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ARTICLES

Raising the Temperature: Analyzing the Implications of the Major Questions Doctrine in *West Virginia v EPA*

Shaurir Ramanujan, Adeline Larsen, Karun Parek, and Kendall Psaila

Impact versus Intention: Fulfilling the Promise of Equal Protection

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The Broken Promise: Restoring the Constitution's Guarantee of Tribal Sovereignty

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Seeking Asylum Under Title 42: Weaponizing Public Health Law to Expel Migrants at The Border

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LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board, I am proud to present the summer 2022 issue of the Columbia Undergraduate Law Review. The articles featured in this edition were carefully selected from a large accumulation of submissions, traversing a diverse range of legal issue areas and representing a plethora of esteemed institutions. The cohort of editors, composed entirely of underclassmen new to the CULR community, was selected from a highly competitive pool of applicants. It is for the combination of the editors' diligence and the thoughtful legal scholarship from the authors that I am excited to present the following articles.

In *Raising the Temperature: Analyzing the Implications of the Major Questions Doctrine in West Virginia v EPA*, Shaurir Ramanujan, Adeline Larsen, Karun Parek, and Kendall Psaila address the landmark Supreme Court case concerning climate change. The team of authors explores the Court's utilization of the major questions doctrine and asserts a rich exploration of subsequent solutions to fight the climate crisis in this shifting legal context.

In *Impact versus Intention: Fulfilling the Promise of Equal Protection*, Andrea Akinola explores the foundations of the Supreme Court's discriminatory intent framework established by *Washington v Davis, Personnel Administrator of Massachusetts v Feeney, and McCleskey v Kemp*. Akinola argues that the Court's existing approach to discriminatory intent is insufficient to respond to contemporary, covert racism in the United States and urges critical modification to the framework in question.

In *The Broken Promise: Restoring the Constitution's Guarantee of Tribal Sovereignty*, Arpit Rao joins the conversation surrounding the role of the federal government in the internal affairs of Native American tribes. Rao probes the plenary power doctrine, cites the disarray in Court precedent surrounding tribal jurisdiction, and implicates historical treaty-making to ultimately argue that federal government intervention in such affairs is unsupported by the Constitution.

In *Seeking Asylum Under Title 42: Weaponizing Public Health Law to Expel Migrants at The Border*, Alexis Fintland offers insight into the evolution of immigration law as it concerns epidemics and other public health emergencies. Fintland invokes this historical foundation, coupled with specific focus on the appellate decision in *Huisha-Huisha v Mayorkas*, to argue that Title 42 violates the non-refoulement principle and should therefore be struck down.

I am particularly proud of the summer edition of this publication and believe it underscores CULR's enduring commitment to fostering legal conversation and intellectual exploration in undergraduate spaces. I am hopeful that you will delve into the pressing legal issues and arguments presented thoughtfully and incisively by the authors herein. Thank you for your continued readership and support of the Columbia Undergraduate Law Review.

Sincerely,

John "Jack" D. Walker II
Executive Editor, Print (Summer)

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.

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The submissions of articles must adhere to the following guidelines:
i) All work must be original.
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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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Raising the Temperature: Analyzing the Implications of the Major Questions Doctrine in West Virginia v EPA

Shaurir Ramanujan, Adeline Larsen, Karun Parek and Kendall Psaila | Columbia College & Barnard College (Columbia Undergraduate Law Review Print Members)

Abstract

This paper discusses the details and implications of West Virginia v Environmental Protection Agency, the landmark Supreme Court case which marked a major impediment to the United States' ability to address climate change. The paper primarily focuses on the majority opinion's unprecedented invocation of the major questions doctrine, an illustration of the Court's rising grip on political power in recent years. Additionally, it examines the doctrine's precarious relationship with other canons such as the Chevron and political questions doctrines, as well as its potentially devastating consequences. Further, the paper highlights a variety of solutions that can be utilized to both effectively fight the climate crisis and circumvent future uses of the major questions doctrine. Placing these ideas in conversation with one another, this paper works to mend the existing gap in literature that surrounds the timely topics of climate change, the role of agency action in addressing environmental issues, and the introduction of the major questions doctrine in the United States' legal lexicon.

I. Introduction

The twenty-seventh session of the United Nations Conference of the Parties (COP27), scheduled to fall on the 30th anniversary of the implementation of the United Nations Framework Convention, will pose a critical point for global action in combating climate change. Being a developed country and the world's second largest emitter of greenhouse gases, the United States has a moral imperative, as the conference approaches, to send a global signal and lead the synchronized efforts necessary to meet the Paris Agreement target goals of limiting global warming to 1.5 degrees Celsius by 2050. During a period of global geopolitical turmoil and heightened tensions, the world anxiously watches the United States. Yet, for years, a divided national government has failed to act as any such beacon of progress, impeded in achieving a cohesive climate policy by its own internal politics.

Over the past year, the Supreme Court has served as the arena for significant action surrounding several issues of high public importance, at times producing decisions that stand in direct contradiction with the desires expressed by a majority of Americans. In June of 2022, *Egbert v Boule*[1] denied the ability of plaintiffs to sue federal agents for violations of their Fourth Amendment rights against unreasonable search and seizure. Just a few weeks later, *Oklahoma v Castro-Huerta*[2] struck a blow to tribal sovereignty, directly contradicting a precedent that had been set by the Court only a year prior. And in that same month, *Dobbs v Jackson Women's Health*[3] overturned *Roe v Wade*,[4] achieving a decades-long conservative legal goal by restoring states' ability to restrict the right to abortion. In a political season characterized by maddening political gridlock and inaction in the legislative branch, a conservative Supreme Court has taken advantage of their 6-3 majority to propel in a certain direction the issues which the other

branches seem powerless to address.

These two pressing issues in the current political scene—climate action and the increasing power of the judicial branch—came to a head in *West Virginia v EPA,*[5] a 2022 case which raised the question to the Supreme Court of whether the Environmental Protection Agency had acted within its authority in interpreting the Clean Air Act to require generation shifting, a relatively drastic carbon emission reduction method. The Court ruled that the EPA did not have an explicit authorization from Congress to regulate carbon emissions, thus limiting the agency's power. In reaching this conclusion, the Court invoked a new legal idea regarding agency authority, one that has risen to prominence over the past few years: the major questions doctrine, a theory espousing that certain questions which come before the Court are of too great economic and political significance to be left up to agency interpretation. Instead, the invocation of the doctrine allows the Court to take the job of interpretation upon itself, specifically by inserting its own perception of Congress's intention in passing any particular statute. Given the relative infrequency of pivotal court cases pertaining to climate change and environmental law, it is necessary to analyze the importance of the major questions doctrine in conjunction with *West Virginia v EPA*. In doing so, we can better understand and portray the effect of this novel doctrine on the scope of agency power in general and in addressing issues of rising global concern.

II. Legal Details

A. Historical Background:

In 1970, President Richard Nixon signed an executive order establishing the U.S. Environmental Protection Agency (EPA) in response to growing concerns about the impact of human activities on the environment.[6] The EPA is an independent executive

agency of the federal government tasked with the responsibility of enforcing environmental laws while collaborating with state, tribal, and local governments. One of its principal tasks is setting and enforcing environmental protection standards – this includes standards for air and water quality, and individual pollutants. President Nixon emphasized the necessity for the EPA to be an independent agency, as "environmental protection cuts across so many jurisdictions" and impacts everybody's quality of life.[7]

The Clean Air Act, passed in 1970, defines the EPA's responsibilities in regards to regulating air quality and hazardous air pollutants, permitting the agency to monitor the emission of certain pollutants by power plants by determining the "best system of emission reduction" (BSER) for the plant.[8] In 2015, the Clean Power Plan (CPP) was established by the EPA, under the Obama administration, to address carbon dioxide pollution and provide emission guidelines for existing power plants. To enact the CPP, the EPA cited Section 111 of the Clean Air Act, which allows the EPA to "list categories of stationary sources" that "cause[], or contribute[] significantly to, air pollution".[9] More specifically, Section 111(b) directs the Agency to establish "federal standards of performance" for each category.[10] While States have the power to set rules for existing power plants, the EPA still maintains the primary regulatory role under Section 111(d). The States must implement plans that abide by the emissions restrictions set by the EPA.

Under the CPP, for existing power plants, the BSER decided by the EPA included a measure dubbed "generation shifting." Generation shifting involves a shift in electricity production from "higher-emitting to lower-emitting producers" in order to limit power plant emissions.[11] It aims to cause a gradual shift throughout the energy sector, requiring existing power plants to reduce their electricity production and turn to cleaner sources. The EPA determined a "reasonable" amount of shift: a feasible and

realistic amount that natural gas, a renewable source, could supply without "reducing the overall power supply".[12] This "reasonable" shift would, according to the EPA's modeling, include "billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors".[13] Further, the Energy Information Administration concluded that the rule would reduce the GDP "by at least a trillion 2009 dollars by 2040".[14] The White House acknowledged that this shift imposed by the CPP would propagate an "aggressive transformation" in the energy industry.[15]

In 2019, under the Trump administration, the CPP was repealed before it had ever gone into effect. The new EPA resolved that generation shifting "exceeded the [EPA's] statutory authority under Section 111(d)," and that the section only authorizes the Agency to regulate the implementation of systems at a "building, structure, facility, or installation."[16] The CPP goes beyond these parameters, impacting the entire energy sector by incentivizing generation shifting at the electric "grid level".[17] Since generation shifting is designed to make change throughout the entire energy sector and have billions of dollars of impact, the EPA concluded that the CPP raised questions which fell under a legal theory known as the major questions doctrine. The major questions doctrine, according to the Court, declares that when there are concerns of "vast economic and political significance," the Court should not defer to the agency. Rather, due to the wide breadth of the CPP in the energy sector, it necessitates explicit congressional authorization– the EPA deduced that this authorization does not exist. The CPP was replaced with the Affordable Clean Energy (ACE) Rule.[18]

Multiple parties filed petitions to challenge the repeal of the CPP and its replacement, the ACE rule. After consolidating the petitions, the Court of Appeals held that the "repeal of the Clean

Power Plan rested critically on a mistaken reading of the Clean Air Act," and that generation shifting should not be considered a "system of emission reduction" under Section 111.[19] The Court vacated the EPA's repeal of the CPP and the ACE rule, remanding both to the EPA. A little over a year later, in *West Virginia v EPA*, the Court was confronted with the question of if Section 111(d) of the Clean Air Act granted the EPA authority to use the generation shifting approach as the BSER. Turning to the major questions doctrine, the Court asserted that the EPA does not have congressional authorization to use the generation shifting approach.

