, the plurality upheld the ordinance as constitutionally permissible and dramatically expanded the government's censorship power.

For argumentative purposes, let us assume that content discrimination analysis can be influenced, in part, by the government's motive; even so, the Erie ordinance fails to be content-neutral. The plurality in *Erie* drew multiple comparisons to Indiana's ordinance, which the court previously upheld as constitutional. However, no positive evidence in *Barnes* suggested that the Indiana ordinance was passed to specifically restrict nude live entertainment establishments. The preamble to the Erie ordinance, on the other hand, explicitly states: "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana…for the purpose of limiting a recent increase in the nude live entertainment within the City."[95] In addition, the footnote in *Pap's* stipulates that mainstream theater productions involving nudity were not subject to the same prohibitions.[96] While the Court may use the secondary effects doctrine to argue that erotic nude dancing, as a form of protected speech, only falls within the "outer ambits of the First Amendment" and thus warrants less than full First Amendment protection, it simply cannot characterize a "facial, content-based [law]" as content-neutral "because…[of] a permissible [harmful secondary effects] purpose."[97]

It is also baffling how the plurality, in appraising the level of scrutiny applied, refuses to examine whether an "illicit [governmental] motive"[98] was present. If the criteria for determining the content-neutrality of a law rests on "the governmental purpose in enacting the ordinance,"[99] and whether

that purpose is "unrelated to the suppression of expression,"[100] then a legal standard should be established to assess whether the statute is constitutional "as applied." A law that is facially valid but constitutes a hidden government motive to regulate expressive conduct is nonetheless (i) content-based; (ii) should be presumptively invalid; and (iii) must be justified under the more demanding, strict scrutiny standard. The plurality's quick dismissal and, arguably, intentional circumvention of the preamble—which implicated that the city had an "unmentioned purpose to 'impact negatively on the erotic message of…[nude dancing]"[101] with the ordinance's "actual purpose…[being the prohibition of] erotic dancing of the type performed at Kandyland"[102]—should not be overlooked. The Court, by refusing to conduct a thorough examination of Erie's "alleged illicit motive,"[103] tacitly permitted the government's use of a secondary effects claim to pass a general restrictive law with the coded intention of suppressing constitutionally protected speech.

B. A Troubling Extension of the Secondary Effects Doctrine to the O'Brien Test

The plurality in *Pap's*, for the first time in legislative history, extended the secondary effects doctrine to justify a total ban of a form of protected speech. By requiring all dancers to wear "pasties and G-strings,"[104] the government completely bars the message nude dancing, as an art form, intends to convey. Justice Stevens, joined by Justice Ginsburg, dissents, even if "the content of the message resulting from the mandated costume change is '*de minimis*'…the crucial point to remember…is that whether one views the difference as large or small, nude dancing still receives First Amendment protection,[105] even if that protection lies only in the 'outer ambit' of that Amendment."[106] In other words, Erie's ordinance burdens a constitutionally protected message. If the erotic message conveyed by dancers nude and dancers wearing

minimal clothing are the same, the ordinance bans "one means of expressing that message";[107] if the erotic messages conveyed by dances nude and dancers wearing minimal clothing are different,[108] then the ordinance bans "one of those messages."[109] In either case, the ordinance is a total prohibition of expressive conduct.[110]

The extension of the secondary effects rationale to the *O'Brien* test is not supported by precedent. Prior to *Pap's*, the government's secondary effects claim was only used to vindicate TPM restrictions. A TPM restriction is, by definition, not a total suppression. Its third prong requires the regulation to "leave open ample alternative channels of communication."[111] The plurality in *American Mini Theaters* upheld Detroit's zoning ordinances after finding "no indication that the ordinances suppressed the production of or, to any significant degree, restricted access to adult movies."[112] Ten years later, the Court in *Renton* defended a similar ordinance, noting that "520 acres, or more than five percent of the entire land area of Renton, [is] open to use as adult theater sites."[113,114] The decision in *Pap's* directly contradicts the Court's previous statement in *Renton* that the First Amendment requires "...a city [to] refrain from effectively denying respondents a reasonable opportunity open to operate an adult theater within the city."[115] Erie's interest in "combating the negative secondary effects associated with nude dancing establishments"[116] is essentially the same as Detroit and Renton's interest in geographically restricting the establishment of adult motion theaters. The only difference lies in the fact that Erie "disguised its attempt in a general law" to entirely eliminate the communicative impact of live nude dancing in the city.[117] The Court's decision to turn a blind eye to "this wolf in sheep's clothing" is disquieting.[118]

As Justice Steven nicely sums, the Court's holding that "a State may totally ban speech based on its secondary effects, which are defined as those effects that 'happen to be associated' with speech,"[119] unconstitutionally increases the government's power to censor expressive conduct. Municipalities can now evoke

Pap's as precedent and use a secondary effects claim to proscribe what mainstream society denounces as "low-value" speech**.** The Court's extension of the "category of effects…[to] the narrower subset of effects caused by speech"[120] has the potential effect of "[swallowing] whole a most fundamental principle of First Amendment jurisprudence."[121] In other words, the *Pap*'s decision directly violates one of the founding principles of the United States—the individual right to freedom of speech. Even the most controversial, least favored opinions should be valued in a country that puts diversity and democratic ideals on a pedestal. The Court's decision opens the floodgates for the possibility of future total bans, beyond simple TPM restrictions, on all areas of protected speech.

C. Twofold Evidentiary Failure: the Court's Dismissal of Concrete Proof on the Relationship between an Expressive Conduct and its Harmful Secondary Effects and the Efficacy of Proposed Government Regulations

The Court's view that (i) particularized evidence of real harms associated with nude dancing is inessential and (ii) the city's infringement on protected speech does not need to "greatly reduce"[122] its concomitant harmful effects makes the expansion of the secondary effects doctrine more troubling.

Even Justice Souter, who originally used the secondary effects rationale to justify a total ban on nude dancing in *Barnes*, stressed that Erie must "develop a specific evidentiary record supporting its ordinance."[123] In appraising whether a harmful secondary effects claim meets the first "real harms" prong in the *O'Brien* test, the plurality entrusts city council members—who may have an "illicit motive" to suppress nude dancing for its content—to make "expert judgements" about "resulting harmful secondary effects" without recorded evidence.[124] It is ironic to take the abstract "findings" of the very party that has a vested interest in

passing a regulation as impartial. The Court implicitly takes a side by presuming the government to be disinterested.

The *Pap's* plurality also permitted the City of Erie to cite evidence gathered by other municipalities, ignoring key differences such as demographics, location, and size. In Justice O'Connor's stipulation: "the city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city address,'"[125] she does not lay out what reasonably relevant means. The Court simply accepts Erie's use of the same Seattle study presented by Renton. How can a Seattle study—one on zoning ordinances and the secondary effects of adult movie theaters—be rationally transferable as an evidentiary basis for Erie's general law on public nudity and the secondary effects of nude dancing? Moreover, the evidentiary reliability of the Seattle study is not established. The Court's refusal to evaluate the scientific validity of the Seattle study paired with its lax attitude towards Erie's analogization of evidence entails that flawed studies can be "shared, referenced, and cited by more and more cities [in distinct] cases—continuing the web of reliance upon fundamentally unreliable evidence."[126]

The Court raises another evidentiary concern by condoning Erie's secondary effects justification, despite it bearing little correlation to the means chosen to alleviate the alleged harms. In Justice Souter's partial dissent, he disavows his previous opinion in *Barnes* and underscores the importance of concrete evidence demonstrating "the efficacy of the chosen remedy…to sustain the city's ordinance."[127] The government and Court cannot "assume" that the presence of pasties and G-strings will have a reasonable remedial impact on the secondary effects associated with nude dancing establishments. The plurality even acknowledges that "requiring dancers to wear pasties and G-strings may not greatly reduce"[128] "violence, sexual harassment, public intoxication,

prostitution, and the spread of sexually transmitted disease."[129] The decision to uphold Erie's ordinance, effectively banning nude dancing when the proposed remedy has little to no efficacy on the activity's secondary effects, is untenable. Despite this, the Court continues to dismiss Erie's need to evidentially show how its regulatory means serves as a legitimate response to secondary effects. There are two implications of the Court's holding. First, it shifts the burden of proof to adult establishments. Adult establishments must now "disprove proactively the effectiveness of a proposed secondary effects-targeted measure."[130] Second, it unlocks the possibility for municipalities to concoct secondary effects and then enact an expression-suppressive regulation that has little-to-no remedial impact on them. The *Pap's* decision has unconstitutionally created a channel for local governments to disguise their improper motive of speech censorship under a general law and secondary effects claim.

VI. Conclusion

The decision in *Pap's* sets another concerning precedent. The Court's perpetuation of its erroneous content-neutral analysis, acceptance of Erie's secondary effects claims to justify a total ban on an entire medium of protected expression, and rejection of concrete findings that demonstrate the relationship between nude dancing and its secondary effects as well as the efficacy of means chosen to alleviate such effects ultimately lowers the evidentiary bar for a greater speech restriction. The plurality, clouded by its own biases towards sexual expression, has extended an untenable, dangerous line of reasoning that unconstitutionally increases the government's censorship power. It is disheartening to see the development of nude dancing cases: after what seemed like a promising initial step—that is, the recognition of nude dancing as a form of adult expression entitled to constitutional protection—the Court has repeatedly rationalized and endorsed ways to evade the

[1] *Barnes v Glen Theatre, Inc.*, 501 U.S. 560 (1991).
[2] *Barnes v Glen Theatre.*, 501 U.S. 560 (1991).
[3] *City of Erie v Pap's A.M.*, 529 U.S. 277 (2000).
[4] *City of Erie v Pap's A.M.*, 529 U.S. 277 (2000).
[5] Proposed originally by Justice Souter in his (*Barnes v Glen Theatre, Inc.)* concurrence.
[6] Anne E. Mitchell, "Dancing and First Amendment Scrutiny," 34 Urb. Law. 283 (2002).
[7] *Barnes*, 501 U.S. at 570.
[8] *Barnes v Glen Theatre.*, 501 U.S. 560 (1991).
[9] *United States v O'Brien*, 391 U.S. 367 (1968).
[10] Anne E. Mitchell, "Dancing and First Amendment Scrutiny," 34 Urb. Law. 283 (2002).
[11] *Spence*, 418 U.S.at 411.
[12] *Spence*, 418 U.S. at 405.
[13] *California v LaRue*, 409 U.S. 109 (1972).
[14] *LaRue*, 409 U.S. at 129.
[15] *LaRue*, 409 U.S. at 118.
[16] *Doran v Salem Inn, Inc.*, 422 U.S. 922 (1975).
[17] *Salem Inn, Inc.*, 422 U.S. at 932.
[18] *Schad v Mount Ephraim*, 452 U.S. 61 (1981).
[19] *Schad*, 452 U.S. at 66.
[20] *Barnes v Glen Theatre*, 501 U.S. 560 (1991).
[21] *Barnes*, 501 U.S. at 566.
[22] *Barnes*, 501 U.S. at 581.
[23] *Barnes*, 501 U.S. at 588.
[24] *Barnes*, 501 U.S. at 587.
[25] *Barnes*, 501 U.S. at 575.
[26] *Barnes*, 501 U.S. at 572.
[27] Christopher Thomas Leahy, "The First Amendment Gone Awry: City of Erie V. Pap's A.M. Ailing Analytical Structures, and The Suppression of Protected Expression," 150 Univ PA Law Rev. 1033 (2002).

[28] U.S. Const. amend. I
[29] *Strict Scrutiny*, Cornell Law School, https://www.law.cornell.edu/wex/strict_scrutiny (visited December 14, 2021).
[30] Christopher Thomas Leahy, "The First Amendment Gone Awry: City of Erie V. Pap's A.M. Ailing Analytical Structures, and The Suppression of Protected Expression," 150 *Univ PA Law Rev*. 1033 (2002).
[31] Ward v Rock Against Racism, 491 U.S. 781 (1989).
[32] United States v O'Brien, 391 U.S. 367 (1968).
[33] *Miller v California*, 413 U.S. 15 (1973).
[34] *Young v Am. Mini Theatres*, 427 U.S. 50 (1976).
[35] *Young*, 427 U.S. at 67.
[36] *Renton v Playtime Theatres*, 475 U.S. 41 (1986).
[37] *Renton v Playtime Theatres*, 475 U.S. 41 (1986).
[38] *Renton*, 475 U.S. at 64.
[39] *Renton*, 475 U.S. at 64.
[40] *Barnes v Glen Theatre*, 501 U.S. 560 (1991).
[41] *Barnes*, 501 U.S. at 566.
[42] *Clark v Community for Creative Non-Violence*, 468 U.S. 288 (1984).
[43] *Young v Am. Mini Theatres*, 427 U.S. 50 (1976).
[44] *Young v Am. Mini Theatres*, 427 U.S. 50 (1976).
[45] *Am. Mini Theatres*, 427 U.S. at 85-96.
[46] *Am. Mini Theatres*, 427 U.S. at 70.
[47] *Am. Mini Theatres*, 427 U.S. at 86.
[48] *Am. Mini Theatres*, 427 U.S. at 87.
[49] *Renton v Playtime Theatres*, 475 U.S. 41 (1986).
[50] Emphasis added.
[51] *Renton*, 475 U.S. at 47.
[52] *Renton*, 475 U.S. at 48.
[53] *Renton*, 475 U.S. at 56.
[54] *Renton v Playtime Theatres*, 475 U.S. 41 (1986).
[55] *Renton*, 475 U.S. at 52.

[56] *Ward v Rock Against Racism*, 491 U.S. 781 (1989).
[57] *Renton*, 475 U.S. at 64.
[58] *Renton*, 475 U.S. at 64.
[59] *Am. Mini Theatres*, 427 U.S. at 71.
[60] *United States v O'Brien*, 391, 367 (1968).
[61] *Barnes*, 501 at 587.
[62] Ibid, 584.
[63] *City of Erie v Pap's A.M.*, 529, 277 (2000).
[64] Given the focus of this paper, I will not discuss the Court's analysis of mootness/whether a live controversy is present.
[65] *Pap's*, 529 at 283.
[66] *City of Erie v Pap's A.M.*, 529, 277 (2000).
[67] *Pap's*, 529 at 285.
[68] "When the United States Supreme Court is fragmented in deciding a case and no single rationale explaining the result enjoys the assent of five of its Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds" (Marks 4).
[69] *Pap's*, 529 at 285.
[70] Ibid, 285.
[71] Ibid, 286.
[72] Ibid.
[73] Ibid.
[74] Ibid, 303-310.
[75] Ibid, 288.
[76] Ibid, 289.
[77] Ibid.
[78] Ibid.
[79] Ibid, 291.
[80] *City of Erie v Pap's A.M.*, 529, 277 (2000).
[81] *Pap's*, 529 at 297.
[82] Ibid, 298.
[83] Ibid, 297.