B. Majority Opinion:

Chief Justice John Roberts delivered the majority opinion of the Court in *West Virginia*, arguing that the BSER determined by the EPA in the CPP was not "within the authority granted to the Agency in Section 111(d) of the Clean Air Act".[20] Under the major questions doctrine, the decision of how to regulate the energy sector, a decision of "such magnitude and consequence," rests with Congress itself.[21] Hence, the EPA must look towards Congress for explicit authorization for this manner of regulation.

The Court argued that, in cases of political and economic significance, they must question whether Congress intended to grant such regulatory authority, instead of allowing for reliance on "ambiguous statutory text".[22] Congress did not have the intention of affording this level of regulatory power to the EPA, as demonstrated by the fact that Congress had repeatedly refused to pass similar types of regulatory programs themselves. Justice Gorsuch, while concurring, admitted that it may be "only natural" that the EPA "might seek to take matters into their own hands" when Congress is slow to act.[23] However, the Constitution safeguards the legislature's right to "prescribe general rules for the government of society," a right that should not be reassigned to the

Executive Branch.[24]

The Court emphasized that the generation-shifting approach is an unprecedented change in the type of regulation the EPA typically enacts, and led to a "fundamental revision of the statute"– the statute referring to Section 111.[25] With the new reading of the statute under the CPP, the EPA would gain an immensely wide breadth of regulatory power over the energy sector, granting them the ability to force "coal plants to shift away virtually all of their generation".[26]

The Court asserted that Congress intended for the BSER to be a "technology-based approach" that focused on improving the emissions performance of "individual sources," rather than improving the "overall power system".[27] The Court points out that even the EPA acknowledged the unfamiliar and unprecedented nature of the approach, claiming that they turned towards this forward-thinking method because the other measures would have been too insignificant in reducing carbon dioxide emissions. Ultimately, the Court found that Section 111(d) did not grant the EPA the authority to use the BSER determined in the CPP. This majority opinion contains the first explicit mention of the major questions doctrine in a decision of the Supreme Court.

C. Dissenting Opinion:

The dissenting opinion, delivered by Justice Kagan and joined by Justice Breyer and Justice Sotomayor, claims that the Court's decision "strips" the EPA of "the power Congress gave it" to respond to climate change, the "most pressing environmental challenge of our time".[28] Justice Kagan details the dangers of climate change to our society, and the clear consequences already being faced. Citing climate research, she strikingly declares that "if the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean".[29]

The dissenting opinion maintains that Congress granted the EPA power to address the harms of climate change, citing Section 111. The EPA has the authority to regulate greenhouse gas emissions, and fossil-fueled power plants contribute about one quarter of the United States' greenhouse gas emissions. While Chief Justice Roberts uses the broad nature of Section 111 to argue that Congress did *not* authorize the EPA to implement generation shifting as a BSER, Justice Kagan argues the opposite. Due to the broad nature of Section 111, which allows the EPA to decide the BSER for power plants, there is no reason why the BSER could not include generation shifting—the section allows for "regulatory flexibility and discretion," only providing constraints relating to account costs and non-air impacts.[30] Justice Kagan differentiates the meaning of "broad" and "vague"—broad signifies "comprehensive, extensive, wide-ranging," while vague indicates "unclear, ambiguous, hazy".[31] The two should not be used interchangeably, as the majority opinion does.

The premise of the majority's decision, according to Justice Kagan, is "that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms".[32] Justice Kagan entirely disagrees, claiming the exact reason why broad delegations like Section 111 exist is so an agency can respond appropriately to arising problems, as they have the proper resources to do so.[33] Justice Kagan also repudiates that the Court should consider that Congress has recently rejected similar regulatory measures– failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law".[34]

Justice Kagan also challenges the usage of the major questions doctrine in regards to how the regulation would impact the energy market. The majority opinion declares that Congress did not intend for the EPA to have such a significant impact on the energy sector through generation shifting, the "mix of energy

sources nationwide".[35] Refuting this, Justice Kagan states that this argument is based on a misunderstanding of regulation of the electricity market. In fact, "every regulation of power plants—even the most conventional, facility specific controls—'dictat[es]' the national energy mix to one or another degree".[36] The EPA is always managing the mix of energy sources. Generation shifting is not completely unprecedented, and power plants use the method independently. Even if it was unprecedented, that does not invalidate it; agencies have to "adapt their rules and policies to the demands of changing circumstances".[37] The BSER could very well evolve.

Justice Kagan ends by arguing that the current Court is "textualist only when being so suits it," and uses special canons like the major questions doctrine as "get-out-of-text-free cards".[38] The result is preventing expert agencies from doing what Congress directed them to. Congress looks to these expert agencies for guidance, as the agencies are *experts* in such fields. So, Justice Kagan asks, what would Congress know about the BSER? The EPA has the knowledge and expertise—not Congress or the Court.

III. Major Questions Doctrine

A. Origins and Evolution:

The delegation of power from Congress to federal agencies is often necessarily broad, as Congress grants experts within these agencies the authority to implement regulations in order to realize their goals. As a result, it frequently falls to agencies to interpret the statutes which grant them regulatory authority, applying the flat text of these statutes to emerging policy issues that may or may not be explicitly addressed in the agency's mandate. Consequently, agency action is often predicated upon the interpretation of an implicit— rather than explicit—delegation of authority from Congress, opening the door for legal challenges. Such challenges

have traditionally been subject to the two-part *Chevron* analysis, a doctrine stating that if Congress's intent in a particular statute is ambiguous, the Court should defer to the agency's interpretation.[39] Yet as questions of agency authority have reached the Court in recent years, a new rationale stands positioned to usurp *Chevron*: the major questions doctrine, a murky manifestation of the traditional legal principle of nondelegation. Championed by many critics of *Chevron,* nondelegation restricts the ability of Congress to transfer legislative authority to other governmental entities, arguing that such a deference violates the separation of powers by shifting too much legislative authority to agencies within the executive branch.[40] The major questions doctrine, then—nondelegation's most recent iteration—seems to address the issue of executive overreach by instead rerouting power to the Court itself.

As the primary framework applied by the majority in *West Virginia v EPA*,[41] the major questions doctrine states that in certain extraordinary cases—namely, those cases concerning issues of "vast 'economic and political significance'"—*Chevron* deference must be rejected, instead proceeding with the assumption that the question at hand is "too important" for Congress to have implicitly delegated to an agency.[42] The sentiments underlying the major questions doctrine have been present in Supreme Court jurisprudence for several decades; in just the past year and a half, they have served as a driving force behind two crucial cases surrounding agency responses to the COVID-19 pandemic. Notably, *West Virginia v EPA* marks the doctrine's first explicit invocation by a Supreme Court majority, solidifying its rise to prominence in recent years. Despite its time in the spotlight, however, the criteria for application of the doctrine remains alarmingly vague, with no clarification to date of exactly what characterizes an issue as one of "vast economic and political significance". As it stands, writes one commentator, the Court's

current rules for identifying a major question "echo of Justice Potter Stewart's famous description of pornography— 'you know it when you see it'".[43] If left unconstrained, this broad definition lends the doctrine potential applicability to virtually every case in which agency interpretation is a concern.

The roots of the major questions doctrine can be traced to *Industrial Union Department v American Petroleum Institute,*[44] which found that the Secretary of Labor had exceeded his authority under the Occupational Safety and Health Act of 1970 in setting standards reducing the concentration of benzene, a carcinogen linked to leukemia, to which workers could be exposed. Explaining their decision to curb the Secretary's authority, the majority opinion concluded that, absent a clear mandate in the Act to set such a standard regardless of cost, "it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the government's view".[45] The Court proceeded to require that statutes offer "intelligible principles" which delineate the bounds of agency authority to prevent the executive branch from acquiring lawmaking powers, a clear example of the nondelegation doctrine at work.[46] However, the language of "unprecedented power over American industry" introduced, for the first time, the concept of a 'major question,' specifically in the context of economic disruption.

In the years following *Industrial Union Department*, major questions of economic significance arose again in several additional challenges to agency regulations. In *MCI Telecommunications v AT&T*,[47] the Court found that the Federal Communications Commission's decision to make tariff filing optional for nondominant long distance telephone carriers was an overly broad interpretation of their authority to "modify" filing requirements under the Communications Act of 1934, writing, "It is highly unlikely that Congress would leave the determination of

whether an industry will be…substantially rate-regulated to agency discretion".[48] A similar interpretation of congressional intent provided the basis for the decision in *FDA v Brown & Williamson Tobacco Corporation*,[49] which determined that a ban on tobacco products promulgated by the FDA was an overstep of the agency's authority. Congress, the Court argues, would not have delegated a decision of "such economic and political significance" to an agency while legislation expressed a clear contradictory intent by allowing tobacco products to remain on the market.[50]

It is worth considering the dissent filed by Justice Stephen Breyer in *Brown & Williamson*,[51] which invokes the political questions doctrine to argue that decisions about the regulation of tobacco—an issue of particular political salience—should be left to a politically accountable branch of government, rather than to the Court. This point touches on a key concern inherent in the major questions doctrine: although presented as a tool to resolve the separation of powers crisis that occurs when legislative power is excessively delegated from Congress to agencies, the Court's use of the doctrine does not return this power from agencies back to Congress. Rather, it reroutes the power to interpret ambiguities to the Court itself. In this sense, it appears that it is not delegation itself which the major questions doctrine seeks to minimize, but more particularly delegation which could potentially result in agency aggrandizement. In justifying the use of major questions through concern over the potential overreach of self-interested agencies, however, it would be naive to simultaneously maintain a view of the Court as completely uninterested in both politics and in expanding its own power.