[84] Ibid.
[85] Ibid, 307.
[86] Chemerinsky, "Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application,"53 (2000).
[87] Ibid.
[88] *Am. Mini Theatres*, 427, at 84.
[89] Ibid, 62.
[90] *Renton v Playtime Theatres*, 475, 41 (1986).
[91] *Renton*, 475, at 47.
[92] Emphasis added.
[93] Ibid, 48.
[94] *Barnes v Glen Theatre.*, 501, 560 (1991).
[95] Leahy, "The First Amendment," 1055.
[96] *Pap's*, 529 at 328.
[97] Chemerinsky, "Content Neutrality," 53.
[98] *Pap's*, 529. at 292.
[99] Ibid, 289.
[100] Ibid, 294.
[101] Ibid, 286.
[102] Ibid, 290.
[103] Ibid, 292.
[104] Ibid, 286.
[105] Emphasis added.
[106] Ibid, 319.
[107] Ibid.
[108] This is supported by Posner's evaluation in *Miller*.
[109] Ibid.
[110] Ibid.
[111] *Ward*, 491, 781 (1989).
[112] *Young*, 427 at 50 .
[113] *Renton*, 475 at 54.
[114] Noted earlier, this argument is dubious. A large portion of the 520 were already occupied by existing businesses and the land must

be bought or leased by adult movie theaters for use. However, the *Renton* plurality's reasoning still demonstrates that, prior to *Pap's*, the secondary effects doctrine was only used to justify zoning restrictions and not used to suppress an entire form of protected speech.

[115] *Renton*, 475 at 54.
[116] *Pap*'s, 529 at 296.
[117] Leahy, "The First Amendment," 1059.
[118] Ibid.
[119] *Pap's*, 529. at 322.
[120] Ibid, 323.
[121] Ibid, 323.
[122] Ibid, 301.
[123] Ibid,299.
[124] Ibid, 298.
[125] Ibid, 296.
[126] Leahy, "The First Amendment Amendment," 1062.
[127] *Pap*'s, 529 at 314.
[128] Ibid, 310.
[129] Ibid, 290.
[130] Leahy, "The First Amendment," 1065.

Counter-Intelligence: Examining the Security and Press Freedom Implications of the 2019 Expansion of the Intelligence Identities Protection Act

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Abstract

In 1982, Congress passed the Intelligence Identities Protection Act (IIPA), criminalizing the disclosure of the identities of "covert agents" working for a government intelligence agency. They defined "covert agent" as any "employee of an intelligence agency whose identity… is classified and who has… within the last five years served outside of the United States." The Senate claimed that only such employees would be endangered if their identities were revealed. In 2020, the IIPA was expanded, per the CIA's request, to redefine "covert agent" as anyone who has ever been an undercover agent for the US government. The CIA justified this by explaining that modern threats, cyberthreats in particular, endanger the lives of agents who have never served abroad. This paper analyzes the arguments for and against the CIA's 2019 IIPA amendment. It first examines the context of and intention behind the 1982 Act's passage, and the rare cases in which it has been used in prosecution. Next, it analyzes the CIA's argument for the 2019 amendment, looking at how cyber and domestic terrorist threats have changed the nature of "covert actions" and the dangers these threats may pose to covert agents. Finally, it evaluates journalists' arguments that the amendment unduly expands unilateral executive power by "criminalizing reasonable disclosure" of the executive branch's covert activities and "chilling reporting in the public interest." The paper concludes by commenting on the relevance of the amendment to the modern tension between national security and personal freedom.

I. Introduction

In 1982, the United States Congress passed the Intelligence Identities Protection Act (IIPA), criminalizing the disclosure of the identity of any covert agent working for U.S intelligence agencies. After six years of debate over who the act would protect, the Senate defined covert agents as "any officer or employee of an intelligence agency whose identity as such is classified and who is serving (or has in the past five years served) outside of the United States."[1] Per US Code Title 50, War and National Defense, "intelligence agency" was specified as "the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation."[2] The Senate justified this controversially narrow definition of "covert agent" on two bases, arguing that (1) operatives serving abroad face unique physical dangers if their identities are revealed compared to operatives on US soil, and (2) any broader definition may inhibit reasonable public disclosure of executive branch activities.[3]

In 2019, the CIA proposed an expansion to the IIPA to broaden the definition of covert agents to all undercover operatives and informants of US intelligence agencies, even those who had retired, died, or only served on US soil.[4] The CIA defended their proposal by explaining that modern national security threats, particularly cyberthreats, endanger the lives of agents who have never served abroad, invalidating the Senate's original justification for its narrow definition.

In the months that followed the CIA's proposal, many media outlets, including *The New York Times*, *The Washington Post* and the *Associated Press*, publicly opposed the expansion, citing concerns over subverting executive accountability by hindering press freedoms.[5] Opponents to the expansion feared the expansion would "chill reporting in the public interest" and

public debate over controversial government activities by silencing journalists and whistleblowers.[6] They highlighted the clause of the IIPA that expands felony criminal penalties to people who engage in a "pattern of activities intended to identify and expose covert agents," rendering journalists who break stories including a classified agent's name subject to potential prosecution.[7] Some argued that threatening reporters and whistleblowers with criminal charges would expand the executive branch's power to carry out clandestine and military operations without public awareness. Any time executive accountability is minimized, journalists argued, opportunities are created for the executive branch to abuse its power. Despite such robust protest, the expansion passed the Senate and was signed into law on January 9, 2020.

While the IIPA is rarely used to prosecute cases, the 2019 expansion raises a serious debate about the evolution of national security law and the public's right to oversee executive action via a free press. Amorphous threats like terrorism and cyber warfare have proliferated in the twenty-first century, rendering covert action vital to identifying and combating national security threats. However, with abounding classified executive actions, it is crucial to consider the implications of expanding the executive's mandate to act out of the public eye. While the government must be able to defend national security interests against modern threats, public discourse and a free press are critical to preventing illicit activity in the name of national security. The 2019 IIPA expansion offers a case study through which to examine the evolving priorities of intelligence agencies and the media, and debate to what extent modern threats justify suppressing press freedoms and executive public accountability.

II. The Backdrop of 1982

The original IIPA passed in 1982, following several instances of former intelligence officials disclosing the identities

of their fellow agents. Congress was particularly motivated to take action against "agent outers" such as former CIA officer Phillipe Agee, who in 1975 published a tell-all memoir and accompanying magazine titled "CounterSpy" that revealed the names of 250 alleged CIA officers, agents, and informants.[8] Agee claimed to act out of a desire to oppose the agency's support of dictators in Central and South America.[9] Following Agee's publication that same year, Richard S. Welch, the CIA's station chief in Athens and one of the operatives named in CounterSpy, was murdered on his way home from a Christmas party.[10] While Welch's death was never explicitly linked to Agee's revelations, it was enough to spark outrage among the American public and to prompt Congress' proposition of the IIPA.[11]

Members of the Senate and House Intelligence Committees argued that such disclosures by Agee and others amounted to "systematic efforts to destroy the ability of [U.S.] intelligence agencies to operate clandestinely," which may have resulted in numerous agent deaths, assassination attempts, and failed intelligence operations.[12] The IIPA's primary goal was therefore to combat threats to agents' physical safety and operational success by criminalizing the publication of agent identities.

Congress's initial proposal of the IIPA was extremely controversial and heavily debated. Facing outcry from free-speech activists, the Senate eventually agreed to limit the agents protected under the act to only those currently working abroad or those who had worked abroad in the past five years, stating, "In the report that accompanied the IIPA, the Senate Judiciary Committee explained that 'covert agent' was defined in this way primarily because of the unique threat agents abroad face when their identities are revealed."[13] The Senate further argued that the public had a right to know about the activities of former intelligence operatives working in the United States who may be "employees of colleges, churches, the media, or political organizations."[14] They wrote, "The degree of involvement of these people with intelligence agencies

is a legitimate subject of national debate," particularly when their actions raise legal and ethical concerns.[15]

Although the Act passed the Senate 81-4, the four Democratic holdouts voiced strong criticisms of the IIPA, many of which would be echoed by opponents of the CIA's 2019 expansion to the bill. Of particular note is a 1982 op-ed written by current president Joseph Biden, who served on the Senate's Select Committee on Intelligence at the time. It argues that the bill harms the US's national security interests.[16] While then-Senator Biden agreed that Congress should act to protect agents from malicious actors, he believed the act's broad language jeopardized free press by intimidating journalists into withholding stories about suspected intelligence agency misdeeds. "[The act] will curtail legitimate journalistic scrutiny of a particularly important and sensitive area of government, creating the possibility that wrongdoing or wrong-headedness could flourish in that area, unchecked by public awareness," Biden wrote.[17] The op-ed concluded with a fierce defense of the free press as a check to government action, a vindication that would become a rallying cry for opponents to the CIA's IIPA expansion 37 years later: "A free… press is the most reliable check the citizens of our nation have against wrongdoing and bad judgment in government, since government, like any individual, is often reluctant to call attention to the errors of its own ways." Passing the IIPA was a mistake, argued Biden, that would hinder the press from performing its critical role in oversight.[18]

Despite President Biden's fears, the IIPA has yet to be used to prosecute a journalist. In fact, since its passage, there have only been two successful prosecutions involving the statute, one against a CIA agent who disclosed fellow agents' identities to her boyfriend, and the other against a former CIA officer who revealed another agent's name to a reporter.[19] In most cases involving the disclosure of defense-related information, the National Security Act of 1947, which criminalizes all attempts to aid the success of

US enemies, has been sufficient for prosecution.[20]

III. The CIA's Proposed Expansion: A Modern Threat Assessment

The rapid growth of the Internet in the twenty-first century has caused intelligence agencies to face cyber threats, both from foreign governments waging cyber warfare on the U.S. and domestic actors hoping to hack and expose covert government activity through online sources such as WikiLeaks. The CIA claimed that these threats necessitated an expansion of the 1982 IIPA, because "undercover Agency officers face ever-evolving threats" that are "no longer limited to those officers who are serving abroad or have done so recently,"and that they necessitate additional protections for current and former agents on U.S. soil.[21] In its three-sentence justification, the Agency highlighted cyberattacks as a primary threat to agent safety and offered two cases as evidence: the Report on the Central Intelligence Agency's Detention and Interrogation Program (RDI), and the WikiLeaks declassification scandal.[22] However, the Agency did not elaborate on how these cases demonstrate increased domestic agent imperilment or heightened cyber threats, requiring the public to speculate about their implications.

The Report on the CIA's Detention and Interrogration Program is the Senate Select Committee on Intelligence's evaluation of the CIA's detention and interrogation program, particularly focusing on "War on Terror" detainees held at Guantanamo Bay, Abu Ghraib, and other U.S. offshore detention facilities.[23] While the full report remains classified, in 2014, the Committee released a 525-page executive summary detailing key findings such as the alleged attempts to mislead other government actors and the media about the program and interrogation tactics resembling torture. While the CIA maintained that their tactics did

not amount to torture and produced life-saving information, the Senate concluded that the "enhanced interrogation" did not yield mission-necessary information.[24]

Fallout from the RDI's publication contributed to the CIA's decision to propose the IIPA expansion. In the wake of the RDI, many human rights activist groups, including Human Rights Watch, called for the prosecution of CIA agents who participated in or were aware of the program. In response, the CIA argued that the report, while highlighting some of the CIA's misdeeds, failed to acknowledge the involved agents' roles in preventing additional terrorist attacks on U.S. soil. John Brennan, the CIA director in 2014, lashed out at suspected partisan motivations behind the report's harsh criticisms, alluding to Democrats' vilification of the CIA as a way to turn public opinion against President Bush's 9/11 response. "If [the report] was done in a more objective, nonpartisan and fair fashion, it would have put those shortcomings in better context," Brennan said in a speech to the Intelligence and National Security Alliance.[25] "I fervently believe there was no agency more responsible for preventing a recurrence of 9/11 than the CIA."[26]

Although no CIA agents were prosecuted for their involvement in the program, attempts to uncover the identities of involved agents continued. In early 2019, military commission defense attorneys for several Guantanamo Bay detainees attempted to identify eyewitnesses to their clients' interrogations.[27] These lawyers wanted to receive compensation for their clients' treatment at the hands of the CIA in the form of reduced sentencing. This was an unprecedented attempt to get CIA officials to testify to torture or witnessing torture.[28] While military commission trials are not open to the public, the identities of the agents involved in the interrogations would have been recorded and exposed to civilian lawyers, enabling future cases against the agents to proceed.[29] While the lawyers eventually ceased their efforts amid government backlash, the fear of persecution provides context for the CIA's motivation to expand the IIPA.

While the CIA did not elaborate on their reasons for citing the RDI fallout in expanding the IIPA, one can infer that the agency feared legal action against agents revealed to have engaged in controversial operations. While the identities of most agents involved in planning, supervising, and carrying out the "enhanced interrogations" remained classified, it is likely that human rights groups would have lobbied much more fervently for their prosecution if agents' identities had been revealed. This likely raised fears of agents being forced to testify in military commission courts. Given the public's limited and biased knowledge of CIA operations, any such prosecutions or testimonies would be susceptible to unfair and illegitimate scrutiny. The Agency argued that since many agents that work on U.S. soil are involved in operational planning, the IIPA needed to be expanded to protect them from biased legal repercussions. However, it should be noted that Michael D'Andrea, the chief of CIA operations during the agency's detention and interrogation program, was never prosecuted despite his identity being publicly revealed by the *New York Times*.[30]

While unwarranted prosecution is certainly a legitimate concern, this argument does not explain why the IIPA was no longer sufficient for protecting agents from physical harm, as the CIA claimed. The Agency may have feared that foreign enemies would be more apt to retaliate if agents' identities were revealed during legal proceedings, especially if the agents ever left U.S. soil in the future. They may also have feared that U.S. citizens who were sympathetic to the "victims" of CIA operations could take action against agents in the U.S. However, given the CIA's lack of clarification, we can only speculate.

The Agency also cited the WikiLeaks declassification efforts as evidence for the IIPA's expansion; it did not, however, specify if a particular leak inspired the Agency's actions. WikiLeaks has repeatedly published classified information regarding CIA covert activity, including agents' identities.

According to the Congressional Reporting Service, however, there is no "information to suggest that WikiLeaks disclosures or publication of leaked information by newspapers has resulted in the exposure of any covert agents" who are specifically protected under the IIPA.[31]

The "ever-evolving" cyber threats referenced by the CIA provide a more specific, compelling argument for IIPA expansion. In the past decade, foreign powers such as Russia have increasingly employed cyber warfare to hack U.S. government systems and obtain classified information in order to subvert Agency activity. In his confirmation hearing before the U.S. Senate, CIA Director William Burns stated that cyberthreats pose an "ever greater risk to [U.S.] society" and intelligence agencies, explaining,[32] "On a daily basis, foreign intelligence services and cyber criminals employ sophisticated and technologically advanced capabilities and tactics in their non-stop efforts to steal the classified information collected, stored, and processed by the CIA."[33]

As an example of such a threat, in 2015, China allegedly launched a cyberattack against the U.S. Office of Personnel Management, gaining access to thousands of U.S. government employee security clearances and employment records.[34] While it is unclear whether China intended to use the information for espionage, the country has repeatedly targeted CIA operatives within its borders, having killed or imprisoned eighteen to twenty agents between 2010 and 2012.[35] China has also used stolen data to expose CIA operatives stationed throughout Africa and Europe in 2013.[36] Additionally, the Russian intelligence service is suspected of conducting a massive hacking campaign against U.S. government agencies—including several Pentagon and Justice Department offices—during the same year in which the CIA proposed IIPA expansion.[37] While these cases did not involve U.S. citizens exposing the identities of intelligence agents working on U.S. soil, they demonstrate that cyber espionage is a legitimate and

mounting threat to U.S. intelligence agents and operations.