From the major questions cases so far discussed, a clear pattern of implementation appears to emerge: an agency interprets a statutory ambiguity in a way that expands its power, and a conservative Court majority leverages the major questions doctrine to limit that power, ruling that the agency has overstepped its

bounds. Yet proponents of the doctrine highlight several cases in the literature that depart from this pattern. In *Gonzales v Oregon*,[52] a liberal majority invoked major questions to strike down the Oregon Attorney General's interpretive rule prohibiting the distribution of drugs for the purpose of assisted suicide. *Whitman v American Trucking*[53] found the Court siding *with* the EPA against a challenge of its National Ambient Air Quality Standard. And in *King v Burwell*,[54] the doctrine was ultimately used to uphold the Internal Revenue Service's (IRS) interpretation of a key Affordable Care Act (ACA) provision, securing a key win for the Obama administration.

Crucially, however, while the practical results of *Burwell* may be used as evidence of the major questions doctrine upholding agency interpretation, the process by which these results were obtained—specifically, the Court's choice to ignore *Chevron* deference in favor of the major questions doctrine—illustrates the exact assault on agency authority which critics of the doctrine fear. Pointing to the extensive interrelatedness of the IRS's proposed ACA reforms, the *Burwell* majority invoked the "deep 'economic and political significance'" of the question to declare that deference to the agency was not appropriate; after all, if Congress had intended to delegate such a question, then they would have done so explicitly.[55] "This is not a case for the IRS," states the Court, going on to assert that "[i]t is instead *our* task to determine the correct reading of Section 36B".[56] [57] Although the majority opinion ultimately upheld the IRS' interpretation of the provision at hand, it did so not by acknowledging the IRS's interpretative power, but by rejecting it and taking the matter into its own hands. Rather than striking down the IRS's authority and returning the question to Congress, as the traditional nondelegation principle would suggest, the Court used major questions as a mechanism through which to transfer interpretive power away from the IRS to itself.

The escalating prevalence of major questions in recent

years, with the doctrine underlying the core reasoning behind three major decisions in the span of the last two years, continues to cement the doctrine as an independent tool through which the Court can take statutory interpretation into its own hands. *Alabama Association of Realtors v HHS*[58] deemed the CDC's nationwide temporary eviction moratorium an intrusion upon a matter of major national significance, declaring that the agency had no specific authorization to take an action such as a moratorium and that it "strain[ed] credulity" to believe that the statute it interpreted to do so "grants [it] the sweeping authority that it asserts".[59] Only months later, in *NFIB v Department of Labor*,[60] the Court halted the enforcement of the Occupational Safety and Health Administration's (OSHA) requirement that large employers enforce certain preventative measures during the COVID-19 pandemic, citing *Alabama* to determine that Congress is expected to speak clearly when giving agencies the authority to exercise powers of "vast economic and political significance".[61] Because COVID-19 was not an explicitly "occupational" hazard, the Court asserted that any action in response to the virus would require an expansion of OSHA's power that would be illegitimate without clear instruction from Congress. In both of these decisions, the major questions doctrine was applied independently and without any consideration of *Chevron* deference, illustrating its evolution as a separate, competing standard.

It is no coincidence that two out of the three major questions cases over the past years have centered around responses to the COVID-19 pandemic, with the third, *West Virginia v EPA*, addressing reactions to the climate change crisis—both issues are quickly developing and difficult to foresee, making it unlikely that agencies have received the explicit delegation necessary to address them. Such is the case with generation shifting, the EPA's proposed emission reduction system that is struck down in *West Virginia v EPA*. "Congress did not grant EPA…the authority to devise

emissions caps based on the generation shifting approach," writes the majority, deciding that because generation shifting is neither explicitly enumerated in the Clean Air Act nor a method with historical precedent, it is beyond the scope of the EPA's authority to require.[62] However, this approach fails to address a clear reason why Congress may not have granted the EPA this specific authority: the Clean Air Act was written nearly fifty years prior to the CPP, long before climate change was broadly considered an issue and even longer before approaches such as generation shifting would have been considered to mitigate it.

This dilemma inherent in *West Virginia* strikes on an alarming implication of the major questions framework: by requiring Congress to 'speak clearly' on anything deemed a major question, the doctrine eviscerates agencies' ability to respond to complex and unprecedented policy issues, leaving them unable to interpret statutes in the context of emerging situations and forcing them to wait for the often tedious lawmaking process to empower them in specific terms. This presents a challenge to Congress as well as agencies: in the event that Congress intends to give an agency the flexibility to address issues as they arise, that intention must be made very clear, a task complicated by the fact that no clear guidance exists on what exactly is considered a 'major question'. With ambitious legislation on the horizon surrounding several key issues, both the climate crisis and current public health crises will present a particularly crucial arena in which to observe the evolution of the major questions doctrine in the coming years.

B. Complications with the Chevron *Doctrine:*

Beyond the complexities within the major questions doctrine, it is also important to consider its relationship with other doctrines. One such example is the *Chevron* deference doctrine, which states that if a congressional statute "is silent or ambiguous with respect to the specific issue, the question for the Court is

whether the agency's answer is based on a permissible construction of the statute".[63] This doctrine is particularly important in the context of areas lacking judicial or legislative expertise, such as environmental regulation. In the two-step process outlined by *Chevron*, step one is used to determine whether Congress's statute is ambiguous in dictating a certain provision. If the statutory provision is determined to be ambiguous, step two involves the Court deferring to an expert agency's credibility and interpretation of the statute, "so long as it is a 'permissible' or 'reasonable' construction of the statute."[64] Here, 'reasonableness' is constituted by the specific context of language and the broader context of the statute. Historically, the Court has remained relatively inactive at step two, only rejecting an agency's statutory interpretation in *AT&T Corp. v Iowa Utilities Board*,[65] *Utility Air Regulatory Group v EPA*,[66] and *Michigan v EPA*.[67] [68]

In the context of *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, the Court ruled that while there is conflict between economic and environmental interest, the EPA's plantwide definition of stationary source "is fully consistent with the policy of allowing reasonable economic growth," and that the EPA "has advanced a reasonable explanation for its conclusion that the regulations serve environmental objectives as well."[69] In the 2014 decision for *Utility Air Regulatory Group v EPA*, however, the Supreme Court decided that the EPA exceeded its authority in interpreting greenhouse gasses as a "major source" pollutant under the Clean Air Act.[70] In fact, they concluded that agencies have "no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms," and that "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity".[71]

Interestingly enough, the major questions doctrine was used as a factor in the step two analysis of *Chevron* in *Utility Air*. As the Congressional Research Service writes, the EPA's regulations were

"an unreasonable reading of the statute in part because they would have constituted 'an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization'".[72] It stands to reason that the Court believed that this 'transformative' expansion of the EPA's capabilities would have such massive and unimaginable economic consequences simply because it addresses, and thereby must severely affect, many industry sectors. While certain details remain unclear, it is important to note that the incorporation of the major questions doctrine was solely used to determine the validity of deferring to the EPA's interpretation, a facet of step two in the *Chevron* framework. The newer, alternative understanding of the doctrine's applied role is far more deadly for *Chevron*.

King v Burwell rendered a different interpretation of the major questions doctrine as a prerequisite consideration to the two-stage procedure, effectively transforming it into a 'step zero' in the process of *Chevron* deference. In fact, commentators note that, despite the ambiguity inherent to classifying a 'major question,' a court could circumvent deference to an agency interpretation "either by utilizing the major questions doctrine as a factor in the course of its *Chevron* analysis or by concluding that the *Chevron* framework is altogether inapplicable."[73]

The Court's understanding of step zero as a prerequisite to the entirety of the *Chevron* framework is misguided, as scholars contend that it "mistakenly implies that judges need to clear that step before reaching [s]tep 1, adding jarring ordinal distance and conceptual misplacement that invites confusion."[74] In reality, step zero serves as a prerequisite to step two, and the conflation of *Chevron* deference (step two) for the whole *Chevron* framework creates this doctrinal confusion. Some forward the solution of abolishing step zero entirely, and instead replacing it with interstitial steps to provide more clarity. Through its current application by judges, this vague yet powerful interpretation of the

major questions doctrine as a simultaneous factor *in* and exception *to* the *Chevron* process is a dramatic shift from its original application simply as a consideration in the step two stage. This evolution of the major questions doctrine is especially dangerous when considering the lack of definitional clarity and certainty present in its current state.

C. Complications with the Political Questions Doctrine:

The *Chevron* deference serves as a natural extension of one of the Court's oldest principles: the political questions doctrine. The doctrine establishes that certain questions and disputes are fundamentally too political to be resolved by the Supreme Court, and must be handled by the other branches of the government. It was first implied in *Marbury v Madison*[75], the case that established the modern concept of judicial review and provided the Court with the authority to strike down laws it found to have violated the Constitution. The landmark case also held the earliest implications of the Court not stepping into conflicts of an overtly political nature. The concept of political questions intended to establish the Court as an apolitical branch that would not use its authority to step into the political sphere and breach the other branches' authority.

Chevron was clearly established with the political question doctrine in mind, providing federal agencies discretionary authority to interpret congressional mandates. By deferring to the regulatory authorities, the Court found that in the face of such ambiguous congressional political mandates, it would be improper for the Court to step in.[76] It effectively holds that any responsibility for clarifying the regulatory authority of government agencies is in the hands of Congress. However, the rise of the major questions doctrine in cases such as *West Virginia v EPA*[77] to prevent regulatory leeway in making policy decisions could prove to be a massive breach of the political questions doctrine and, thus, the

separations of powers.

Justice Kagan, in her dissent in *West Virginia*, challenged the usage of the major questions doctrine on multiple grounds, including the lack of prior explicit usage of the doctrine itself and failure to find any actual error in the EPA's interpretation of Section 111 of the Clean Air Act.[78] She concluded that the high political stakes of an issue such as climate change fundamentally exists as an area of expertise of the EPA, and preventing its ability to push through policies such as the Clean Power Plan breaches Congress's authority to make policy decisions and effectively rewrote the law that it had passed.[79]

This assertion by Justice Kagan implicitly places the major questions doctrine into contention with the political question doctrine. The Court was founded on the basis of serving as an apolitical actor meant to arbitrate on issues that it is an expert on, namely issues of high constitutional importance. Similarly, the other branches and agencies within those branches are experts in their own respective areas of policy and legislation, such as the EPA in the area of environmental policy. The official introduction of the major questions doctrine into the Court's lexicon, however, stretches past the role of serving as an apolitical actor that the political question doctrine calls for. Rather, as Kagan asserts, the Court has chosen to "appoint itself—instead of Congress or the expert agency—the decision maker on climate policy".[80] The usage of the major questions doctrine places the Court into the center of a massive political fight, and fails to account for a critical test of how the Court is supposed to handle cases.

There has long existed a standard for determining whether a case fell under that of a political question and, thus, should not be handled by the Court. The Supreme Court's decision in *Baker v Carr*[81] put in place a set of six criteria tests to determine whether a case was in regard to a "political question". These six criteria tests are "(a) commitment of the issue to a branch of government

other than the judiciary; (b) lack of standards for resolving the issue; (c) impossibility of the judiciary to resolve the issue without first making a policy determination; (d) a judicial decision of that matter as a lack of respect for other branches of government; (e) a political decision has already been made; or (f) the potential for multiple pronouncements by various branches on one question."[82] The existence of any of these factors fundamentally transforms a question brought up to the courts from a legal one to a political one and, hence, outside of its remit.

When delving into both the context of the major questions doctrine and its usage in *West Virginia* in particular, there are a variety of gray areas regarding whether this case should have been considered a political question. Starting from the first test, "a commitment of the issue to a branch of government other than the judiciary," *West Virginia* appears to breach, or at least heavily flirt with, the political questions doctrine by impeding on Congress's power to delegate authority. The very basis of using the major questions doctrine in this situation presents a huge challenge to this test: it can be reasonably inferred that if Congress had perceived the EPA was overstepping its regulatory authority, then Congress would have attempted to pursue some sort of legislation to that goal. Justice Kagan even suggests this when she compares the terminology of "broad" and "vague" in the context of the authority afforded to the EPA, and with her assertion that Congress had provided the agency broad authority to regulate the environment.[83]

In the next test, whether there was a lack of standards for resolving the issue, there exists some possible justification for the Court's decision to step in. There had been a long-existing standard for approaching conflicts between federal agencies and other actors on their interpretation of congressional statutes. However, these standards are held within the *Chevron* deference, whose very existence has been challenged by the Court's usage of the major questions doctrine. The Court has artificially created

a set of nonsensical standards by recurring usages of the *Chevron* deference and the major questions doctrine in the past several years.[84] For years after the original Chevron ruling in cases such as *Chevron U.S.A., Inc. v Echazabal,*[85] the Court has upheld the doctrine, while more recently issuing rulings under the major questions doctrine, to limit agency actions.

The third test, the impossibility of the judiciary resolving the situation without making a policy decision, continues to indicate the presence of a political question. It can clearly be determined that the limits the ruling placed on the EPA can constitute a policy decision. The Court cited President Biden's references to the continued use of provisions of the Clean Air Act to regulate energy policy as justification for ruling on the case despite the repeal of the Clean Power Plan, which was being challenged.[86] However, it would be equally prudent in taking into account the commentary of the various state attorneys general that joined in on the challenge on the question of climate change and climate policy.

Looking just at the lead Attorney General representing West Virginia in this case, Patrick Morrisey, there exists a litany of comments from him and his fellow petitioners expressing their disbelief in climate change and actively challenging climate policy making.[87] By adjudicating the case and issuing this ruling, the Court fundamentally attacks the political question doctrine by stepping into clear policy disagreement between the federal government and select state governments. Beyond that, it steps in as a legislative authority by placing a statutory limit on the EPA when that responsibility should have clearly been held in the hands of Congress. The Court cites its use of the major questions doctrine as being justified by inferring Congress did not mean to reasonably confer to the EPA so much power.[88] However, it could just have been reasonably inferred that congressional inaction served as an implicit sign of approval of the EPAs's interpretation of the statute.

The failure of each of these tests, by the facts of the case, provides ample evidence of how the political question doctrine should have taken precedence in this case. By brushing aside this doctrine in favor of major questions, the Court has set the stage for the consideration of other cases to limit executive authority, cases that open the door to breaching the separation of powers and the accountability of each branch of government to its own branch of policy. The use of the major questions doctrine enables the Court to enter the policy making arena. At the same time, its retention of the *Chevron* deference establishes a series of contradicting realities in which federal agencies should be given some respect for being experts, while still giving the Court the power to intervene against this standard.[89] This conflict also prompts questions of the Court's willingness to create standards that are out of place with one another, and raises the specter of judicial activism.

The perception of the Court is extremely important in maintaining its legitimacy. The political questions doctrine was established in an effort to maintain a perception of a group above the fray of politics. However, with the increased presence of the major questions doctrine parallel to political questions, the appearance of an activist Court willing to retain or push through any precedent to maximize its own powers and goals grows in the eyes of the populace. The *West Virginia* ruling will have ripple effects for years to come, beyond just the remit of climate, and into a variety of other policy areas that the Court might believe fall under major questions. It will be hugely important to see if the Court will take any action to rectify its conflicting standards, or push further into the realm of activism and policy making.

D. Implications for the SEC Climate Risk Disclosure Rule:

An upcoming announcement that could be greatly affected by the rising popularity of the major questions doctrine is the implementation of the Securities and Exchange Commission's

(SEC) Climate Risk Disclosure Proposal. These proposed rule changes would require public companies to disclose climate-related information in periodic statements, which would include "information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements."[90] There is expected to be heavy pushback regarding this proposal, which will likely manifest in several lawsuits that use the major questions doctrine to challenge the scope of the SEC's regulatory ability in requiring such disclosures. While transparency in disclosing climate change information is arguably necessary and relevant to the general public interest and welfare, legal scholars note that regulating in the public interest, as per Section 7(a) of the Securities Act and Section 12(b) of the Exchange Act, "is not a concept without ascertainable criteria, and its authority to issue such rules does not afford it the power to impose disclosure obligations related to securities on *any* subject matter or to use the disclosure framework to achieve objectives that are unaligned with the objectives Congress has required the SEC to pursue."[91] Here, it is clear that the relationship between the SEC and "public interest" is one that is narrowly defined and constrained to protecting investors and their returns, and that the climate disclosure requirement is tangential information that does not explicitly fit within the SEC's core mandate.

There is a strong case for the validity of the climate disclosure rule, contending that the SEC's action constitutes an investor protection measure by requiring material risk disclosure. In her statement entitled "We are Not the Securities and Environment Commission - At Least Not Yet," however, Commissioner Hester M. Peirce argues that the SEC "do[es] not have a clear directive from Congress, and we ought not wade blithely into decisions of such vast economic and political

significance as those touched on by today's proposal."[92] Commissioner Peirce's comments clearly allude to the major questions doctrine, namely by using the resemblant language of "vast economic and political significance" as well as by expressly referring to explicit authorization by Congress. What remains unclear is how an advancement in the reporting of climate risks has a significant impact on market efficiency or gives the SEC an unconstrained power over the economy.

In the context of topics experiencing significant legislative inaction, particularly surrounding the evolving environmental issues, the demand for explicit congressional authorization essentially ties the hands of agencies such as the SEC and the EPA. As previously mentioned, Justice Kagan explicitly refers to the broad nature of Congressional delegations in her dissenting opinion, citing it as a necessary condition for agencies to flexibly adapt their regulation.[93] In the context of climate disclosures in financial reporting, the rise of Environmental, Social and Governance (ESG) factors in investing could constitute 'changing circumstances' of the market environment. Increasing transparency regarding climate risks could prevent market manipulation such as "greenwashing," or "the dissemination of false or deceptive information regarding an organization's environmental strategies, goals, motivations, and actions."[94] However, the current interpretation of the major questions doctrine would prevent the agency's ability to respond flexibly to such issues of great relevance and significance, especially given the relative inaction of the legislative branch.

Consequently, regulatory agencies are constrained in two ways. First, agencies must patiently wait for a gridlocked Congress to make a firm decision regarding issues in which the agency possesses vastly greater amounts of expertise. Because of this waiting game, their regulatory flexibility is hampered, as actions are always delayed in response to the 'changing circumstances'

identified by the agency. Secondly, the application of the major questions doctrine constrains a federal agency to actions defined by their historic role and mandate. Accordingly, the Court's obsequious relationship with the major questions doctrine ossifies administrative power. This natural conservatism is consistent with the current Supreme Court's reputation, but forecloses the necessary ability of agencies to adapt effectively.

IV. Implications of *West Virginia v EPA*

A. The New Role of the EPA:

The Court's decision in *West Virginia v EPA* is undoubtedly a severe blow to the Agency's ability to carry out its mission of protecting human health and the environment, kneecapping its authority when it comes to the regulation of existing carbon-polluting power plants—some of the largest greenhouse gas producers in the country and by extension the world.[95] By determining that capacity within the power sector for generation shifting, which had been identified by the EPA as the clear BSER, is not an acceptable standard by which to set limits on emissions, the Court takes away a powerful tool that would have allowed for major strides towards the United States' climate goals. Without this approach as an option, regulating carbon emissions will become significantly harder.

However, the *West Virginia* ruling does not eradicate the EPA's authority to enact carbon regulation, even though it hinders it significantly. Under the Clean Air Act, the EPA retains the ability to regulate emissions from the power sector, including setting standards for existing power plants under Section 111(d): the responsibility of the Agency to implement the best emission reduction system remains, although with the large caveat that generation shifting cannot be considered this "best system."[96] Further, additional sections of the Clean Air Act

remain untouched by the ruling, including Section 111(b), which allows the EPA authority to regulate greenhouse gas emissions from "new, modified, and reconstructed" fossil fuel plants; §7521, which grants the ability to set standards for emissions of "any air pollutant" from new motor vehicles; and sections permitting the regulation of leaks from gas and oil wells.[97] Generation shifting itself is also not entirely off the table as a strategy to reduce emissions, as individual states may yet choose to harness the system in their own implementation of the EPA's rules.