Cyberattacks by malicious non-state actors have also mounted. For example, the 2020 hack of Grindr, a dating app with a primarily LGBTQ+ customer base, enabled "anyone with the email address linked to a valid account to reset the user's password and take over their profile," giving the hacker "full access to an individual's account, including images, messages and HIV status."[38] As social media apps proliferate sensitive and personal information on-line, individuals working in all sectors, including intelligence, are more vulnerable to hacks resulting in personal embarrassment, persecution, or blackmail. If a foreign advisory were able to blackmail high-level U.S. operatives, many U.S. national security secrets could be compromised.

The question remains whether cyber threats endanger U.S. intelligence agents working on U.S. soil, and whether the IIPA expansion was necessary to curb such dangers. While there is no public evidence indicating that CIA agents in the United States have been harmed after having their identities exposed, the IIPA expansion may have been a legitimate preventative measure given an increase in malicious cyberattacks. If a covert agent's identity is revealed to the public, they may be targeted by foreign hacking operations that obtain information about the agent's travel plans or contact information of fellow agents overseas, which could endanger international operatives as well.

While the CIA's justification for the IIPA expansion was incredibly brief, it reveals the Agency's perspective on the modern national security landscape. By claiming that identified agents in the United States are at risk, the Agency asserted that all covert agents, even those not engaged in overseas espionage, have become sought-out targets of foreign enemies, and indicated that covert action has become a primary tool of modern national defense. This shift necessitated an increase in safeguards for all covert agents and ensured that their identities remain secret regardless of their location.

IV. Freedom of the Press, and Other Considerations

Following the CIA's expansion proposal, the Reports Committee for the Freedom of the Press, an organization of 37 media outlets including the *Associated Press*, *New York Times,* and *Washington Post*, issued a letter to Congress urging them to reject the expansion. The group argued that the new threats of prosecution that came with the 2019 IIPA would prevent journalists from publishing critical national security stories and inhibit public oversight capabilities. "While press organizations understand that clandestine officers should not be put at risk, there are cases where anonymity can shield the intelligence agencies from public accountability, which heightens the risk that intelligence officers or agents will act recklessly or cross ethical or legal lines," the Reporters Committee wrote.[39] Although oversight has always been necessary to ensure that intelligence agency operations do not cross ethical and legal boundaries in the name of security, modern technology such as semi-autonomous drones have blurred the line between covert and military operations, leading the CIA to take a more prominent role in U.S. military affairs. While the CIA claims that the post-9/11 technologically-dominated security landscape necessitates greater secrecy, the media argues that the CIA's expanded military role increases its ability to conduct illicit covert activities, making greater transparency more crucial than ever.

The CIA has argued that journalists can still hold the Agency accountable without revealing agents' names, as the public is able to evaluate the government's broad operations and strategies while agents are evaluated by Congress and relevant executive branch authorities. However, journalists argue that the Agency has an obligation to publish the names of agents who design and run the CIA's military operations, such as the drone program, in order to ensure that CIA agents receive the same level of public oversight as senior military officials. Making the identity of leadership

officials common knowledge allows the public to judge those officials' career records. "If I wrote a story about Bagram [Airfield detention facility], in Afghanistan, it would be really weird not to mention the guy who runs Bagram. I think you'd be leaving out a compelling detail that helps you to understand [the full story]," wrote *New York Times* Executive Editor Dean Banquet. Personnel evaluations are particularly critical for CIA programs, given that the public is less likely to be aware of specific Agency operations. For example, the CIA's Detention and Interrogation program went unknown for nearly thirteen years until the Senate brought it to light. Journalists argue that the public has a right to know and discuss the character and deeds of the agents in Langley, Virginia, running "thousand-person" operations which "have tremendous repercussions for national security."[40]

For example, the *New York Times* published an article in 2015 about a CIA drone strike that killed two American hostages, in which the *Times* named three undercover CIA officers—Michael D'Andrea, Chris Wood, and Greg Vogel—who had been instrumental in designing or leading the CIA's drone program.[41] The *Times'* Executive Editor Dean Banquet defended his decision to make the identities public in a *Lawfare* interview, claiming that the identities of the three men raised serious concerns about the ethics of the program's leadership.[42] The agent of most note was D'Andrea, who the *Times* disclosed was "chief of operations during the birth of the agency's detention and interrogation program and then, as head of the C.I.A. Counterterrorism Center, became an architect of the targeted killing [drone] program."[43] D'Andrea was removed from the program a month before the article's publication and replaced by Wood, an operations officer, and Vogel, a former Agency paramilitary officer. Knowing that the person in charge of designing the CIA's drone program also helped design and run the extremely controversial detention and interrogation program enabled the public to urge a reevaluation of the program's ethical framework. "We believe that the American

public has a right to know who is making life-or-death decisions in its name," wrote *Times* national security editor Amy Fiscus.[44]

The CIA, however, called the *Times'* decision to publish a "disgrace" which endangered the lives of the agents, as well as their families and contacts made while abroad.[45] Banquet explained that he decided to name the officers despite these objections because the agents worked in the US and "were well known as CIA officers in the countries in which they had been stationed."[46] He insisted that the *Times* and other reputable publications take the decision to publish an undercover agent's name very seriously, often refraining from publishing at the CIA's request. However, Banquet explained that the CIA must make a specific and compelling case to prevent him from publishing a name, as they are apt to claim that revealing any undercover agents' identity would risk lives.[47] In the drone program case, Banquet said that the CIA could not give a compelling reason the agents' names should not be known while their military counterparts in charge of the drone program were public knowledge.[48] Although it is true the CIA should err on the side of caution to protect its agents and limit what it reveals to journalists, as Banquet asserts, the Agency is known to "over-classify" names and materials.[49] It is therefore journalists' job to weigh the risks of "declassification" with the benefits of enabling the public to scrutinize their government. As Banquet argued, "If those empowered to be decision-makers about critical government initiatives are allowed to stay shielded in perpetuity by anonymity, they never face the public accountability that is an essential check in our system of government."

Journalists argue that the 2019 IIPA expansion took away the media's right to evaluate national security and public interest risks. The CIA no longer has to make a compelling case to keep an agent's name classified, as any publication of an undercover agent's name could be prosecuted as a federal offense. Yet, in their publicized justification for the IIPA's 2019 expansion, the House Intelligence Committee argued that the IIPA expansion

would not hinder journalists' reporting and accountability roles. "The committee wishes to stress… that the change does not imply any enhanced risk of IIPA liability for journalists… Traditional news gathering and publication—including on abuses of power, violations of law and civil liberties, and other controversial activity—does not require, or even typically involve…" engaging in a pattern of activities intended to expose agents to impede or impair U.S. intelligence operations.[50] In short, the Committee argued that journalists would typically not be prosecuted under the IIPA because reporting generally does not constitute a "pattern of activities" intended to do harm. However, as a *Lawfare* article opposing the IIPA expansion points out, "the legislative history also indicates that… cultivating sources and seeking to uncover, receive and publish classified information *could* constitute the requisite pattern of activities."[51] Therefore, despite the Committee's promises, it is entirely plausible that traditional news-gathering activities could be prosecutable under the 2019 IIPA expansion—meaning that whenever a journalist decides to publish an undercover agent's name, they now do so at the risk of federal prosecution.

V. Conclusion

The 2019 IIPA expansion signaled an acknowledgement that the intelligence community's national security role has evolved to a pseudo-military status. Amorphous threats and pervasive technology have blurred the lines between covert and military action, which necessitates reevaluation of the definition of "covert agent." The CIA has argued that emerging threats enable enemies to reach agents within US borders, warranting increased protections and security. Contrarily, the journalistic community has asserted that, due to the agency's expanding mandate, the press must be able to disclose agents' names when discussing illicit action. While the CIA certainly faces challenging threats, there must be measures in place to hold agents accountable for their

actions. The CIA has justified immoral activities, such as enhanced interrogation tactics, in the name of national security before, and without the threat of journalistic exposure, they may be inclined to do so again. Therefore, to ensure the IIPA expansion cannot quietly subvert public oversight, Congress should act to protect journalists who publish reasonable content related to the ever-expanding field of covert action. We cannot allow modern, national security threats to frighten us into curtailing civil liberties such as the First Amendment's freedom of the press, liberties which are the foundation to our democracy.

[1] H.R.4 - Intelligence Identities Protection Act of 1982, 50 USC §312 (June 23, 1982)
[2] War and National Defense, 50 USC §426(5) (June 25, 1948)
[3] Charlie Savage, "Expansion of Secrecy Law for Intelligence Operatives Alarms Free Press Advocates," *New York Times,* July 10, 2019, "https://www.nytimes.com/2019/07/10/us/politics/cia-operatives-secrecy-law.html.
[4] Central Intelligence Agency, 2019, "Extending the Intelligence Identities Protection Act of 1982," https://int.nyt.com/data/documenthelper/1370-extending-the-intelligence-ide/03e4922f9d59a25e9d6d/optimized/full.pdf.
[5] Bruce Sanford and Bruce Brown, "Why are we expanding the covert agent secrecy law?" *The Washington Post,* July 17, 2019, https://www.washingtonpost.com/opinions/2019/07/17/why-are-we-expanding-covert-agent-secrecy-law-now/.
[6] Reporters Committee to Members of Congress, August 8, 2019, https://www.rcfp.org/wp-content/uploads/2019/08/8-8-19-IIPA-Sign-On-Letter.pdf.
[7] Charlie Savage, "Expansion of Secrecy Law for Intelligence Operatives Alarms Free Press Advocates," *New York Times,* July 10, 2019, "https://www.nytimes.com/2019/07/10/us/politics/cia-operatives-secrecy-law.html.
[8] Gabe Rotten, "Congress Should Think Twice Before Expanding the Intelligence Identities Protection Act," *Lawfare,* (July 16, 2019), online at https://www.lawfareblog.com/congress-should-think-twice-expanding-intelligence-identities-protection-act (visited March 29, 2022).
[9] Ibid.
[10] Steven Roberts, "One Year Later, the Murder of C.I.A.'s Chief Officer in Athens Remains a Mystery," *New York Times,* (Dec. 26, 1976), online at https://www.nytimes.com/1976/12/26/archives/one-year-later-the-murder-of-the-cias-chief-officer-in-athens.html (visited March 29, 2022).

[11] John Crewdson, "The murder that sparked Identities Protection Act," *Chicago Tribune,* (March 12, 2006), online at https://www.chicagotribune.com/news/ct-xpm-2006-03-12-0603120383-story.html (visited March 29, 2022).
[12] Jennifer Elsea, "Intelligence Identities Protection Act," *Congressional Research Service*, (April 10, 2013), online at https://sgp.fas.org/crs/intel/RS21636.pdf (visited March 29, 2022).
[13] Central Intelligence Agency, "Extending the Intelligence Identities Protection Act of 1982," (2019), online at https://int.nyt.com/data/documenthelper/1370-extending-the-intelligence-ide/03e4922f9d59a25e9d6d/optimized/full.pdf (visited March 29, 2022).
[14] Charlie Savage, "Expansion of Secrecy Law for Intelligence Operatives Alarms Free Press Advocates," *New York Times,* (July 10, 2019) online at, https://www.nytimes.com/2019/07/10/us/politics/cia-operatives-secrecy-law.html (visited March 29, 2022).
[15] Ibid.
[16] Joseph Biden, "A spy law that harms national security," *The Christian Science Monitor,* (April 6, 1982), online at https://www.csmonitor.com/1982/0406/040622.html (visited March 29, 2022).
[17] Ibid.
[18] Ibid.
[19] Linda Feldman, "In CIA Leak Case, Eyes on Rove," *The Christian Science Monitor,* (July 13, 2005), online at http://www.csmonitor.com/2005/0713/p01s02-uspo.html (visited March 29, 2022).
[20] Gabe Rotten, "Congress Should Think Twice Before Expanding the Intelligence Identities Protection Act," *Lawfare,* (July 16, 2019), online at https://www.lawfareblog.com/congress-should-think-twice-expanding-intelligence-identities-protection-act (visited March 29, 2022).
[21] Central Intelligence Agency, "Extending the Intelligence Identities Protection Act of 1982," (2019), online at https://int.

nyt.com/data/documenthelper/1370-extending-the-intelligence-ide/03e4922f9d59a25e9d6d/optimized/full.pdf (visited March 29, 2022).

[22] Ibid.

[23] Senate Select Committee on Intelligence Report 113-288, (Dec 9, 2014), online at https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf (visited March 29, 2022).

[24] Senate Select Committee on Intelligence Report 113-288, (Dec 9, 2014), online at https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf (visited March 29, 2022)..

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"Send Lawyers, Guns, and a Dispersal Notice": An Analysis of the Insurrection Act of 1807 and Its Application to the January 6th Capitol Riots

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I. Introduction

Americans – for the most part – are not used to the idea that insurrection is likely, or even possible. However, a cursory glance at history reveals that insurrections have been vital in shaping the course of the United States. Indeed, earlier generations have been intimately familiar with insurrection and what it entails. While insurrections have not always been violent *per se*, the American people have a rich tradition of manifesting such individualism in the form of obstinance and resistance, ranging from small instances of public disobedience to large-scale acts of rebellion. Enshrined within the Constitution is a fundamental guarantee of expression via freedom of speech, peaceable assembly, and redress of grievances, among others.[1] As long as these norms and protections have existed *de facto* and *de jure*, lawmakers and government officials have struggled to balance them with the state's own vested interest in the orderly operation of society, maintenance of the peace, and supremacy of the rule of law. When these fundamental protections are over-extended or abused, officials have looked towards a select set of mechanisms and policy options to regain control and defend the state's legitimacy.

Perhaps the most potent of these tools is the Insurrection Act of 1807. Drafted by the Jefferson administration, the Act as originally constructed granted the President the ability to deploy the military for the broad purposes of "suppressing insurrection." Since its drafting, the Act has been a subject of extreme controversy. Through it, Congress has, at least in part, gifted the Executive a critical Article I power: the ability "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[2] On the plainest reading of the Constitution, however, it appears that the Framers intended for militia power to lie firmly within the hands of Congress. Leaving aside conflicts

regarding the Act's constitutionality,[3] it seems to be a perversion of this check on the Executive's power, as articulated by the Framers. But beyond the Framers' intentions, the Insurrection Act is significant from a civil-military relations perspective.[4] Although the President serves as commander-in-chief of the U.S. Armed Forces, there are legal and constitutional bounds to the President's authority. The primary bound is the Posse Comitatus Act of 1878.[5]However, because the Insurrection Act fits within the exception carved out by the Posse Comitatus Act, the Act could, in theory, be used and abused by the President for arbitrary or even nefarious purposes.[6] And indeed, the Act has been used for many reasons that seem to fit very loosely within the cases conceived by the Act in the most generous interpretations. From suppressing the KKK[7] and suppressing the Rodney King riots[8] to helping resolve feuds between Mississippi gubernatorial candidates[9] and forcing Alabama Governor George Wallace to stand down from the doors of the desegregating University of Alabama,[10] the Insurrection Act has a long and storied history, often being invoked in situations that seem to deviate from what most would consider an "insurrection."

In the 21st century, the Act has lain dormant, last being invoked during the aforementioned 1992 Rodney King riots. Given the nature of the Act, its unique history, and its strong potential to be misused by the President, the Act has more recently been treated as a last-resort statute for the most dire of circumstances.[11] With the exception of a small Congressional skirmish about expanding the scope of the Act regarding the President's power to use the military in natural disasters,[12] the core tenets of the Act have been largely untouched by policymakers, while the Act itself has not been invoked.

This began to change during the George Floyd protests in the summer of 2020. On May 25, 2020, Minneapolis police officer Derek Chauvin killed George Floyd, kneeling on Floyd's neck for over seven minutes in the midst of an arrest while he repeatedly

begged, "I can't breathe."[13] As Floyd's death sparked national outrage marked by protests and demonstrations, President Trump sharply warned, "If a city or state refuses to take the actions necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them."[14] The implication was clear: Trump was prepared to invoke the Insurrection Act to take control of the military and crush protestors. While such an action would be, in a way, a return to form, many legal experts and academics warned that such aggressive measures may have important ethical and constitutional ramifications.[15]

A mere seven months later, on January 6, 2021, a mob of protestors stormed the U.S. Capitol while both chambers of Congress counted States' electoral votes from the 2020 presidential election.[16] Protestors, some armed, took control of the Capitol, forcing lawmakers to quickly evacuate; in many instances, only seconds and lucky breaks separated lawmakers from protestors.[17] Protestors were egged on by Republican leaders, including President Trump, in protesting the certification of then-President-elect Biden's electoral win in the face of alleged voting irregularities.[18] While some protestors may have been merely "along for the ride," elements of the riots were highly orchestrated and coordinated, featuring paramilitary groups like the Oath Keepers and far-right groups like the Proud Boys, many of whom were armed with weapons, riot gear, and even zip ties.[19] For hours, Capitol police tried and failed to keep protestors at bay as they breached the heavily-protected chamber floors. It was only after the D.C. National Guard was called in, seemingly by Vice President Mike Pence,[20] to secure the District that the protestors were contained and forced out of the Capitol Complex.[21]

The Trump administration did not openly discuss the Insurrection Act before, during, or after the events of January 6, events that easily might have been called a failed "insurrection."[22] From a legal-authoritative perspective, this paper attempts to address three questions. First, *could* President Trump have invoked

the Insurrection Act during the Capitol riots? If so, *should* he have done so? And third, in light of its history and scope, *does* the Insurrection Act function as a beneficial instrument of executive authority? I argue that the Act could *and* should have been invoked – both as a necessary precaution and as a symbolic reclamation of the Capitol. However, the third question is distinctly trickier to answer. In any case, having a wide-ranging and public debate about the normative value of the Insurrection Act will be instrumental to domestic security policy, especially when the next insurrection arises – whether in two years or ten.

In Part II, I recount the history of the Insurrection Act, starting from its precursor, the Calling Forth Act of 1792.[23] In Part III, I outline the modern Insurrection Act and its key provisions. In Part IV, I argue that the Insurrection Act could *and* should have been invoked during the January 6th Riots, as it would have been an appropriate application with respect to the original intent and history of the Act. In Part V, I discuss the normative status of the Act as a fixture of American security policy and its bearing on civil-military relations in the context of both the Summer 2020 Floyd protests and the events of January 6th. And in Part VI, I provide closing remarks on the future of the Act and how it may play a role in domestic security in the coming decades.

II. History of the Insurrection Act

A. Origins and Drafting

The Insurrection Act finds its origins in an earlier Act of Congress, the Calling Forth Act of 1792. While the 1792 Act only guided the President's ability to call forth the militia, the U.S. lacked a formal military at the time, and the militia was considered under the Act to be the primary response force for domestic emergencies.[24] Much like the current Insurrection Act, the 1792 Act required that the

President issue a cease-and-desist proclamation before attempting to use force to quell insurrection.[25] The President also required explicit consent to deploy the military, either by a judicial certificate in the case of a violation of federal laws, or by an application by the state government in violations of state law.[26] Even after securing a certificate, the President was only authorized to call in the militia in emergency situations while Congress was not in session, and the President could not keep the militia in service for more than thirty days after the start of a legislative session without Congressional consent.[27] The militia itself was also highly transient, with service limited to three months in any one year for an individual militiaman, and the penalty for failure to respond to service limited to one year's pay or incarceration for one month per each $5 of an unpaid fine.[28] The 1792 Act remained in force for the next fifteen years, used by the Washington Administration to successfully put down the Whiskey Rebellion in 1794.[29] In response, Congress made the Act permanent legislation, and in 1795, removed the judicial certificate requirement along with the requirement that Congress not be in session.[30]

While the origins of the Insurrection Act lie in the Calling Forth Act of 1792, the *motivation* for the Insurrection Act comes from a fascinating threat to the authority of the United States.[31] Former Vice President Aaron Burr, after serving out his term in Jefferson's Administration where he famously shot and killed founding father Alexander Hamilton in a duel, had moved out West in search of a new life outside of politics.[32] Finding a partner in Herman Blennerhassett, a wealthy Irish-immigrant proprietor, Burr established a base of operations on his colleague's island in the Ohio River, enlisting the help of supporters as far south as Tennessee to build boats for expeditions down the Ohio and Mississippi rivers.[33]

It is hard to know what Burr's true intent was in organizing these expeditions, and indeed, his motives were fiercely debated among both Burr's contemporaries and modern historians.[34] Some argued that Burr was attempting to raise a force which would float

down to New Orleans, seizing territory from both the US and Spain at the same time.[35] Others contend that Burr was merely pioneering a "filibustering expedition" against Spanish territories, with the operation depending on an eventual war between the Union and Spain.[36] In any case, Burr was never able to succeed in either. Brigadier General James Wilkinson, the then-commanding general of the U.S. Army in the West, was at one time a fellow conspirator with Burr while on the dime of the Spanish government.[37] In the process of skirmishing with the Spanish near the Sabine River, Wilkinson decided to turn on Burr, penning a letter to Thomas Jefferson in October 1806, warning the President of the following.

> [A] numerous and powerful association, extending from New York through the western states to the territories bordering on the Mississippi has been formed with the design to levy & rendezvous eight or ten thousand men in New Orleans for an attack on Spanish territory.[38]

Jefferson sprang into action, issuing a proclamation announcing his knowledge that a group of "sundry persons" were preparing to launch an expedition against Spanish territory without a proper declaration of war.[39] The proclamation asked all civil and military officers of the U.S. or of the states or territories involved to bring "[*sic*] condign punishment all persons engaged or concerned in such enterprise… [to seize & detain] all vessels, arms, military stores, or other means…& in general [to prevent] the carrying on such expedition or enterprise by all the lawful means within their power."[40] Having received an opinion from James Madison that only militia could be used against a domestic insurrection, unlike the previous proclamation issued by Washington in accordance with the Calling Forth Act during the Whiskey Rebellion, Jefferson's proclamation was written with the intent that both militia and regulars would enforce the law as a sort of grand *posse comitatus*.[41]

While Burr chose, in the end, to stand down and surrender

rather than entering into open conflict with U.S. forces, the Burr conspiracy would have wide ranging effects for U.S. security policy going forward.[42] On March 8th, 1807, President Jefferson signed into law the Insurrection Act, allowing military regulars to participate alongside militia in situations implicated by the Calling Forth Act.[43] The text of the Act as initially enacted was as follows:

> [I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.[44]

B. 19th Century

The Insurrection Act was first invoked during the Embargo Troubles, just shortly after its passage in 1807.[45] Early in the century, however, two important Supreme Court cases clarified the authority with which the President may act when invoking the power to deploy troops. In *Martin v. Mott*,[46] defendant Jacob E. Mott filed suit after being court-martialed for failing to report to the New York Militia after being summoned by President James Madison during the War of 1812, pursuant to his authority under the 1795 Calling Forth Act.[47] Mott unsuccessfully argued that no state of emergency existed to justify a deployment of the Act, as well as that President Madison lacked the authority to federalize the militia.[48] Justice Story's unanimous majority opinion made clear that the President certainly *did* have such an authority, stating resolutely:

> We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President,

> and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the [1795 Militia Act].[49]

In *Luther v. Borden*,[50] Martin Luther, a supporter of the Dorrite rebellion in Rhode Island, filed a trespass suit against a Rhode Island state government official, Luther Borden, alleging that the Rhode Island government Borden was representing was not "republican" in nature as required by Article IV, Section 4 of the Constitution.[51] While this suit presented a number of interesting legal questions, the Court reaffirmed that the President is the ultimate arbiter in determining whether an insurrection exists or not, along with whether or not troops should be deployed. In his majority opinion, Chief Justice Taney states clearly:

> By the [1795 Act], the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President.[51]

Such judicial opinions would be crucial as the Act was invoked in what would become the largest and bloodiest conflict ever fought on American soil: the Civil War. President Abraham Lincoln would rely upon the executive authority granted to him by the Calling Forth Act of 1792 and the Insurrection Act of 1807 to declare war on secessionist Southern states, enabling him to mobilize the military in defense of the Union.[53] The Act would also be used a number of other times in the 19th century, including to suppress the famous Pullman strike in Chicago.[54]

By the time the Posse Comitatus Act was enacted in 1878, the Insurrection Act had emerged as an authoritative guide to dealing with domestic disturbances. The Posse Comitatus Act was written as follows:

> Whoever, except in cases and under circumstances expressly

> authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[55]

Because the Insurrection Act was an "Act of Congress," it superseded the Posse Comitatus Act, leaving the Executive with a powerful tool in national emergencies.

C. 20th Century

The Insurrection Act continued to be used throughout the 20th century, particularly as a tool to quell social unrest. However, unlike in previous centuries, a new dimension in America's political, social, and cultural landscape gave rise to novel opportunities for the Act's use. Namely, as the fight for civil rights came to the forefront of both the American consciousness and the domestic policy environment, the Act became a multifaceted tool, utilized by various Presidents both to further the cause of social justice and tamp down on civil unrest resulting from major events of historical significance.

On one hand, the Act was used by Presidents Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson to help ensure the success of the Civil Rights Movement and enforce federal policy and judicial decisions. In the wake of *Brown v. Board of Education*,[56] President Eisenhower federalized the military to ensure that the Little Rock Nine could safely attend school at Little Rock Central High School in Arkansas.[57] After encountering resistance from Arkansas Governor Orval Faubus, a noted segregationist who used the Arkansas National Guard to support segregationist protestors and prevent the integration of Arkansas public schools,[58] the President issued a dispersal notice – pursuant to the Insurrection Act – and subsequently federalized the military to protect and enforce the integration called for by *Brown*.[59]

Likewise, President Kennedy, relying upon the precedent set by Eisenhower with the Little Rock Nine, invoked the Insurrection Act in the famous "Stand in the Schoolhouse Door" incident in June 1963, federalizing the military to stop Alabama Governor George Wallace from preventing the integration of the University of Alabama.[60] Additionally, Kennedy issued a dispersal proclamation against segregationist protestors during the integration of the University of Mississippi beginning in September 1962.[61] At the so-called "Battle of Oxford," when Mississippi Governor Ross Barnett blocked James Meredith, a Black student, from attending the University, and an inflamed mob attempted to stifle Meredith's attempts to enroll, the President once again federalized the military to ensure that Meredith could safely and properly enroll like any other student.[62]

President Johnson's use of the Act extended beyond the mere enforcement of *Brown*. In March of 1965, in the aftermath of "Bloody Sunday," when civil rights advocates were brutally beaten by local police and *posse comitatus* while marching from Selma to Montgomery, Alabama,[63] Johnson invoked the Act and federalized national guardsmen in order to protect the remaining marchers.[64] However, this marked an end to the Act's routine use as an instrument of social justice. As the 1967 Detroit Riots picked up steam, with confrontations between black residents and Detroit police becoming explosive, Johnson invoked the Act upon the request of Governor George W. Romney to maintain law and order.[65] While it seems that Johnson was aware of the negative public perception likely to follow a deployment of the majority-white National Guard to resolve a flashpoint occurring along racial lines, he nevertheless invoked the Act and federalized the Guard in an apparent act of desperation.[66] In effect, Romney's request for military assistance paved the way for an increased role of the military in civil disturbances, with three governors making similar requests in the next year alone.[67] Indeed, with the assassination of Rev. Dr. Martin Luther King Jr. on April

4, 1968, riots sprung up in D.C.,[68] Baltimore,[69] and Chicago,[70] each resulting in the federalization and deployment of the military by Johnson.

The most recent use of the Insurrection Act occurred during the Los Angeles Riots of 1992.[71] The arrest and gruesome beating of Rodney King, a black man who later died of his injuries, by four LAPD officers was captured on film by a bystander, sparking national outrage as the officers were acquitted and the film was widely displayed on national television.[72] Once deployed, the federalized troops significantly decreased the level of violence in the area, and local authorities were eventually able to regain control of the city.[73] Such an invocation of the Act is in line with its use nearly three decades earlier; however, it also reflects a shift in civil-military strategy. In spite of multiple riots and instances of civil disobedience, the Act has not been fully invoked since 1992. While there may be several reasons for the Act's dormancy, it seems obvious that, as police brutality and violence against black people remains an ever-topical issue, former President Johnson's fear – that a mostly-white military force resolving racial conflicts with force is, at the very least, symbolically problematic – remains a relevant concern.

III. The Modern Act

The Insurrection Act in its current form can be found in 10 U.S. Code Chapter 13 §§ 251-255. Over the years, the Act has been tweaked and updated, but the core of the Act remains the same.