Additionally, the EPA maintains much of its authority to regulate non-carbon pollutants. Under the Clean Air Act, the EPA is required and able to set National Ambient Air Quality Standards for particulate matter and other conventional pollutants including ozone, carbon monoxide, and lead. Subtitle D of the Resource Conservation and Recovery Act, a statute focused on the regulation of hazardous solid waste, allows the EPA to address risks surrounding the disposal of coal ash. The Clean Water Act of 1972 (CWA) allows for the agency's continued authority to regulate the discharge of pollutants into United States waters.[98] Notably, however, a case set to come before the Court in October 2022 will challenge the CWA and may narrow the definition of the "United States waters" which the Act protects.

While *West Virginia* does not entirely remove the EPA's ability to set rules in climate-change related areas, it is a significant red flag for climate rules that may come before the Court in the future, setting a precedent for their rejection through the interpretation of Section 111(d). Going forward, the immediate challenge to the EPA will be crafting a new best system of emissions reductions for existing power plants—with measures drastic enough to create progress on the climate front, but conservative enough to avoid challenges of exceeding their authority.

B. Pathways for Expanding the Role of States:

Climate federalism is defined as "the allocation of responsibility for climate change policy among the federal, state, and local governments."[99] As previously mentioned, the legislative inaction surrounding climate policy at the federal level has left an enormous gap that urgently demands the intervention of alternative agents. One such non-federal actor with the potential to ambitiously take the reins on environmental action are state governments. While traditional models of federalism view states as laboratories of democracy, this cooperative understanding of federalism can be applied in novel ways to address climate change. A bottom-up approach to environmental policy is more effective in addressing emissions while avoiding the issue of federal preemption, which traditionally nullifies state law when the two come into conflict. In the absence of cooperation, the federal government would limit the creativity afforded by state solutions, specifically by "straitjacketing states [and] forcing them to conform to a single, minimally protective federal regime," a decision that "would be both unnecessarily limiting and unwise."[100] Such creativity, often led by states such as California and New York, has manifested in popular solutions such as decoupling the power sector and Clean Energy Standards and developing solutions such as Low Carbon and Alternative Fuel Standards and Carbon Cap and Trade systems.[101]

While promising, state progress on climate action does not come without its obstacles. First, such solutions must avoid Dormant Commerce Clause challenges, which stipulate that states cannot burden the interstate commerce power delegated to Congress. The Dormant Commerce Clause was created to ensure that states can experiment in social and economic areas, while preventing "economic Balkanization," which is defined as 'political fragmentation,' or the separation of regulatory jurisdictions into smaller, individual, and often hostile bodies."[102]

In the context of climate change, this doctrine is often used to combat progressive state action, most notably by challenging clean air programs. In *Rocky Mountain Farmers Union v Corey*, for example, opponents of California's Low Carbon Fuel Standard program argued that it facially discriminated against out-of-state commerce in the context of crude oil and ethanol. The Ninth Circuit reversed the original district court's decision, finding that "a regulation is not facially discriminatory 'simply because it affects in-state and out-of-state interests unequally.'"[103] Additionally, the Ninth Circuit Court noted that Congress explicitly "endorsed California's right to act as an experimental regulatory laboratory."[104] It is important to note that this congressional endorsement was provided in the context of the Clean Air Act, which allowed California to create and implement its own tailored emission standards. While challenges to clean energy programs in California and Oregon were both decided in favor of state experimentation, states and local governments should carefully craft policies in order to avoid economic Balkanization as well as future Dormant Commerce Clause challenges.

Another challenge lies within federally proposed market-based solutions to regulating climate change, such as cap-and-trade programs. Local actions to mandate clean motor vehicles or prevent certain trading programs have been denied by various courts, primarily because of the close relationship between the energy sector and the economy. This conflict between federal and state actions could obviate many attempts at progress, as "any additional state and local regulation could be viewed as posing an obstacle to those market-facilitating and cost-effectiveness goals."[105] While Congress could solve this by creating explicit agency guidelines or even a new regulatory agency to better navigate state and local environmental regulation, the process would be lengthy and would likely further stifle administrative flexibility and efficiency.

C. The Role of Indigenous Communities:

The consequences of climate change, and therefore the *West Virginia* decision as well, disproportionately impacts marginalized groups, such as Indigenous communities. The United Nations Department of Economic and Social Affairs notes that "[c]limate change poses threats and dangers to the survival of Indigenous communities worldwide, even though Indigenous peoples contribute the least to greenhouse gas emissions."[106] Due to Indigenous peoples' close relationship and dependence on the environment, they are "among the first to face the direct consequences of climate change."[107] Many Indigenous communities have "relied on the land for generations, an intimate knowledge of the natural cycles of plants, animals, and weather".[108] Already, the community confronts political and economic oppression, and their land and resources being stolen from them. The consequences of climate change exacerbates these existing problems.

Indigenous communities in the United States, and globally, have been an essential part of combating the impacts of climate change. California's Native American tribes worked with the state government to limit wildfires by "lighting small fires which clear out excess vegetation, leaving less fuel for a big fire."[109] While tribes have been at the forefront of such practices for years, they were banned from the practice for more than a century. Nikki Cooley, a co-manager of the Tribes and Climate Change Program for the Institute for Tribal Environmental Professionals, said that "Indigenous peoples have always been on the front lines," and have "always been adapting to climate change."[110] Climate activists are continuing to realize the importance and value of Indigenous knowledge of climate change mitigation, after excluding them from climate activism for years.[111]

David Kaimowitz, the Senior Forestry Officer at the Food and Agriculture Organization of the United Nations,

acknowledged that "we cannot win the race to save the planet" without Indigenous peoples – already, they manage around 24 percent of the "total above-ground carbon stored in the world's tropical forests."[112] The Indigenous Environmental Network, a coalition of grassroots environmental justice activists, stated that the *West Virginia* decision is a continuation of "settler violence perpetrated against Indigenous peoples" and goes beyond the Court's constitutional authority.[113] They urged President Biden to take executive action to limit fossil fuel emissions and declare a climate emergency.

D. Global Impacts of West Virginia v EPA:

The Court's ruling on *West Virginia v EPA* not only hamstrung the federal government's ability to fight climate change but also sent a frightening signal across the world about the United States' commitment to fighting climate change. Climate change never has been—and never will be—an issue confined to one single nation or region. It has a kaleidoscope of effects that ripple across the world, effects that have become increasingly obvious with higher global temperatures and the rise of once-in-a-lifetime weather events. The United States' response to climate change has historically been one of the weakest across the developed world, with no single federal response having been passed in recent years. By further shredding the executive branch's ability to manage the climate crisis, the Court has sent a disheartening message to countries across the globe: the United States will not pursue climate action to its foremost ability.

Western Europe has largely led the charge on global climate action, as they have faced many of the early consequences. The European Union has set out lofty goals to reach climate neutrality by 2050 and cut emissions by at least 40 percent from 1990 levels.[114] They have pushed for legislation banning the sale of internal combustion engine vehicles by 2035 in the Union and

set out mass clean energy initiatives.[115] Climate action has become a core part of the EU agenda, the agenda of individual member states, and the agenda of neighboring countries such as the UK who have all pushed for major green initiatives. Unfortunately, their actions will not be enough, as many critics point to these major actions as not moving quickly enough. For many in Europe, this decision marks another crack in the Trans-Atlantic alliance, furthering the portrayal of the United States as an unreliable partner.[116]

The Court's decisions also echoed across much of the developing world with negative consequences across Africa, Asia, and Latin America. For years, developing nations have requested a $100 billion fund from developed countries as a sign of good faith to help in climate resilience and sustainable industrialization efforts. This fund did not come to fruition by the original 2021 deadline, which sparked a growing distrust of Western Europe and the United States.[117] Coupled with this ruling, the United States has only increased the growing divide between its policy initiatives with those of the developing world, and hampers the possibility for global action. This was already seen by the recent failure at COP26 to secure a global commitment to end the usage of coal, a measure challenged by countries like India which viewed the action as hampering their potential development.[118] *West Virginia v EPA* serves to further widen this gap by presenting to these nations the image of an America who is unwilling to lead on climate, and portraying it as fruitless for them to develop and industrialize in a green manner if a prominent global leader will not do it either.

This bleak global situation, however, is not without signs of hope. A variety of states have pursued actions to curb emissions and invest in clean energy efforts, and the ruling itself did not fully handicap the EPA's ability to lead climate efforts. It is clear that the nation is suffering from a cognitive dissonance, however, as various states and branches of the federal government push for

and against climate action. Progress is being made in cementing climate change as a major issue in the eyes of the American people and the government, but decisions like *West Virginia v EPA* send the world a signal of a nation unsure of itself and divided on the most pressing issue faced by humanity. However, the rise of climate federalism efforts in the United States and the passage of the Inflation Reduction Act of 2022 both present massive steps by the nation to invest in climate change efforts.

E. A Note on the Inflation Reduction Act:

During the writing of this article, the United States Congress passed the Inflation Reduction Act of 2022 (IRA), a measure considered to be the most monumental legislation to address climate change in the nation's history. While the bill addresses several topics that, together, reduce the government deficit, the Congressional Budget Office estimates that roughly $369 billion would be invested into energy security and climate change.[119] In this bill, Congress has taken a 'carrot' based approach of providing incentives that departs from the traditional, punitive regulation labeled as a 'stick' based approach. One incentive that the bill provides is clean-energy tax credit, which rewards private and public investment in renewable energy vehicles such as solar and wind power. Another feature is the $1.5 billion Methane Emissions Reduction Program, which "would reward oil and gas companies that slash their emissions of methane and penalize those that don't."[120] While the passage of this bill reflects an exception to congressional lethargy in addressing climate change, it is nevertheless a boost to progressive climate policy and engages private sector investment in order to reduce emissions. In order to reach an ambitious climate goal of cutting emissions by 40 percent from 2005 levels, this bill essentially changes the energy mixture in a manner consistent with generation shifting.[121] What remains to be seen is how this exercising of congressional authority in the area

of climate change affects the EPA's ability to perform its regulatory duties.

Indeed, the implementation of the IRA will present a crucial test of how sincere the Court's use of the major questions doctrine was in *West Virginia v EPA*. In the case's majority opinion, congressional inaction surrounding climate change is cited as a reason to invoke major questions. In support of the fundamental claim that Congress could not have intended to delegate an issue as significant as the regulation of coal-based generation to the EPA, Roberts challenges the idea that Section 111(d) would enable the Agency to "enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times."[122] The passage of the IRA, which signals Congress embracing an ambitious carbon emission reduction goal, should dissolve this concern surrounding legislative inaction. Yet the possibility remains that *West Virginia* is instead used as precedent for the Court to continue wielding major questions in order to obstruct environmental progress.