§ 251 tackles the specific issue of federal aid for an insurrection in a particular state. According to this section, "the President may, upon the request of [the State's] legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress

the insurrection."[74]

§ 252 is the crux of the modern Act and is clearly derived from the 1807 instantiation. In its entirety, the section reads as follows:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[75]

Of importance here is the requirement that enforcement of the laws of the United States be "impracticable…by the course of judicial proceedings…" [76]As previously stated, it is important to note that the President retains the sole authority to determine what may count as an insurrection and when troops may need to be deployed, pursuant to the Supreme Court's opinions in *Martin v. Mott* and *Luther v. Borden*.[77]

§ 253 adds further clarification about when the Insurrection Act can be triggered with regard to violations of federal or state law. The first clause of the section specifies that the President may deploy troops to "suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy" where "any part or class of [that State's] people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection…"[78] The second clause states that the President may also deploy troops if such event "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[79]

§ 254 adds a further legal requirement to the Insurrection Act; the President must "by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time,"[80] during the invocation of the Act. Finally, § 255 clarifies that Guam and the Virgin Islands are considered states for the purposes of the Act.[81]

In summary, there are two requirements that must be fulfilled in the course of invoking the Insurrection Act. First, the President must identify one of the following:[82]

1. A request from a State legislature (or governor if the legislature cannot be convened) for military aid in the course of an insurrection against the State government.[83]

2. Unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States which make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.[84]

3. Any insurrection, domestic violence, unlawful combination, or conspiracy which…

> a. hinders the execution of the laws of that State, and of the United States within the State, such that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection;[85] *or*
>
> b. opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.[86]

And second, upon such identification, the President must

issue a proclamation that immediately orders the insurgents to disperse.[87]

These two requirements, which I will call the *identification requirement* and the *proclamation requirement*, respectively, will be crucial in testing whether a specific case may be a suitable candidate for the invocation of the Insurrection Act.

IV. Potential Application to the January 6th Capitol Riots

Two questions emerge from the preceding analysis. First, *could* the Insurrection Act have been applied to the January 6th riots? Second, if the Act could have been applied, *should* it have been applied? Each question ought to be tackled slightly differently. In asking whether the Act could have been applied, I am primarily interested in whether there is legal basis for executive action as a practical matter. In asking whether the Act should have been applied, I turn towards more normative concerns, assessing whether invocation of the Act would be normatively beneficial in the specific context of January 6th. As the second question implies an affirmative answer to the first, I am less interested in legal considerations when considering whether the Act should have been used. Instead, I am primarily concerned with the historical and contextual concerns of invocation, the facts on the day of January 6th, and the national security considerations implied therein.

A. Question 1: "Could"

In answering the first question, we must assess whether President Trump could have fulfilled the identification requirement outlined by the Insurrection Act.[88] Absent more specific guidance from the Supreme Court or Congress, the president has full discretion

to determine what is and is not an insurrection for the purposes of the Act In asking whether the Act *could* have been invoked, I find it unnecessary to evaluate the Insurrection Act from the perspective of any specific president in particular Instead, one should evaluate the Act from a somewhat *neutral* perspective and see whether the Act could have been invoked by a *platonically ideal* American president, stripped of any particularly personal or fiercely partisan interests.

Because the proclamation requirement would likely be triggered in the process of quashing an insurrection pursuant to the Act, in order to assess whether the Act could have been applied, it must be determined whether a president could have adequately satisfied the identification requirement.[89] It is reasonable to assume that such a platonic president, when considering whether the Act could have been *legally* applied, would have successfully satisfied the identification requirement necessary to invoke the Act. From the forgoing analysis of January 6th, it seems clear that there was some manner of "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States which make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings,"[90] or at the very least, that there was some form of "domestic violence, unlawful combination, or conspiracy," present "which… opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[91]

A president could have chosen either of the above prongs of the modern Act to satisfy the identification requirement. A number of laws were very clearly broken by the mere action of storming the Capitol. Federal law prohibits "depredation against any property of the United States,"[92] attempted or successful robbery "of any kind or description of personal property belonging to the United States," [93] and the act of "knowingly enter[ing] or remain[ing] in any restricted building or grounds without lawful authority to do so…with intent to impede or disrupt the orderly conduct of Government business or

official functions," including "knowingly engag[ing] in any act of physical violence against any person or property in any restricted buildings or grounds."[94] Obstruction of these laws *en masse* should have been sufficient to satisfy the identification requirement.

However, a further case can be made for the "impracticability" of carrying out justice in the course of the events on January 6th. Protestors stormed the Capitol during the counting of electoral votes, one of the few practices of Congress explicitly outlined in the Constitution.[95] A failure to carry out this core procedure would spell an ill omen for the continued sustenance of American democracy. The inability of Congress to function must at least constitute some degree of "impracticability to enforce the laws of the United States."

B. Question 2: "Should"

Having justified that the President *could indeed* have invoked the Insurrection Act on January 6th, the question now shifts to whether the President *should* have invoked the Act. Notably, the President is in no way enjoined to invoke the Act by law. Just like any other authorities, a President is well within their rights to *not* invoke the Insurrection Act. As seen on January 6th, the National Guard and Capitol Police were, in the end, capable of breaking the protestors' occupation of the Capitol without military assistance. Notwithstanding the Capitol's success in restoring order, the question of whether or not the Act should be invoked remains unanswered. The decision to invoke the Insurrection Act is never made *in medias res* with the counterfactual knowledge that the situation would definitely have been properly resolved absent such a decision. Indeed, lawmakers nearly avoided several close-calls with protestors, and the situation on January 6th could have been far more tragic, costly, or urgent than it ended up being in reality.

With this in mind, when considering whether President Trump should have invoked the Act, it is important to place oneself

in the shoes of the key officials on the day of January 6th. There are several possible reasons why the Act was not invoked. First, President Trump may have lacked sufficient knowledge of what was going on inside the Capitol Complex. Second, President Trump could have thought that there was no precedent to justify invocation of the Act.

One should consider the amount of information these officials had access to, the gravity of the situation as it unfolded, and the broader implications of an invocation of the Insurrection Act. It was certain that President Trump and his administration had ample information about the severity of the situation and its potential explosivity with their access to defense and intelligence agencies. At the very least, Vice President Mike Pence was in the Capitol as protestors swarmed it, and he was in communication with the National Guard and other police and military officers.[96]

One might attempt to defend the President by saying that he was blatantly unaware of the broad powers offered to the executive in insurrectionist scenarios through the Act. Such a defense would require one to first assume that the President had no personal knowledge of the Act itself. This seems highly unlikely given President Trump's previous threat to invoke the Act during the Summer 2020 Floyd Protests.[97] However, even assuming that the President had no knowledge about the Act, his advisors, agency heads, administration officials, and military officers would most likely be aware of the Act's relevance or potential application to the scenario.

Under the assumption that the President acknowledges the Act, it is valuable to examine reasons why the President might not have wanted to invoke the Act. One may argue that the President would not have considered the ability to federalize the military in response to a non-protest scenario. Once again, this argument assumes that none of the Capitol personnel considered the emergency powers of the Act applicable to the events on January 6th. It seems

incredulous that the same officials who discussed a potential military response to the Summer 2020 Floyd protests would be unaware that the "Insurrection Act" would be applicable to a surge of rioters attempting to halt a key democratic process.

Another plausible reason is that the President may have determined that there was no precedent for an invocation of the Insurrection Act in the case of January 6th. However, such a determination would be wrong since the conditions on January 6th resemble—and even surpass—the severity of conditions in situations where the Act was actually invoked in the District of Columbia.[98] Moreover, given the lack of constraints on the invocation of the Act, the President may operate with a high degree of autonomy in deciding that the federalization of the military is necessary.

The President may have also made the determination that the National Guard was sufficient to quash the protests at the Capitol. While that may be true, it hardly seems to be an overreaction to deploy the military when the government is under attack. Beyond the US military's superior operational capabilities as compared to the National Guard, military deployment against an attempted insurrection seems to be in the country's best interest from a national security perspective. The protestors' forcible storming of the Capitol was a symbolic act as much as a physical one — to American patriots dedicated to the rule of law, it represented a collapse of the very foundations of our system of government. In this sense, there is a *symbolic* reason why the military should have been deployed. The military — expressly charged with protecting and defending the nation, and *a fortiori*, her seat of government — had the primary responsibility to quash the protestors.

One may also charitably assume that President Trump and his administration could have intentionally decided against an invocation of the Insurrection Act. There are a panoply of reasons why the administration could have voluntarily chosen not to invoke the Act, and each should be investigated in turn. First, the President

himself may have determined that such an invocation was against his own personal or political interests, given that most of the insurrectionists seemed to be Trump supporters, or, at the very least, seemed to be egged on by Trump himself alongside other pro-Trump figures.[99] It bears repeating that the Insurrection Act, like most other powers, need not necessarily be invoked, and its existence is merely meant to be its contingent nature and its *potential* ability to be used.[100]

Notwithstanding the President's lack of legal responsibility to invoke the Act, there is *at least* one constitutionally grounded imperative that holds President Trump accountable in situations such as these: the Take Care Clause. In requiring the president to "take Care that the Laws shall be faithfully executed…"[101] it would appear that, at the very least, the president should be minimally required to ensure that electoral results can be properly certified by Congress in concert with the Constitution. Indeed, it seems that William Taft, the only U.S. president to also serve as Chief Justice of the U.S. Supreme Court, argued that, at the very least, the president has the implied power to protect federal property, including federal buildings.[102] Notably, this particular constitutional interpretation is somewhat untested and does not require that the president use the Insurrection Act itself. However, such an approach would require the federalization and deployment of military forces, something that obviously did not occur on January 6th. Such a constitutional mandate ought to supersede any personal or political interests a particular president may have, as the president has an indisputable obligation to the country first. Regrettably, were it to be the case that President Trump allowed these interests to overcome a need for troops to defend the Capitol, it would be a dereliction of duty to the highest degree.

As a whole, the President *should* have invoked the Insurrection Act in response to the events on January 6th. The President should have federalized the military for a period of several weeks, sending

a strong signal to far-right groups while simultaneously giving Congress a degree of security. While it is difficult to say for certain why the Act itself was not invoked, or how the timeline of events on January 6th may have been altered post-invocation, the President would have done well to utilize the Act as it was originally intended.

V. The Normative Value of the Act

One further question looms. While it can easily be said that the Insurrection Act could *and* should have been used by the President in relation to the January 6 Capitol Riots, can it be said that the Insurrection Act is normatively beneficial as an instrument of executive authority? Put another way, should the Insurrection Act remain a part of U.S. law? This question, unlike the previous two, is as difficult as it is important. Several scholars have already tried their hand at attempting to determine whether the Act may be cured of its constitutional infirmities and authoritative idiosyncrasies.[103] But there are several ways in which the Act may be evaluated beyond its constitutional status. From a historical angle, the Act has clearly been used for various purposes, the totality of which cannot be merely labeled as "good" or "bad." While it seems obvious that the Civil War necessitated an invocation of the Act (an event that is captured within even the broadest definition of "insurrection"), most invocations occupy a sort of historical middle ground. It is, of course, impossible to know how events may have played out without the existence of the Insurrection Act.

Despite this inability to gain full knowledge of historical counterfactuals, however, there may be other ways to evaluate the normative value of the Act itself. On the theoretical or procedural end, there is an interesting debate to be had about the civil-military implications of the Insurrection Act. Sidestepping for a moment both the potential ramifications of military action in domestic disorders and the constitutional constraints imposed upon executive power, [104]

there is an important discussion to be had regarding the unilateral power the Act grants to the executive. Namely, is it beneficial to grant one individual the power to deploy the military to quash any "insurrection" they themselves identify without needing to answer to Congress, the legal system, or military officials?

On one hand, decisive action is necessary in the face of an existential threat to the nation. It makes sense that the President, as commander-in-chief, should have the ability to rapidly respond to *legitimately grave* domestic emergencies without being subjected to overly arduous, lengthy, or restrictive response processes. Depending on the threat itself, it is even possible that these hypothetical processes would be incapable of being exercised. For example, take the events of January 6th. In a world where Congressional authorization is required to federalize troops in response to a domestic insurrection, how could such authorization be given if *Congress itself* is under attack? To be sure, the National Guard may be mobilized without Congressional approval, as happened. However, suppose the rioters' defeat required military-level precision and expertise - is it wise to tie the executive's hands behind its back when the fate of the country lies in the balance?

On the other hand, the Constitution does not require the President to have any previous military or executive experience. While it may be unwise to tie the executive's hands behind its back, is it not *equally* unwise to hand the proverbial "keys to the military" to a civil leader, empowering them to a fantastical degree and effectively making executive conduct impregnable and inviolable to scrutiny from any other body or authority? While it is probably true that Congressional authorization is overly cumbersome, it seems that, at the very least, Congressional *notification* may encourage best practice regarding insurrections. Even still, as a purely reactionary measure, what more can be done to prevent the executive from having absolute military power, while still preserving the ability to respond to exigent circumstances as they arise?

There seems to be no easy way out of this quandary from a normative perspective. It is almost impossible to say whether or not the Act is normatively "beneficial" because it boils down to its usage by each executive. Indeed, history seems to bear this out, with Presidents using the Act for a variety of purposes across three centuries.

However, there is another lens through which one may view the Act which may shine more light on its normative value, or lack thereof. While the Act was neither invoked on January 6th, nor during the Summer of 2020, comparing the two cases in light of the history of the Act can be quite instructive. In the early days of the Calling Forth and Insurrection Acts, invocation largely centered around the identification of some kind of existential threat to the nation. In the case of the Whiskey Rebellion, it was the threat of a rogue militia which threatened the stability of the newly-founded United States.[105] In the case of the Burr conspiracy, it was the potential for war, or potentially civil war, with a newly founded nation.[106] In the case of the U.S. Civil War, it was the fight for the soul of a nation torn in two.[107] However, after the Civil War, there seems to be a shift in the class of situations where the Insurrection Act is invoked. Perhaps it is for the best that the amount of existentially threatening insurrections decreased after this point in history; however, the fact remains that the Act has been used in ways that deviate sharply from these existentially threatening situations, from enforcing civil rights decisions, to tamping down on public unrest.[108]

When considering the events of January 6th, it easily could have been an existentially threatening event in the course of American history. Much like the early cases where the Insurrection Act was invoked, the conditions on January 6th, were they allowed to fester, could have spelled disaster for the country. While it is certainly true that there was a degree of unrest in many parts of the country during the 2020 Summer Floyd protests, were the Act to be invoked, it would fall squarely in line with more recent invocations

of the Insurrection Act in the latter half of the 20th century.[109] This is particularly true when one considers the racial overtones of these situations and the degree to which the Act began being invoked to tamp down on civil unrest. The President has the ability to invoke the Insurrection Act at will; however, keeping in mind the disturbing degree to which that power might be overused and abused, perhaps the best way to evaluate the Insurrection Act is through defining "insurrection."

While evaluating the normative value of the Insurrection Act itself is somewhat difficult, it seems that the identifying an insurrection is crucial in determining the appropriateness of federalized military action in domestic disorders. Presidents should strive to use restraint when deciding to invoke the Act, reserving it for the direst of circumstances, when existentially-threatening conditions or national security concerns necessitate it.

VI. Conclusion

In "Lawyers, Guns, and Money," the closing track of Warren Zevon's hit 1978 album *Excitable Boy*, Zevon tells the riveting story of a young man in Latin America in the midst of the Cold War.[110] Finding himself in a treacherous situation with Russians, the song's character reports, "Now I'm hiding in Honduras//I'm a desperate man//Send lawyers, guns, and money//The shit has hit the fan."[111] It is abundantly clear that, on January 6th, 2021, in the Capitol Complex, the shit had hit the fan. Like the young man from the Zevon song, President Trump was in hiding, weathering the storm from the White House while legislators and his own Vice President were placed under direct threat by an angry mob descending upon the Capitol. However, unlike the young man, Trump refused to call forth any guns in an attempt to remedy the situation militarily. The President's lawyers, too, sat silently, as Trump refused to leverage his executive authority in any unique or meaningful way. Instead, in

what might be called an act of mere political desperation, the best the President could offer at the time was a video message telling the protestors to "go home," adding "We love you. You are very special."[112]

While the Insurrection Act remains shrouded in both constitutional and normative controversy, it is still an active part of U.S. law. And while the bounds of the Act remain unclear, it is clear that President Trump missed an opportunity to invoke the Act when it was sorely needed. For if an insurgent, armed mob of protestors storming the seat of U.S. government during the counting of electoral votes crucial to the peaceful balance of power cannot be considered an insurrection, what can be? Even if the Insurrection Act is a blatant overreach of executive power with the potential to be abused and overused, would it not be in the best interest of our government to leverage such power while it is available in an instance to protect the Republic?

While no one can predict the future of the Insurrection Act, one thing remains certain – militant far-right groups are on the rise, both in the U.S. and beyond.[113] As these groups continue to gain steam and become emboldened, there is no guarantee there will not be another attempted January 6th-style riot at some point in the near future, whether it be in the U.S. Capitol, the White House, a State Capitol, or some other building of governmental import.[114] As long as the Insurrection Act remains part of U.S. law, the President ought to, at the very least, remember that the Act may serve as a powerful tool against such groups, should they attempt something so bold as active insurrection. In using the Insurrection Act as it was originally envisioned – merely for the suppression of actual insurrections and rebellions – we may find a way to ensure the Act maintains its relevance without succumbing to the temptation to stretch the Act beyond its natural limit, as domestic security becomes increasingly fraught.

[1] U.S. CONST. am. 1.
[2] U.S. CONST. art. 1, § 8, cl. 15.
[3] The constitutionality of the Insurrection Act, while of great import and relevant interest, is beyond the scope of this paper. For more on the constitutionality of the Act, *see generally* Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act* (2009), 80 TEMP. L. REV. 391 (2007); William C. Banks, *Providing "Supplemental Security" - The Insurrection Act and the Military Role in Responding to Domestic Crises.* Journal of National Security Law & Policy, 3(39).
[4] Banks, *supra* note 7, 40-41.
[5] *Posse comitatus* is defined as follows: "The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc." Black's Law Dictionary. (6th ed. 1990). In essence, it is the ability to mobilize a force for a specific purpose. The term *posse* in common parlance finds its origin in this phrase.
[6] *See infra* notes 86-87, 89-91, and 93 for the current iteration of the Insurrection Act.
[7] Robert Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (1988). Washington D.C.: Center of Military History, at 309 to 310. While Grant technically relied on the Enforcement Act of 1871 to suppress the Klu Klux Klan, it uses nearly the same language as the original Insurrection Act and seems to take inspiration from it. Upon a closer comparison, it seems that the 1871 Act is a mere retrofitting of the 1807 Act, with some additional provisions surrounding the issue of *habeas corpus*. *See also supra* note 4 for the text of the 1807 Act.
[8] Paul J. Scheips, 2005. *The Role of Federal Military Forces in Domestic Disorders, 1945-1992*. Washington, D.C.: Center of Military History, U.S. Army, p. 445.
[9] Coakley, *supra* note 12, 333."

[10] Scheips, *supra* note 13, 150.
[11] This is perhaps made most clear by its failure to be invoked at any point in the 21st century, in spite of the presence of civil disturbances and riots that may have justified an invocation of the Act from a historical point of view.
[12] I do not find the 2007-2008 fight over the expansion of the Insurrection Act to have any particularly strong bearing on the civil-military aspect of the Act, and therefore do not cover it in this paper. For more on this conflict, *see* Banks, *supra* note 7.
[13] Christine Hauser, Derrick Bryson Tyler & Neil Vigdor, 'I Can't Breathe': 4 Minneapolis Officers Fired After Black Man Dies in Custody. *The New York Times* (2022), https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html (last visited Feb 8, 2022).
[14] Christine Wilkie & Amanda Macias. *Trump threatens to deploy military as George Floyd protests continue to shake the U.S.*. [online] CNBC. (2021) Available at: <https://www.cnbc.com/2020/06/01/trump-threatens-to-deploy-military-as-george-floyd-protests-continue-to-shake-the-us.html> [Accessed 6 April 2021].
[15] Many academics wrote about the implication of such an invocation of the Insurrection Act at this time. Professor Stephen Vladeck was among them, having already authored academic articles about the Insurrection Act specifically and national security law more broadly. *See* Steve Vladeck. *Opinion | Trump's military force threats raise questions. Here's what he can (and can't) do.*. [online] NBC News. (2021) Available at: <https://www.nbcnews.com/think/opinion/trump-s-george-floyd-protest-threats-raise-legal-questions-here-ncna1222241> [Accessed 6 April 2021]. *See also* Vladeck, *supra* note 7.
[16] Bryce Klehm, Alan Rozenshtein & Jacob Schulz, Here's How the Capitol Mob Violated Federal Criminal Law Lawfare (2022), https://www.lawfareblog.com/heres-how-capitol-mob-violated-

federal-criminal-law (last visited Feb 8, 2022).
[17] Ibid.
[18] Brad Heath & Sarah N. Lynch, *Arrested Capitol rioters had guns and bombs, everyday careers and Olympic medals*. [online] Reuters. (2021) Available at: <https://www.reuters.com/article/us-usa-trump-protest-cases-insight-idUSKBN29J2V8> [Accessed 6 April 2021].
[19] Ibid. Pete Williams & Rebecca Shabad, *Oath Keepers leader coordinated with Proud Boys and others before Capitol riot, prosecutors say*. [online] NBC News. (2021) Available at: <https://www.nbcnews.com/politics/justice-department/oath-keepers-leader-coordinated-proud-boys-capitol-riot-prosecutors-say-n1261928> [Accessed 6 April 2021]. Mallin, A. and Pereira, I., 2021. *Capitol riot suspects who allegedly brought zip ties, wore tactical gear arrested*. [online] ABC News. Available at: <https://abcnews.go.com/US/capitol-riot-suspects-allegedly-brought-zip-ties-wore/story?id=75166059> [Accessed 6 April 2021].
[20] The Vice President most decidedly does *not* have the ability to call in *any* National Guard of *any* kind – the President *alone* may call in the D.C. National Guard. In any other circumstance, such an action by a Vice President would likely be placed under heavy scrutiny, legal or otherwise. *See* Collins, K., Cohen, Z., Starr, B. and Hansler, J., 2021. *Pence took lead as Trump initially resisted sending National Guard to Capitol*. [online] CNN. Available at: <https://www.cnn.com/2021/01/06/politics/pence-national-guard/index.html> [Accessed 6 April 2021].
[21] Ted Barrett & Manu Raju, *US Capitol secured, 4 dead after rioters stormed the halls of Congress to block Biden's win*. [online] CNN. (2021) Available at: <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html> [Accessed 6 April 2021].
[22] Or, quite literally, the nation's *Capitol Complex.*
[23] It is not the aim of this paper to engage in novel historical research or rehash the work already undertaken by historical and

legal scholars. I aim to recount the history of the Act insofar as it is relevant to provide context for events in the 21st century. For more on the history of the Insurrection Act more specifically, *see generally* Banks, *supra* note 7, Hoffmeister, *supra* note 7, and Vladeck, *supra* note 7. For more on the history of military action in the United States, *see generally* Coakley, *supra* note 12, Schieps, *supra* note 13, and Laurie, *infra* note 61.

[24] Coakley, *supra* note 12, 23.

[25] Ibid., at 22. *See also infra* note 93 for the modern instantiation of this requirement.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid., 28-65.

[30] Ibid., 67.

[31] Ibid., 77-78.

[32] Ibid., 78.

[33] Ibid.

[34] Ibid., 77-78.

[35] Ibid.

[36] Ibid. *Filibustering* here means "to carry out insurrectionist activities in a foreign country." Merriam-Webster Dictionary (online ed. 2021). It seems that, had Burr gotten his way, the Spanish would have had to invoke a sort of Insurrection Act of their own.

[37] Ibid., at 78.

[38] Ibid., at 79.

[39] Ibid.

[40] Ibid., at 79 to 80.

[41] Ibid., at 80. *See also supra* note 8 for the dictionary definition of *posse comitatus*.

[42] Ibid., at 82 to 83.

[43] Ibid., at 83.

[44] Insurrection Act of 1807, ch. 39, 2 Stat. 443.
[45] Ibid., 83-90.
[46] 25 U.S. 19, 20 (1827).
[47] Hoffmeister, *supra* note 7, 885.
[48] Ibid.
[49] 25 U.S. 19, 20 (1827), 30.
[50] 48 U.S. 1 (1849).
[51] 48 U.S. 1, at 34-35, 42. *See also* Hoffmeister, *supra* note 7, at 886. The "republican" requirement for States from the Constitution reads as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. 4, § 4.
[52] 48 U.S. 1, at 43.
[53] Coakley, *supra* note 12, at 227.
[54] Clayton D. Laurie & Ronald H. Cole. *The role of federal military forces in domestic disorders, 1877-1945*. Washington, D.C.: Center of Military History, U.S. Army, p. 118. (1997).
[55] 18 U.S. Code § 1385. For more on the Act itself, *see generally* Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U. L. Q. 953 (1997).
[56] 347 U.S. 483 (1954).
[57] Scheips, *supra* note 13, at 44.
[58] Ibid., at 34.
[59] Ibid., at 45.
[60] *Supra* note 15.
[61] Scheips, *supra* note 13, at 93.
[62] Ibid."
[63] *See* supra note 9 for the definition of *posse comitatus*.
[64] Scheips, *supra* note 13, 163.
[65] Ibid, 188-191.
[66] Ibid, 191.

[67] Ibid, 204.
[68] Ibid, 284.
[69] Ibid, 324.
[70] Ibid, 305.
[71] *Supra* note 13.
[72] Scheips, *supra* note 13, 441.
[73] Ibid, 446.
[74] 10 U.S. Code Ch. 13 § 251.
[75] 10 U.S. Code Ch. 13 § 252.
[76] Ibid.
[77] For more on these cases, *see generally* Vladeck, *supra* note 7 and Hoffmeister, *supra* note 7.
[78] 10 U.S. Code Ch. 13 § 253.
[79] Ibid.
[80] 10 U.S. Code Ch. 13 § 254.
[81] 10 U.S. Code Ch. 13 § 255.
[82] Hereinafter referred to as an *Identification Requirement*.
[83] 10 U.S. Code Ch. 13 § 251.
[84] 10 U.S. Code Ch. 13 § 252.
[85] 10 U.S. Code Ch. 13 § 253.
[86] Ibid.
[87] 10 U.S. Code Ch. 13 § 254. Hereinafter referred to as the *Proclamation Requirement.*
[88] *Supra* note 88.
[89] *Supra* note 88.
[90] *Supra* note 90.
[91] *Supra* note 92.
[92] 18 U.S. Code Ch. 65 § 1361.
[93] 18 U.S. Code Ch. 103 § 2112.
[94] 18 U.S. Code Ch. 84 § 1752. *See also* Klehm, *supra* note 21.
[95] U.S. CONST. art. 2, § 1.
[96] Collins, *supra* note 23.
[97] *Supra* note 19.

[98] *Supra* note 74.
[99] Rob Kuznia et. al., *How Trump allies stoked the flames ahead of Capitol riot*. [online] CNN. (2021). Available at: <https://www.cnn.com/2021/01/18/politics/trump-bannon-stone-giuliani-capitol-riot-invs/index.html> [Accessed 11 May 2021].
[100] H.L.A. Hart, *The Concept of Law* (3d ed. 2012), at 26 to 49.
[101] U.S. CONST. art. 2, § 3.
[102] Hoffmeister, *supra* note 7, at 883-884.
[103] *See generally* Banks, *supra* note 7; Hoffmeister, *supra* note 7.
[104] Although, it certainly remains incredibly important to consider these constraints. However, the Act remains a part of U.S. law and has yet to be successfully challenged on constitutional grounds. While it is, of course, possible that the Act itself is unconstitutional, I am, here, concerned with the potential separation-of-power concerns the Act potentially poses, concerns that may exist irrespective of the Act's constitutionality.
[105] Coakley, *supra* note 12, 28-35.
[106] Ibid, 77-84.
[107] Ibid, 227.
[108] *Supra* notes 62-79.
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[111] Ibid.
[112] Barrett, *supra* note 26.
[113] Cas Mudde, *What happened in Washington DC is happening around the world*. [online] The Guardian. (2021). Available at: <https://www.theguardian.com/commentisfree/2021/jan/07/what-happened-in-washington-dc-is-happening-around-the-world> [Accessed 6 April 2021].
[114] It is not unlikely or unreasonable to suggest that such an event

could happen at some point in the near future. *See* Cas Mudde, *A far-right threat shut down US Congress this week. Why aren't we talking about it?*. [online] The Guardian. (2021). Available at: <https://www.theguardian.com/commentisfree/2021/mar/06/capitol-attack-threat-far-right-why-not-talking-about-it> [Accessed 6 May 2021]. *See also* Mudde, *supra* note 122.

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How Brown Died: An Autopsy into the Causes of Modern Segregation

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Abstract

While the 1954 landmark Supreme Court case *Brown v Board of Education of Topeka* is held in the collective American consciousness as a sacred pronouncement of equality in American schools, this country has never lived up to the holding's promise. Racist housing policies and migratory patterns have resulted in American schools that are bastions of ever-increasing segregation and inequality. Although modern-day de facto segregation sits in continuity with the 1954 *Brown* holding, which spoke in sweeping terms about the need for integration and provided little implementation guidance, the years directly after *Brown* saw a period of genuine progress. The curvilinear trajectory of school segregation thus began with the Warren Court's prioritization of local control, which allowed Southern school districts to disobey integration orders. However, the Court changed course, reinvigorating Brown in the 1960s by leveraging Elementary and Secondary Education Act (ESEA) funds and coercive measures to force non-compliant districts to integrate. Nonetheless, the *Brown* holding ended back where it started, with the Rehnquist and Berger Courts limiting the scope of judicial involvement to cases of de jure segregation and prioritizing local control over court supervision. This weakening of *Brown*, without outright abandonment, has allowed America to hold on to the holding's story and promise while creating the permission structure for policymakers to employ legalistic, color-blind justifications to end policies like race-conscious college admissions. Such policies expose Brown's fundamental flaw: its prioritization of spatial proximity over quality education, forcing Americans to look beyond courts for solutions to unequal education.