However, Congressional Democrats have been extremely intentional in the wording of the IRA, acting to ensure that the EPA is granted the authority it needs by directly amending the Clean Air Act "to define the carbon dioxide produced by the burning of fossil fuels as an 'air pollutant.'"[123] With this definition, the EPA should have complete authority to regulate greenhouse gases and push for renewable energy projects. Notably, this language was vigorously contested by Republicans prior to the landmark 51-50 vote in the Senate; indeed, there is a general consensus that the use of explicit language by Congress will make it harder for opposition groups to pose regulatory challenges in the future.[124] The passage of the IRA bill exemplifies and emphasizes the crucial need for legislators to draft policy around quickly developing issues, such as climate change, and to do so as clearly and specifically as possible. Doing so provides legislative avenues to strategically

circumvent the force of the major questions doctrine and unshackle the administrative ability of expert agencies.

V. Conclusion

The Supreme Court's ruling in *West Virginia v EPA* has upended the federal government's attempts to mitigate the effects of global climate change. The Court's decision to curb the EPA's Clean Power Plan has established new roadblocks for the federal agency to regulate carbon emissions and potentially slows efforts to contain the climate crisis. Though these Court-imposed roadblocks are limited in nature, the additions to the Supreme Court's legal lexicon will have consequences not only in fighting climate change but also in administrative law and separation of powers more broadly.

The *West Virginia* ruling is the first to explicitly introduce the novel major questions doctrine into the legal lexicon, which complicates the *Chevron* doctrine and allows the Court to use the veiled terms of 'political and economic consequences' to intervene and determine agency interpretation of congressional statutes. Though the interpretation of this doctrine in *West Virginia* is relatively tame with regards to the limits imposed on the EPA, such decisions open a legal Pandora's box for the Court to intervene in a variety of cases that are believed to fall into such exceptionally vague standards. The ruling acts as a perverse example of judicial activism, specifically by maintaining a series of contradicting legal standards that empower the Court to intervene in policy issues generally handled by experts and policy makers.

In the current moment, the Supreme Court has boldly taken on an increasingly large role as a policy maker, rather than just an apolitical adjudicator. In doing so, the Court also puts into question the role of expert agencies, such as the EPA, and their decision-making authority. This scenario places a massive burden

on the separation of powers, especially in the context of the fraught sociopolitical landscape. As the Court begins its next session, there exists a growing danger that the majority will choose to expand its use of the major questions doctrine in order to ignore established precedent and push policy initiatives that risk the rule of law. This strategy would expand roadblocks for regulators to combat ongoing crises, especially in the realm of climate change.

While *West Virginia* was a harsh blow to the EPA's ability to regulate carbon emissions, it did not completely prevent the Agency's ability to fight climate change. The EPA still retains the authority to set certain carbon standards, as well as regulating other air and water pollutants. Further, other actors have continued to fight climate change, across the public and private sphere both domestically and abroad. Commitments to pursuing net-zero targets by national and state governments, as well as the work of Indigeneous actors to combat the effects of climate change, prove that incremental progress is possible.

Most recently, the United States legislative branch made the monumental move to pass the Inflation Reduction Act of 2022, marking the largest series of actions by the federal government to combat climate change. This landmark measure will hopefully prove successful in reeling in the United States' emissions, but it can not be the only move made by the legislative branch. The stakes grow higher every day, as the world watches the United States' commitment to addressing climate change. If the Supreme Court continues its trajectory of using the major questions doctrine to intervene in agency efforts to combat climate change, then it will be key for Congress to reassert its authority and push for more legislation to fight the climate crisis. With enough united yet balanced action, society will be able to confront the largest existential challenge of modern times while preserving the fabric of democracy.

[1] *Egbert v Boule,* 596 U.S. _ (2022).
[2] *Oklahoma v Castro Huerta,* 597 U.S. _ (2022).
[3] *Dobbs v Jackson Women's Health Organization,* 597 U.S. _ (2022).
[4] *Roe v Wade,* 410 U.S. 113 (1973).
[5] *West Virginia v Environmental Protection Agency,* 597 U.S. _ (2022).
[6] *The Origins of EPA*, Environmental Protection Agency (June 24, 2022), online at https://www.epa.gov/history/origins-epa (visited August 23, 2022).
[7] *Reorganization plan no. 3 of 1970*, Environmental Protection Agency, (September 6, 2016), online on https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html (visited August 23, 2022).
[8] *Summary of the Clean Air Act*, Environmental Protection Agency (September 28, 2021), online at https://www.epa.gov/laws-regulations/summary-clean-air-act (visited August 23, 2022).
[9] *West Virginia v Environmental Protection Agency,* 597 U.S. _ (2022), 4.
[10] Ibid.
[11] Ibid, 8.
[12] Ibid, 9.
[13] Ibid, 10.
[14] Ibid.
[15] Ibid, 12.
[16] Ibid, 3.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid, 6.
[21] Ibid, 31.
[22] Ibid, 19.
[23] Ibid.
[24] Ibid.

[25] Ibid, 24.
[26] Ibid.
[27] Ibid, 23.
[28] Ibid, 1.
[29] Ibid, 2.
[30] Ibid, 7.
[31] Ibid, 8.
[32] Ibid, 5.
[33] Ibid.
[34] Ibid, 27.
[35] Ibid, 21.
[36] Ibid.
[37] Ibid, 26.
[38] Ibid, 28.
[39] *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).
[40] Congressional Research Service, *Congress's Delegation of "Major Questions,"* (Library of Congress 2021), online at crsreports.congress.gov/product/pdf/LSB/LSB10666 (visited Aug 22, 2022).
[41] *West Virginia v Environmental Protection Agency,* 597 U.S. _ (2022).
[42] Congressional Research Service, *The Supreme Court's Major Questions Doctrine: Background and Recent Developments* (Library of Congress 2022), online at crsreports.congress.gov/product/pdf/LSB/LSB10745 (visited Aug 22, 2022).
[43] Jonas J. Monast, "Major Questions About the Major Questions Doctrine," 68 *Administrative Law Review* 445, 449 (2016).
[44] *Industrial Union Department v American Petroleum Institute,* 448 U.S. 607 (1980).
[45] Ibid, 645.
[46] Ibid, 686.
[47] *MCI Telecommunications Corp. v American Telephone & Telegraph Co.,* 512 U.S. 218 (1994).

[48] Ibid, 231.
[49] *FDA v Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000).
[50] Ibid, 160.
[51] *FDA v Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000), 190 (Breyer S. dissenting).
[52] *Gonzales v Oregon*, 546 U.S. 243 (2006).
[53] *Whitman v American Trucking Associations, Inc.,* 531 U.S. 457 (2001).
[54] *King v Burwell,* 576 U.S. _ (2015).
[55] Monast, "Major Questions About the Major Questions Doctrine," 450.
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Impact versus Intention: Fulfilling the Promise of Equal Protection

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Abstract

The Supreme Court's discriminatory intent framework for disparate impact cases has unnecessarily weakened the power of the Fourteenth Amendment Equal Protection Clause. This discriminatory intent framework, established by *Washington v Davis* and *Personnel Administrator of Massachusetts v Feeney*, holds that for a disparate outcome to violate the equal protection guarantee, state actors must have discriminated to intentionally cause harm. The Court's decision in *McCleskey v Kemp* sought to adhere to the *Washington v Davis* and *Feeney* precedent of prioritizing questions of intent in evaluating disparate impact claims. The decision legitimized stark racial disparities in capital punishment. *McCleskey* showcases the egregious consequences of applying the discriminatory intent doctrine. The outdated discriminatory intent standard is insufficient to respond to the current, covert nature of racism in America. In order to fulfill the promise of equal protection, the Courts must focus on impact rather than intent. By applying a modified form of the disparate impact framework to Fourteenth Amendment equal protection claims while also considering the history of discrimination, the size of the disparity, and the stakes of the consequences, the Court can safeguard the rights of racial minorities in America.

I. Introduction

On April 22, 1987, the Supreme Court affirmed the constitutionality of racial disparities in the criminal justice system in *McCleskey v Kemp.* Despite strong statistical evidence showing that Black criminal defendants in Georgia were being executed disproportionately more often than their White peers, the Court allowed the system to continue. To understand the justices' decision, we must examine the disparate impact cases that were brought to the Court shortly before the *McCleskey* case. *Washington v Davis* and *Personnel Administrator of Massachusetts v Feeney* established that disparate outcomes only violate the Equal Protection Clause if state actors discriminated intentionally. This requirement of discriminatory intent, also known as discriminatory purpose, has resulted in systematic prejudice against marginalized groups. *McCleskey v Kemp* is one of the most egregious examples of the consequences of applying a discriminatory intent framework in evaluating equal protection claims. In accordance with the precedent set by *Washington v Davis* and *Feeney*, the Court dismissed McCleskey's equal protection claim because the Court argued that McCleskey could not prove that the disparate outcome was the result of the state's purposeful desire to harm Black criminal defendants. *McCleskey v Kemp* is often compared to infamous cases such as *Dred Scott v Sandford* which denied citizenship to formerly enslaved Black Americans and affirmed the institution of slavery, and *Plessy v Ferguson,* which upheld the Constitutionality of racial segregation. These two historic cases stunted the development of racial justice in the United States, just as *McCleskey* did. While the *Dred Scott* and *Plessy* decisions were since overturned, the *McCleskey* decision still stands as precedent, posing a formidable barrier to achieving a criminal justice system free of racial bias. In order to relegate the *McCleskey* decision to the past, the requirement of discriminatory intent must be abandoned.

The discriminatory intent standard must be replaced with a new framework that emphasizes impact in order to promote justice for marginalized groups. The discriminatory intent doctrine is insufficient because it is only useful in addressing explicit racism. In an era in which explicit forms of racism are frowned upon while more covert forms of racism abound, the Court must address all forms of racism in order to fulfill the guarantee of equal protection. By reviving a disparate impact framework and applying it to Fourteenth Amendment equal protection cases, the Court could better protect those affected by all forms of discrimination. To assess impact, the Court should evaluate historical patterns of discrimination, the size of the disparity, and the stakes of the consequences. These factors would help the Court recognize disparities caused by equal protection violations without unjustifiably including those which are simply differences in group outcomes.