I. America's Brown Myth

Responding to a question posed during her confirmation hearing by Senator Amy Klobuchar, then-Judge Amy Coney Barrett characterized *Brown v Board of Education of Topeka* as constituting one of a handful of "super precedents," a case "so well established" that overturning it would be "unthinkable."[1] She's right. *Brown* is an "icon," "sacred"[2] in American jurisprudence largely for what it represents. The case is crucial to an American teleology that holds that while the country may have had a racist past, the nation and Constitution are color-blind today. *Brown* is so clearly ingrained in the American collective consciousness that the country often momentarily loses sight of the case's central issue: school desegregation. However, in comparing *Brown's* desegregation aims with the material changes that occurred in American classrooms, it is evident that the holding's relative success is far less iconic—and far less impactful—than what the nation perceives at present.

Today, America's schools are bastions of segregation. Of the 50 million students who attend public schools, over half sit down each day in a *de facto* segregated classroom.[3] Black students are five times more likely than white students to attend highly segregated schools, those in which the majority of their peers are Black or brown.[4] Such segregation interacts perniciously with residential poverty to produce a discouraging picture of America's public school system. A 2020 study conducted by the nonprofit EdBuild found that majority-white school districts received $23 billion more in funding than majority nonwhite schools in 2017.[5] These funding disparities cause real harm, with students in poorer districts scoring 10 percent lower on standardized tests than their wealthier white peers.[6] Such segregation is not a new phenomenon. As University of Pennsylvania professor of education and demography Erika Frenkenburg noted in 2017, there hasn't been a

single year in American history during which at least 50 percent of Black students attended majority-white schools.[7]

As residential patterns lead to *de facto* segregation of public schools across the country, school segregation continues to worsen. According to the National Center on Education Statistics, the number of schools classified as segregated (in which less than 40 percent of students are white) has nearly doubled between 1996 and 2016.[8] Although scholars like Manhattan Institute fellow Robert VerBruggen credit this change to an increase in the number of minority students in the American public school system and changing national demographics, it is impossible to ignore that students of color have increasingly attended schools in which the majority of students are Black and brown since 1988.[9] As Princeton University Professor of sociology Patrick Sharkey also notes, this lack of interracial interaction in both schools and other community spaces results in "inherited inequality." This leads to students in segregated low-income neighborhoods being unable to climb up the social ladder generation after generation.[10]

Given these trends of school segregation, there is no empirical reason to believe that the next 25 years will be any different than the past 25. In fact, schools may become more segregated as America's continued affair with *Brown* romanticizes the notion of color-blindness to some within the polity. Many conservative thinkers draw on *Brown's* pronouncement that "separate educational facilities are inherently unequal" to argue that all race-conscious policies are unconstitutional.[11] Those who subscribe to this approach, one that Yale Law School professor Jack Balkin terms "anticlassification," contend that the solutions to racial disparities within the education system lie in simply ignoring race as a factor in decision-making.[12] While this post-racial world is theoretically appealing, empirically, we observe that race continues to play a role in instances of color-blind decision-making. For instance, Stuyvesant High School, one of New York City's most prestigious secondary schools, was mandated by the

City to use the Specialized High School Admissions Test in 2019. As the sole factor in determining school admission, this race-neutral admissions exam led to Stuyvesant admitting a class that was 0.78 percent Black in a city where Black individuals comprise 24 percent of its population.[13] In light of the observed failure of a color-blind approach, those on the American political left opt for what Balkin terms an "antisubordination approach."[14] Rooted in *Brown*'s promise of correcting a historic wrong, this approach is grounded in notions of equity in contrast to the anticlassification principle's preference for equality.

Despite these empirical flaws of race-neutral education policy, conservatives continue to argue that the 1954 *Brown* holding demands a color-blind standard. This logic is epitomized in *Students for Fair Admissions Inc. v President & Fellows of Harvard College,* a case currently on the Supreme Court docket. Although the case nominally concerns Harvard's use of a "subjective" personal metric that petitioners claim unfairly discriminates against Asian Americans, it has broad implications on race-based admissions. The case offers the Court's 6-3 conservative majority the "chance to end affirmative action at universities."[15] Doing so would cement *Brown* as an anticlassification holding rather than one promoting equity and antisubordination. It would end *Brown*'s promise of desegregation by permitting color-blind policies that are facially neutral yet result in on-the-ground segregation in America's classrooms. The petitioner's brief in *Students for Fair Admissions Inc.* makes repeated references to *Brown* as the rationale for a color-blind holding; it buys into *Brown*'s post-racial myth. Therefore, the brief argues, "special accommodations" and further progress in school desegregation are not necessary.[16]

While this post-racial world has never existed in American public schools, the country was at least heading in the right direction in the decades immediately following *Brown.* Grounded in the belief that integration would improve educational

outcomes for Black students, schools took drastic steps to achieve desegregation during this period. These measures were effective. Between 1954 and 1976, southern states saw a 45 percent increase in the number of nonwhite students attending majority-white schools.[17] This increase was accompanied by modest gains in all regions of the country other than the Northeast where *de facto* segregation—segregation that existed outside of the bounds of *Brown* and judicially available remedy—prevailed. As such, *Brown* followed a curvilinear trajectory, beginning and ending with segregation in American classrooms but with some genuine moves toward integration in between.

The story of *Brown* begins with a holding far less powerful and "iconic" than the one which exists in our collective consciousness. Emboldened by the Civil Rights Act of 1964 and a change in national popular sentiment, the feeble *Brown* was revived in the 1960s. However, that progress came to a close in the 1970s as the conservative Burger Court pigeonholed *Brown* in *Milliken v Bradley* (1974)[18] and *Keyes v Denver School District* (1973),[19] ensuring that the Court could only act in cases with demonstrable segregative intent. Decades later, the conservative Rehnquist Court of the 1990s dealt the final blow for *Brown* by prioritizing local control over present segregation wherever possible in *Oklahoma City Board of Education v Dowell* (1991),[20] *Freeman v Pitts* (1992),[21] and *Missouri v. Jenkins* (1995).[22] This consequently allowed for school districts to resegregate, returning to a level of segregation not seen since 1954. *Students for Fair Admissions Inc.* offers the Court the opportunity to further limit integration efforts by favoring a color-blind reading of the holding that would limit the ability of students of color to access prestigious universities. In this position, *Brown* becomes more dangerous than beneficial, allowing America to hold on to its post-segregation story without living up to its promise.

II. With No Deliberate Speed

Brown itself did painfully little to effectuate the integration of American public schools. While the 1954 holding spoke in sweeping terms about the need for school integration, the complexity of the issue, along with Chief Justice Earl Warren's desire for a unanimous holding, led the Court to delay actual implementation. Thus, the Court divided *Brown* into two parts: *Brown I* and *Brown II*. While *Brown I* was full of lofty intentions, the source of the "*Brown* story" glossed in the introduction, *Brown II* attempted to tangibly expose the roots of 20th-century segregation. Central to *Brown II* was its deference to district courts to enforce desegregation measures, requiring only that they proceed with "all deliberate speed."[23] The Court argued that such deference was optimal, as lower courts could ensure that implementation was achieved in "a systematic and effective manner.[24] However, University of Virginia professor Kimberly Jenkins Robinson maintains that the "gradual approach" of *Brown II* was "the price that some Justices imposed for agreeing to *Brown I*,"[25] a necessary but costly concession to the South that limited *Brown*'s power from day one.

As the Court proved unable to enact strong implementation measures, southern states maintained school segregation for more than a decade after the *Brown II* holding. Unlike the aggressive anti-integration policies featured in history books, the far more sinister story of the post-*Brown* South was one of quiet noncompliance. Both elected officials and district courts and implemented "freedom of choice" plans that afforded students the right to choose between attending a white or Black school.[26] These plans manipulated *Brown* by arguing that the case necessitated only a negative prohibition on expressed segregation, rather than a positive requirement toward integration. In this way, southern school districts delayed integration, using the language of "deliberate speed" to implement desegregation plans that did little

to materially desegregate classrooms.

As southern states resisted, the Supreme Court continued to reaffirm *Brown* without addressing the failures of implementation, rendering the case weak and ineffective. Such failures featured in a trio of similar cases in the late 1950s and early 1960s: *Cooper v Aaron* (1958),[27] *Goss v Board of Education of Knoxville, Tennessee* (1963),[28] and *Griffin v School Board of Prince Edward County* (1964).[29] In all three cases, the Court struck down blatant segregation in schools while failing to answer the larger question of how systemic segregation should be remedied generally. Without judicial guidance, segregation continued throughout the South. What was required to achieve real desegregation, according to Harvard Law professor Derrick Bell, was a "specific, judicially monitored plan"[30] for school integration. This type of plan is seen in later school segregation jurisprudence but was notably absent in *Brown*'s early era. Rather than creating a plan to address deficiencies in *Brown II*, the Court delayed action and kept their rulings narrow.

This delay, however, may have been out of necessity rather than apathy. University of Chicago law professor Gerald Rosenberg makes this argument, noting that the Court would be ineffective no matter the implementation scheme it set up, for "the court alone can not effectuate policy change…only when Congress and the executive branch [act] in tandem with the courts [does] change occur."[31] For Rosenberg, this cooperation first began with the Civil Rights Act of 1964. However, Rosenberg's thesis is impossible to substantiate empirically, as the Court did not act on implementation until the latter half of the 1960s. While today's proponents of school desegregation might consider the 1954 rulings futile, the intentions outlined in *Brown I* lay the normative ground for the largely effective executive, legislative, and judicial desegregation efforts that succeeded it.

III. *Brown*'s Return

In 1964, the country abandoned its gradualist approach to school integration through both legislative and judicial action. Courts were critical in accelerating desegregation by leveraging larger legislative "carrots" and judicial "sticks" to bring about the integration that *Brown I* promised. The big, new "carrot" of 1964 was the Elementary and Secondary Education Act (ESEA), a cornerstone of President Lyndon Johnson's war on poverty that provided federal aid to schools with large percentages of low-income children as a means of closing the skill gap between high-and-low-income school districts. With additional financial resources, the Department of Health, Education, and Welfare (HEW) conditioned federal dollars on compliance with anti-segregation rules that forbade "freedom of choice plans." As Rosenberg notes, this allocation put the courts in a powerful position: by placing them in charge of evaluating district compliance with HEW standards, they had effective control over the government tap.[32] Although the ESEA "carrot" never made its way onto the Supreme Court's docket, circuit courts relied heavily on the money to force district courts into compliance. Two cases from the Fifth Circuit help illustrate this use. First, in *Singleton v Jackson Municipal Separate School District*[33] (1965) and then in *U.S. v Jefferson County*[34] (1966), the circuit court bound school districts to HEW guidelines by warning noncompliant district courts that less stringent desegregation orders would not be upheld.[35] To southern states, a loss of ESEA dollars meant teacher layoffs, cuts to after-school programming, and fewer textbooks and school supplies in the most underserved school districts. The prospect of budget cuts ultimately proved to be more painful than integration for southern schools, enabling the Court to accelerate its pace.

As for "sticks," the Court changed course from the 1950s holdings and allowed for more coercive measures to ensure the

integration of America's public schools. *Green v County School Board* (1968)[36] and *Swann v Charlotte Mecklenburg Board of Ed.* (1971)[37] encapsulate this change; each sought to correct for different deficiencies of *Brown II* by necessitating an immediacy that *Brown* lacked.[38] School boards were now required to "come forward with a plan that promises realistically to work … *now*" or else face judicial supervision and coercion.[39] Moreover, the Court addressed *Brown*'s lack of clarity by establishing that "freedom of choice" plans were unconstitutional and that *Brown* necessitated integration. Lastly, the Court changed course with regard to focus. As Robinson notes, "the ruling shifted the attention from process to results."[40] The presence of anti-discriminatory policy was no longer sufficient; policies were required to lead to real decreases in school segregation. More concretely, in *Green*, the Court specifically relied on the percentage of Black students who continued to sit in all-Black classrooms as the justification of its holding that New Kent County continued to maintain a dual system."[41] This nuance was reinforced by lower courts, which also began to focus on impact over process for the first time since *Brown*. Trying was no longer enough, and district courts were required to focus on tangible realities instead of school board policy in deciding cases. On the ground, the ruling led HEW to require that "actual integration" be the standard for desegregation plans. Districts that did not meet this new standard, including those who continued to employ "freedom of choice" plans, were at risk of losing ESEA funding and therefore increased classroom diversity to meet the new "actual integration" standard.[42]

Swann went even further than *Green* by correcting the main deficiency of *Brown II*: implementation. While *Swann* begins with a reiteration of *Brown II's* deference to district courts, the rest of the ruling provides districts with explicit strategies for achieving integration. The use of revised attendance zones which redrew district lines to create more diverse classrooms, as well as busing which moved students between school districts, were now on the

table. *Swann*'s takeaway was that district courts had broad leeway to implement remedial measures that would integrate classrooms. Policies like bussing, which imposed significant burdens on students, were deemed judicially appropriate. Lower courts followed suit and began to enforce remedies that were equally or similarly burdensome.

Despite the improvements in both *Swann* and *Green,* the focus in each on *de jure* segregation laid the groundwork for the Court's failure to address the *de facto* segregation of the 1970s. The former concerns segregation by law, as seen in Southern Jim Crow legislation, while the latter deals with segregation by fact, segregation that flows from the racial residential segregation that arises from differential migratory patterns between Black and white Americans. Although *Brown, Swann,* and *Green* dealt with *de jure* segregation, *de facto* segregation became the primary driver of school segregation as the country moved through the 20th century. The problem for school integration advocates is that the Court felt constrained in its ability to remedy *de facto* segregation. As Pepperdine University law professor James McGoldrick notes, under the state action doctrine, the Court viewed itself as unable to adjudicate anything other than segregation by law.[43] While the 1960s saw the ascendance of a legal scheme adept at handling the vestiges of Jim Crow, that same scheme left large gaps regarding judicially available remedies for *de facto* segregation. Thus, *Green* and *Swann*, while often viewed as the highwater mark for integration efforts, also foreshadowed the ultimate death of *Brown* in the face of the changing world of the 1970s as segregation by law gave way to racial residential segregation.

IV. Desegregation Losses of the 1970s

New frontiers were emerging in the desegregation fight. Of the problems that plagued school desegregation efforts in the 1970s, no other hampered progress like white flight from urban

areas, which posed a new set of challenges. As white Americans packed up and headed to the suburbs, school district lines continued to correspond with city boundaries. This, incidentally, served to decrease intradistrict segregation as the districts themselves became more monochromatic, while bringing about a significant rise in interdistrict segregation. On the ground, the substantive difference between these types of segregation is virtually none. A student in a segregated classroom is a student in a segregated classroom. But the Court in *Milliken v Bradley* (1974) held that this wasn't the case, that in terms of judicially-available remedy, little could be done about the segregation of the interdistrict variety. Despite its broad implications on the possible remedies for *de facto* school segregation, the case itself concerned *de jure* segregation in a single district within the Detroit metropolitan area. The district, found to be violating the High Court's holding in *Brown,* was forced to impose a multi-district integration plan. For the Supreme Court, this remedy crossed the line, for "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[44] This holding had a devastating effect on desegregation. As Berkeley Law School professor Erwin Chemerinsky notes, if judicial injunctions couldn't involve multiple districts, there was no solution to white flight segregation: "there are simply not enough white students in the city, or enough African American students in the suburbs."[45] As the decade progressed, intradistrict segregation declined while interdistrict segregation rose, bringing more and more schools into this realm of segregation without a judicially-available remedy.[46]

Meanwhile, schools in the North, where dual school systems had not been maintained, remained highly segregated as integration methods such as bussing sparked significant public resistance. The challenge here, as seen above, is that northern school segregation is not the result of expressed state law. As a result, these cases proved difficult to adjudicate because the Court

lacked a relevant standard for evaluating school segregation that existed outside the domain of Jim Crow. In *Keyes v Denver School District* (1973), the Court created one that significantly limited northern plaintiffs' ability to achieve relief. Despite winning the battle by forcing the Denver school district to integrate, integration proponents lost the war: the Supreme Court set a standard that required plaintiffs to prove "segregative intent" to gain relief. The presence of segregation was no longer enough to constitute an equal protection violation.[47] Moreover, the Court did not clarify its vague standard, making it difficult to prove school segregation in ubiquitous—but more covert—instances of *de facto* segregation.

These holdings, in effect, created a nearly unscalable hurdle in gaining relief in instances of *de facto* segregation. In order to gain relief, the plaintiff must satisfy the *Keyes* requirement by proving that the school district is not only incidentally segregated but that this segregation is intentional. Even if segregation is proved, an interdistrict remedy will almost certainly not be permitted under *Milliken*, resulting in a system only equipped to handle intradistrict instances of *de jure* segregation. But by the 1970s, America had largely moved on from Jim Crow segregation; it was *de facto* segregation from here on out.

V. The Era of Localization

If *Brown* was pigeonholed in the 1970s, it was outright abandoned in the 1990s as the Rehnquist Court ended successful school desegregation orders. University of California Los Angeles professor Gary Orfield argues that such abandonment was a significant factor in the rise of school segregation during the 1990s.[48] Harvard Law School professor Mark Tushnet provides blunter analysis: the period is characterized by a Court that believed it had simply "done enough" on the issue of school desegregation.[49] The conservative majority's federalist sensibilities won out as the Court repeatedly ruled to re-emphasize local

control, even as 32.1 percent of Black students continued to sit in classrooms in which more than 90 percent of their peers were students of color in 1988. The work of integration was far from over, but this preference for localism cemented the losses of the 1970s and enabled further segregation throughout the country.

In *Oklahoma City Board of Education v Dowell* (1991), the Court signaled to boards of education nationwide that the era of court supervision was ending. Oklahoma City's enforcement plan was to be lifted because "federal supervision of local school systems [has always] been intended as a temporary measure to remedy past discrimination."[50] Thus, once a school was deemed to have implemented the plan "to the extent possible,"[51] enforcement would stop, even if there were reasonable grounds to believe that districts would return to policies that reinforce segregation once the order was lifted.

The ruling, in effect, did three things. First, it signaled to school districts that court orders were not a forever prospect and that if they complied long enough, they would regain local control and be able to re-engage in discriminatory practices.[52] Second, it lessened the burden on school districts, focusing on the extent to which districts *tried* to implement the court order rather than the extent to which schools actually desegregated.[53] Finally, the focus on "past" discrimination indicated that, while the Court remained interested in remedying the vestiges of Jim Crow, it did not plan to address the more pressing issue of *de facto* segregation. Robinson goes as far as to say that, combined, these factors "reconstitutionalize[d] school segregation," allowing "districts that had been found to have engaged in intentional discrimination" to simply continue the practice once they were no longer under Court order.[54] Segregation was essentially legal in America once more.

The Court took another step toward re-constitutionalizing school segregation in *Freeman v Pitts* (1992).[55] Here, Justices took *Dowell* a step further, hamstringing district courts' ability to enforce integration efforts by allowing for partial unitary status. In

other words, in situations where the district court injunction had multiple parts—for instance, one mandating racial parity among faculty and another among students—once a district was found to have fully complied with one portion of the order, that portion could no longer be viewed. It was through this lens the Court released DeKalb County's school district from four out of six portions of its court order while retaining the other two. In doing so, the Court conceded that the school district had not sufficiently complied with a third of its judicially mandated integration requirements while simultaneously limiting its ability to enforce integration in Dekalb County. In other words, the Court weakened its oversight capacity in a district that was actively engaged in segregation by its own account. As director of the National Center for Law and Economic Justice Dennis Parker points out, the holding demonstrates a basic lack of understanding for the multiple ways different "aspects of school operations work together to affect the experience of individual students."[56] Thus, *Freeman* drastically increased the risk of school resegregation, allowing districts with partial unitary status to be deregulated while maintaining many of their existing racist practices.

Freeman did more than just highlight a preference for local control: it introduced the very notion of local control as a virtue in and of itself. Justice Kennedy says as much in *Freeman*, writing for a unanimous Court that "returning schools to control of local authorities at the earliest practicable date is essential to restore their true accountability in our government system."[57] McGoldrick argues that this posture was a break from the past, for while localism was considered in cases from *Green* to *Milliken*, "it was only in *Freeman* that localism became a competing goal."[58] Here, local control was balanced against desegregation as an inherent good with the potential to outweigh classroom segregation.

The Rehnquist Court used the logic of local control to build on *Milliken*, further limiting the scope of judicially available remedies for integration efforts in *Missouri v Jenkins* (1995).

In many ways, *Jenkins* was an attitudinal rejection of *Swann*. Whereas *Swann* provided for broad district court authority to correct the past ills of segregation, *Jenkins* placed clear limits on enforcement, making it even easier for a district to claim unitary status. In terms of the substantive holding, the Court first found that the use of a magnet school system to create a multi-district, multi-racial educational experience violated *Milliken*; second, that mandating salary increases to attract a competent, diverse staff constituted judicial lawmaking and was therefore not a judicially available remedy; and finally, that racial disparities in test scores were an insufficient basis for continued supervision. As Chemerinsky notes, these findings sent a clear signal to lower courts: "the time has come to end desegregation orders."[59] District courts listened, working speedily to "free" school districts from the "oppressive" remedies of *Green* and *Swann.* Localism had won out over desegregation, leaving those in segregated classrooms with few judicial options left on the table.

VI. Conclusion

By 2007, in *Parents Involved in Community Schools v Seattle School District*, the Court cut off nearly all avenues for achieving racially equitable public schools, holding that not only courts but also democratically elected boards of education were barred from considering race to achieve racial balance in public schools.[60] Relying on a perverse notion of color-blindness that equates any racial classification scheme—even for remedial purposes—as racist, the Court found that using race as a tie-breaker in selective high school admissions constituted race-based discrimination. Thus, even when most district residents want to desegregate their public schools, they face obstacles in doing so. *Students for Fair Admissions Inc.* could take *Parents Involved* to its logical conclusion, prohibiting all race-based criteria for admission in American schools. Such a decision would turn the

logic of integration on its head to justify policies that disadvantage Black students by limiting their access to universities that serve as storehouses for vast and historically white social and financial capital.

Such setbacks have led some to question *Brown*'s very logic and progeny. Central to the *Brown* holding is a rejection of segregation because it is unequal, but scholars like Derrick Bell posit that segregation is not and should never have been the primary concern. The real issue, they say, was that Black students were receiving an inferior education. For Bell, placing Black bodies next to white ones should come second to simply achieving quality schools for students of color.[61] Justice Clarence Thomas makes the same argument in *Zelman v Simmons-Harris* (2002), a case involving school vouchers: "While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children."[62] Coming from opposite ends of the political spectrum, both Bell and Thomas articulate a post-*Brown* vision that prioritizes the quality of the education students of color receive over the racial compositions of their classrooms. While such a departure from *Brown* brings school integration law into uncharted jurisprudential territory, the Court's foreclosure of legislative, executive, and judicial solutions to desegregation efforts under *Brown* and its progeny necessitates such a change. For proponents of school integration, however, such a change in legal consensus would likely be a welcome shift, allowing courts to prioritize equitable, quality education over spatial proximity.

[1] Brian Naylor, "Barrett Says She Does Not Consider Roe v. Wade 'Super-Precedent,'" National Public Radio, October 13, 2020, https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent.

[2] Jack Balkin, "*Brown* as Icon," in *What Brown v. Board of Education Should Have Said,* ed. Jack Balkin (New York: NYU Press, 2002), 1.

[3] Emma Garcia "Schools Are Still Segregated and Black Students are Paying the Price," Economic Policy Institute (February 2020): 2.

[4] Ibid, 2.

[5] EdBuild, $23 Billion (Jersey City: EdBuild, 2019), 2. Accessed March 5, 2022, https://edbuild.org/content/23-billion.

[6] Garcia, 3-4.

[7] Erica Frankenberg et al. "Southern Schools More than a Half Century After the Civil Rights Revolution," *UCLA Civil Rights Project* (May 2017).

[8] Will Stancil, "School Segregation Is Not a Myth," *The Atlantic,* March 14, 2018.

[9] Alvin Chang, "The Data Proves That School Segregation Is Getting Worse," *Vox,* March 5, 2018.

[10] Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* (Chicago: The University of Chicago Press, 2013): 9.

[11] *Brown v. Board of Education of Topeka,* 349 U.S. 294 (1954).

[12] Jack Balkin, "Plessy, Brown, and Grutter: A Play in Three Acts," Cardozo Law Review 26 (2005): 123.

[13] Eliza Shapiro, "Only 7 Black Students Got Into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots," *The New York Times*. March 18, 2019.

[14] Jack Balkin, "Plessy, Brown, and Grutter: A Play in Three Acts," Cardozo Law Review 26 (2005): 123.

[15] Joan Biskupic, "Supreme Court Conservatives May Have Their

Chance to End Affirmative Action at Universities," CNN (Cable News Network, December 9, 2021), https://www.cnn.com/2021/12/09/politics/affirmative-action-supreme-court-conservatives-harvard/index.html.

[16] Supplemental Brief for Petitioner, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199, (Supreme Court filed Dec 22, 2021) (available at scotusblog.com).

[17] Charles Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* (Princeton: Princeton University Press, 2006): 56.

[18] *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

[19] *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973).

[20] *Board of Ed. Of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

[21] *Freeman v. Pitts*, 503 U.S. 467 (1992).

[22] *Missouri v. Jenkins,* 495 US 33 (1990).

[23] *Brown v. Board of Education of Topeka,* 349 U.S. 294, (1954).

[24] *Brown v Board of Education of Topeka*, 349 U.S. 294, 295 (1954).

[25] Kimberly Jenkins Robinson, "Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools," 88 *North Carolina Law Review* 787, 800 (2010).

[26] This came along with a rise of Christian and private schools that could more easily be segregated.

[27] *Cooper v Aaron*, 358 US 1 (1958).

[28] *Goss v. Board of Education of Knoxville,* Tennessee, 373 US 683 (1963).

[29] *Griffin v. School Board of Prince Edward County,* 377 US 218 (1964).

30 Derrick Bell, "*Bell, J.,* Dissenting," in *What Brown v. Board of Education Should Have Said*, ed. Jack Balkin (New York: NYU Press, 2002), 196.

[31] Gerald Rosenberg, *The Hollow Hope* 71 (Chicago 2d ed 2008).

[32] Ibid.

[33] *Singleton v. Jackson Municipal Separate School Dist.*, 332 F. Supp. 984 (S.D. Miss. 1971).
34 *United States v. Jefferson County Bd. of Educ.,* 380 F.2d 385 (5th Cir. 1967).
[35] *Singleton v. Jackson Municipal Separate School Dist.*, 332 F. Supp. 984 (S.D. Miss. 1971).
[36] *Green v. County School Board*, 391 US 430 (1968).
[37] *Swann v. Charlotte Mecklenburg Board of Ed.*, 402 US 1 (1971).
[38] Kimberly Jenkins Robinson, "Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools," 88 *North Carolina Law Review* 787, 805 (2010).
[39] Charles C. Green v. County School, Board of New Kent County, 391 U.S. 430, 438 (1968).
[40] Kimberly Jenkins Robinson, "Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools," 88 North Carolina Law Review 787, 807 (2010).
[41] Ibid.
[42] Ibid.
[43] It should be noted that the Court found in *Baston v. Kentucky (1986)* that because racialized peremptory challenges for jurors were occurring within *the court system*, they constituted an equal protection violation. This logic could easily be mapped onto schools, but it has decidedly not been.
[44] *Milliken v. Bradley,* 418 U.S. 717, 745 (1974).
[45] Erwin Chemerinsky, "The Segregation and Resegregation of American Public Education: The Court's Role," 81 *North Carolina Law Review* 1597, 1607 (2003).
[46] Charles Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* (Princeton: Princeton University Press, 2006), 63.
[47] James McGoldrick, Jr., "Two Shades of Brown: The Failure of Desegregation in America; Why it is Irremediable (and a Modest

Proposal)," 24 *Cardozo Journal of Equal Rights and Social Justice* 271, 289 (2018).

[48] Gary Orfield, "Schools More Separate: Consequences of a Decade of Resegregation," The Civil Rights Project, Harvard University, 16, (2001).

[49] Mark Tushnet, "The 'We've Done Enough' Theory of School Desegregation," 39 Howard Law Journal 767, (1996).

[50] *Board of Ed. Of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

[51] Ibid.

[52] Dennis D. Parker, "Are Reports of Brown's Demise Exaggerated? Perspectives of a School Desegregation Litigator," 49 *New York Law School Law Review* 1069, 1076 (2005).

[53] Note the reversal from *Green.*

[54] Kimberly Jenkins Robinson, "Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools," 88 *North Carolina Law Review* 787, 820 (2010).

[55] *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

[56] Dennis D. Parker, "Are Reports of Brown's Demise Exaggerated? Perspectives of a School Desegregation Litigator," 49 New York Law School Law Review 1069, 1077 (2005).

[57] *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

[58] James McGoldrick, Jr., "Two Shades of Brown: The Failure of Desegregation in America; Why it is Irremediable (and a Modest Proposal)," 24 *Cardozo Journal of Equal Rights and Social Justice* 271, 298 (2018).

[59] Erwin Chemerinsky, "The Segregation and Resegregation of American Public Education: The Court's Role," 81 *North Carolina Law Review* 1597, 1618 (2003).

[60] *Parents Involved in Community Schools v. Seattle School District no. 1*, 551 U.S. 701 (2007).

[61] Derrick Bell, "*Bell, J.,* Dissenting," in *What Brown v. Board of Education Should Have Said*, ed. Jack Balkin (New York: NYU

Press, 2002), 196.

[62] We will, momentarily, put aside Thomas' blatant hypocrisy, he having worked throughout his career to make desegregation harder in American public schools. For instance, Thomas was in the majority in *Parents Involved. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

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