II. The Constitutional Basis of Equal Protection

The Fourteenth Amendment's Equal Protection Clause is at the heart of the debate surrounding the adoption of a disparate impact versus discriminatory intent framework. Analyzing the history and language of the Fourteenth Amendment is necessary to understand which framework is most in line with equal protection guarantees. The Fourteenth Amendment was adopted in a package of constitutional revisions known as the Civil War Amendments, which attempted to reconstruct American society by freeing formerly enslaved people and safeguarding their rights.[1] The goal of the Fourteenth Amendment was to end the active discrimination committed against Black Americans across the country by establishing Black Americans as citizens of their state. The Equal Protection Clause of the Fourteenth Amendment declares that "No state shall...deny to any person within its jurisdiction the equal protection of the laws." This short clause has been a powerful resource

for marginalized groups fighting for equality. The Equal Protection Clause was cited in prominent cases such as *Brown v Board of Education*, which outlawed segregation in schools, and *Loving v Virginia*, which invalidated laws against interracial marriage. Yet, the implications of this clause are subject to serious debate and the Supreme Court's interpretation of "equal protection" is constantly evolving. The key question remains: *should the Equal Protection Clause guarantee remedy whenever there is a disparate outcome, or only when the state intends to discriminate?*

III. *Washington v Davis* and *Feeney*: Establishing the Precedent of Discriminatory Intent

Skinner v Oklahoma (1942), a case about criminal rights to bodily autonomy, first introduced a phrase that would become central to equal protection jurisprudence: *invidious discrimination*. The Court asserted that the Equal Protection Clause was adopted to protect people from invidious discrimination. Only in such cases would the Court apply a more exacting level of analysis known as strict scrutiny. While the Court never defined what was meant by invidious discrimination, it was eventually interpreted as discrimination based in malice.

Washington v Davis (1976) firmly tied invidious discrimination to discriminatory intent. In *Washington v Davis*, Black applicants who had been denied employment at the District of Columbia Metropolitan Police Department brought their case to court, alleging that the Police Department's policies were racially discriminatory. Although they asserted that several of the department's practices operated to exclude Black candidates, they focused specifically on the federal civil service exam, referred to as Test 21. The exam, used in many other federal civil service departments, was designed "to test verbal ability, vocabulary, and reading

comprehension."[2] The plaintiffs asserted that a higher percentage of Black applicants failed the exam than White applicants, and that the Police Commission failed to prove the accuracy of the exam in predicting job performance. The Supreme Court was tasked with deciding whether the DC Police Department's hiring practices violated the Fourteenth Amendment's Equal Protection Clause. Justice White, writing for the majority, argued that the police department's hiring policies were valid. The Court's decision was grounded in the notion that invidious discrimination requires discriminatory intent. Justice White began his analysis by explaining that ".... the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[3] Numerous times throughout the opinion, Justice White reaffirmed the idea that the police department was not trying to discriminate. He writes that the "the affirmative efforts of the Metropolitan Police Department to recruit [B]lack officers, the changing racial composition of the recruit classes and the force in general, and the relationship test to the training program *negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.'*"[4] According to this logic, discrimination is only unconstitutional when it is purposeful. To Justice White, because the department attempted to recruit Black applicants, the substantive impact of Test 21 on Black applicants was less significant. Justice White asserted that because the Black applicants had failed to prove the police department's intention to exclude Black candidates, the case was not an example of an invidious racial classification, and therefore the Court would not apply strict scrutiny. Thus, Test 21 only had to pass the rational basis test which requires that policies are rationally related to a valid government objective. Justice White concluded that Test 21 did not violate Fourteenth Amendment equal protection guarantees because it passed the rational basis test as a racially neutral qualifi-

cation for employment. In a move that diminished the importance of impact, Justice White wrote, "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule…that racial classifications are subjected to the strictest scrutiny and are justifiable only to the weightiest of considerations."[5]

As Justice Stevens argues in his concurring opinion, one significant issue with the Court's reasoning in *Washington v Davis* is that the opinion wrongfully linked invidious discrimination and discriminatory intent. While validating Test 21 was not unreasonable, the Court's emphasis on intent was problematic because analyzing a state actor's intent is often inadequate to determine whether they caused harm. The Court reasonably claims that the DC Police Department may have had a valid desire to ensure that its officers had a certain level of verbal and reading comprehension skills—these are necessary for effective job functioning. However, the Court should not have equated discriminatory intent with invidious discrimination. The police department's intentions should not have been deemed grounds for determining that Test 21 itself was not discriminatory. Even with neutral or positive intentions, the impact of a policy may make it clear that the state is not equally protecting various groups. Further, as Justice Stevens argued in his concurring opinion, "It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process."[6] As Stevens argues, requiring a plaintiff to prove a legislator's intentions is setting them up for an almost impossible task. Further, a good law can be good despite the fact that some legislators had bad intentions, conversely a bad law can be bad despite the fact that

some legislators had good intentions. Stevens rightly posits that intent is often irrelevant in evaluating the virtue of law. For this reason, it should not be the determining factor through which equal protection cases are judged.

Disparities—such as the racial difference in the pass rate on Test 21—are often the result of deeper issues that reveal America's unfulfilled promise of equal citizenship. Even as the Court upheld the validity of Test 21, the Court could have explored the systemic reasons for the disparity in pass rates and made suggestions to address these root causes. The Court could have questioned the test itself and investigated whether it, like many other standardized tests, was written in accordance with the norms of White middle-class individuals. Even if the Court did not find racial bias in the test questions, Justice White could have discussed the need to invest in quality education for Black residents of the District of Columbia to equip Black students with the skills needed to pass tests of reading comprehension, vocabulary, and verbal ability. Though the Court does not typically address underlying issues, it should use its power of influence to make recommendations to further equal protection. Bold changes such as this are necessary to finally fulfill the promise of equal citizenship for all.

While *Washington v Davis* narrowed disparate impact claims to ones with discriminatory intent, *Personnel Administrator of Massachusetts v Feeney* (1979) narrowed what evidence could count in order to prove discriminatory intent. The *Feeney* case was a sex discrimination case in which Massachusetts women argued that the absolute preference given to veterans in state civil service jobs invidiously discriminated against women, who were underrepresented in the veteran pool. In *Washington v Davis*, Justice White left space for "an invidious purpose [to] be inferred from the totality of relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[7] However,

the *Feeney* decision limited the Court's ability to make inferences based on impact. The majority holding in *Feeney* asserted that "'discriminatory purpose' implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[8] This line ultimately came to be known as the Feeney Rule. While this may appear to be only a slight variation of the *Washington v Davis* decision, the Feeney Rule's implications were more extreme. This rule mandated that even if state actors knew that the policy enacted would lead to a disparate impact, the policy would still be considered valid as long as the impact was an effect of the policy rather than a goal. Proof that a state actor knowingly caused harm was no longer enough to prove discriminatory intent unless an aggrieved party could prove that the discriminatory outcome was the direct purpose of the policy. In Justice Stevens' concurring opinion in *Washington v Davis*, he argued that it is often safe to assume that an actor intended the consequences of their actions. The Feeney Rule firmly rejects this logic. Without evidence of an express statement by an actor indicating that they were trying to harm a group by adopting a policy, it would be almost impossible to satisfy the intent requirement. As distinguished Yale Law Professor, Reva Siegel, has remarked, "the requirement that malice be proved is so exacting that, since this test was announced in 1979 [in *Feeney*], it has never been met, not even once."[9]

Siegal's observation that not a single case has met this standard raises questions as to its validity in determining equal protection. The Feeney Rule dramatically weakened the guarantee of equal protection because a state actor's informed decision to allow harm to a group was no longer a violation of their duty to equally protect their citizens. This standard of discriminatory purpose established in *Washington* and furthered in *Feeney* laid the ground-

work for the judicial failure that was *McCleskey v Kemp*.

IV. *McCleskey v Kemp:* The Consequences of Applying the Intent Doctrine

In 1978, Warren McCleskey, a Black man from Georgia, was sentenced to death for killing Frank Schlatt, a White police officer, during the armed robbery of Dixie Furniture Store in Atlanta. According to Georgia's state law, McCleskey was eligible for the death penalty because the murder had two aggravating factors: the murder occurred in the course of a serious felony and the victim was a police officer.[10] When appealing the case to the Supreme Court, in *McCleskey v Kemp*, McCleskey's defense team argued that a third aggravating factor also contributed to his death sentence: McCleskey was Black, and his victim was White.

McCleskey's team argued that race played a significant role in Georgia's death penalty sentencing and thus the state had neglected their duty to equally protect Black and White citizens. McCleskey's lawyers used two statistical studies conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth to make this claim. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," later referred to as "the Baldus study," analyzed over 2,000 death penalty criminal cases and found evidence of racial disparities in Georgia's capital sentencing. According to the Baldus study, racial disparities in death sentences persisted even when controlling for 230 nonracial variables that might explain the discrepancy. The largest variation was based on the victim's race. Criminal defendants charged with killing White victims were 4.3 times more likely to receive a death sentence than criminal defendants charged with killing Black victims. The study also found statistically significant disparities between White and Black defendants with the former 1.1 times more likely to receive a death sentence than other defendants.[11]

Thus, Black defendants who had killed White victims, like McCleskey, suffered the greatest probability of execution. McCleskey's team used these findings to argue that Georgia's capital sentencing process was administered in a racially discriminatory manner and therefore violated the Eighth Amendment and the Fourteenth Amendment's Equal Protection Clause.

The majority was not wholly convinced by the complex statistical study and held that regardless of the validity of the Baldus study results, they were insufficient to change McCleskey's fate. Justice Powell, writing for the majority, dismissed McCleskey's equal protection claim. Powell's opinion was grounded in the idea McCleskey would have to show that either the prosecutors, jurors, or the Georgia state legislature acted with discriminatory purpose in order to prove that Georgia had violated the Equal Protection Clause. Relying on the precedent set in *Feeney*, Powell argued that even if McCleskey's team could demonstrate that Georgia continued their biased capital sentencing system despite knowledge of racial disparities, such evidence would be insufficient to prove an equal protection violation. Powell asserted that for McCleskey's "claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect."[12] Powell doubled down on this logic, arguing that "In *Gregg v Georgia*, this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is no evidence now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose."[13] Thus, the only way to win an equal protection violation claim would be to show that the Georgia legislature created the system with the purpose of harming Black defendants. Further, Powell asserted that McCleskey would have to prove that the state legislature, prosecutors, or jurors acted with discriminatory purpose in his specific case. With this requirement, Powell created an almost

insurmountable barrier as obtaining this evidence would be almost impossible. Powell feared that if McCleskey's claim prevailed, it would challenge the structure of the entire criminal justice system. Prioritizing the maintenance of the system over the valuation of Black life, Powell remarked "At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."[14] In Powell's analysis, Black victims of state execution were simply collateral damage; lives that were expendable in order to preserve traditional methods of the criminal legal system. In Justice Brennan's dissent, he calls Powell's reductio ad absurdum argument "a fear of too much justice."[15] If the Baldus study opened the door to more claims of injustice, that should be welcomed rather than resisted in the pursuit of furthering equal protection.

Ultimately, in the case of Georgia's capital sentencing disparities, the question of intent should have been irrelevant because the dramatic disproportionate impact on Black defendants should have triggered the court to apply strict scrutiny. In a matter as important as the life or death of Georgia residents, American citizens, and most importantly, human beings, the disparity should not be tolerated regardless of what the Court perceives the legislators' intentions to be. As described above, the Fourteenth Amendment does not mention intent, but it does mandate that states equally protect their citizens. The data in the Baldus study, brought forth in *McCleskey*, strongly suggested that the state of Georgia had failed to live up to this guarantee.

The *McCleskey* decision, often referred to as "the Death Penalty Dred Scott" has validated racial bias in the criminal legal system. As the National Association for the Advancement of Colored People's Legal Defense Fund (NAACP LDF) claimed, "The *McCleskey* decision reached far beyond the confines of Georgia's capital punishment system and Warren McCleskey's appeal. It created a crippling burden of proof for anyone seeking to stamp

out the corrosive influence of race in the criminal justice system."[16] By arguing that statistical proof of discrimination is not sufficient to prove an equal protection violation, the Court has turned its back on justice. In Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, she wonders "If McCleskey's evidence was not enough to prove discrimination in the absence of some kind of racist utterance, what would be?"[17] Her rhetorical question suggests that nothing would be enough. That is not justice.

V. The Shortcomings of the Intent Doctrine

In the US, we have moved from an overtly racist society to a more covertly racist society. Although we have succeeded in making many explicitly racist policies illegal, our failure to address the roots of racism and White supremacy has led to the acceptance of continued harm to Black Americans and other communities of color. The intent standard, which relies on explicit declarations of racial animus, is not adequate given this new societal context. Non-explicit forms of racism evade the discriminatory intent doctrine, such as when intent is disguised or bias is unconscious.

At the most basic level, the intent standard is insufficient because it is easy for legislators and other state actors to evade detection simply by disguising their motivations. State legislators with nefarious intentions are aware that our current society frowns upon overt forms of racism. For this reason, they will use alternate explanations to justify their policy rather than explicitly stating that their policy is designed to harm a racial group. This issue is at the center of racial discrimination in jury selection following the decision in *Batson v Kentucky*. In many criminal cases with Black defendants, prosecutors will attempt to substantially reduce the number of Black people on the jury through peremptory challenges because they believe that Black jurors will be more empathetic

towards the Black defendant. However, the prosecutors know that according to *Batson*, the race of the juror is not an accepted reason for peremptory strikes. In order to evade violations, they put forward alternate reasons why they exclude the potential Black jurors. Judges are often aware that this occurs, however, they are bound by judicial protocol to accept these alternate reasons even when they suspect that the prosecutors' actions are racially motivated.[18] Racism disguised in more palatable forms is still detrimental. Enforcing the idea that racism must be explicit in order to be real allows for legislators to perpetuate harm as long as they do so surreptitiously.

In addition to issues of disguised intent, it is possible for policymakers to believe that their actions are neutral even when motivated by unconscious bias. The theory of unconscious racism, or implicit racial bias, holds that Americans have been socialized in a White supremacist society and therefore hold internalized messages about racial groups. They might subconsciously believe that Black people are criminals, lazy, overly sexual, loud, etc. We have received these messages from the media, from our families and friends, and institutions such as schools and churches. Although overt racism is no longer socially acceptable and many people do not want to be seen as a racist, we continue to hold racist sentiments deep down. Proving unconscious bias is difficult because these are feelings and attitudes that people actively try to avoid. Evaluations like Harvard University's Implicit Association Test (IAT) have tried to measure individuals' implicit sentiments towards racial groups. The IAT is a computer test that measures "the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)" by analyzing the participant's response times when asked to quickly group the concepts with the evaluations or stereotypes. This complex test does not always yield consistent results; however, the Harvard researchers assert that the test is designed to

make predictions based on the aggregate data after an individual has taken the IAT many times. Further, the researchers have found that it is incredibly difficult to measure thoughts that occur on the subconscious level.[19] Regardless of the reliability of Harvard's Implicit Association Test and others like it, scholars continue to accept the theory of implicit bias. They suggest that when we interrogate our attitudes and actions, we will find that we harbor some internalized White supremacist ideologies. When confronted with hard-hitting questions (like *Do we automatically feel unsafe and uneasy when in Black communities? When we imagine social welfare recipients, who is the first to come to mind?*), our honest responses might reveal the prejudices we hold toward Black people and communities.

Legislators are not exempt from unconscious bias. They too hold implicit assumptions about Black people and these biases can become codified into law. A classic example of this is the differences in sentencing for crack cocaine and powder cocaine. In the 1980s, during the War on Drugs, the US government imposed mandatory minimum prison sentences for possessing certain quantities of drugs. At the time, powder cocaine was more expensive than crack-cocaine and tended to be used by more affluent White Americans whereas crack cocaine was cheaper and more accessible to poor Black Americans. Despite the two drugs having similar composition and similar effects on users, the Anti-Drug Abuse Act of 1986 created a significant disparity in the mandated punishment for possessing crack cocaine versus powder cocaine. Coined "the 100:1 ratio," under the Anti-Drug Abuse Act, a minimum five year prison sentence would be triggered for possessing just 5 grams of crack cocaine, but one would need to possess 500 grams of powder cocaine to trigger the same mandatory five year sentence.[20] In 2010, the Fair Sentencing Act decreased the ratio from 100:1 to 18:1, but still, a sizable disparity remains.[20] Even if this difference in drug sentencing was not based on overt malice towards Black Ameri-

cans, the detrimental impact is clear. Regardless of the legislators' stated intentions, too many Black Americans were incarcerated for far longer than justified as a result of these drug policies.

Legal scholar and prominent critical race theorist, Charles Lawrence, makes an expansive argument on equal protection and unconscious bias in his article "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism." Lawrence argues that traditional notions of intent are insufficient to address unconscious racism. He writes, "There will be no evidence of self-conscious racism where the actors have internalized the relatively new American cultural morality which holds racism wrong or have learned racist attitudes and beliefs through tacit rather than explicit lessons. The actor himself will be unaware that his actions, or the racially neutral feelings and ideas that accompany them, have racist origins."[21] Even if the actor is unaware that his actions are motivated by racial animus, Lawrence still believes that the guarantees of equal protection should still hold. While it may seem unclear how the courts would determine the presence of unconscious racism, Lawrence argues that it would not be as difficult as some may imagine. In his article, Lawrence proposes a new "cultural meaning test" that justices should use as a framework in determining the presence of unconscious racism in our laws. In this test, judges would question whether governmental conduct "conveys a symbolic message to which the culture attaches racial significance."[22] Lawrence provides the example of a law that would construct a wall between the Black neighborhood and White neighborhood in Memphis, Tennessee. He argues that this law would have "cultural meaning growing out of a long history." According to Lawrence, even if legislators insisted that they had neutral intentions in adopting the law that would construct the wall, judges would know that given Tennessee's history of segregation, it is likely that the legislators actions were motivated by unconscious racism. Lawrence's cultural meaning test is still grounded in an attempt to determine

intent, but he argues that this test would catch unconscious motives too, thereby eliminating one of the key weaknesses of the intent doctrine. However, Lawrence's method is not necessary and most likely problematic. As exemplified by Harvard's Implicit Association Test, it has proven incredibly difficult to uncover unconscious motives. Further, if a legislator firmly believes that racism had no influence on their decision-making, it would provoke heated controversy if judges were to say that they are more aware of the inner workings of the legislator's mind than that legislator is of their own. Judges could bypass the inherent difficulty and controversy embedded in Lawrence's cultural meaning test by focusing on impact rather than motive.

VI. Towards a Better Alternative: Reviving a Disparate Impact Framework

One way to remedy the issues with the discriminatory purpose standard would be to take a more expansive look at the Equal Protection Clause. Rather than limiting the state's power to discriminate intentionally, the clause should be interpreted more expansively to mean that the state's must ensure that their policies do not unfairly harm marginalized groups. The focus would shift from questions of intent to questions of impact. Although this seems foreign now that the intent doctrine has become so entrenched in equal protection analysis, it is actually very similar to what the Court was already doing prior to *Washington v Davis*. In his paper, "Discriminatory Intent and the Taming of Brown," David A. Strauss, a legal scholar and law professor at the University of Chicago, argues that the decision in *Brown v Board of Education* offered a much more expansive view of equal protection. He argues that *Washington v Davis* applied *Brown*'s interpretation of what qualifies as unconstitutional discrimination in the narrowest way possible. According to his analysis, the discriminatory intent

standard established by *Washington v Davis* is self-defeating and unnecessary. According to Strauss, "There is no apparent reason for adopting such a limited view of the class of government actions that the Equal Protection Clause forbids."[23] If there is no constitutional basis for the discriminatory intent standard, it can and should be changed in order to better guarantee equal protection. In "Towards Systemic Equality: Reinvigorating a Progressive Application of the Disparate Impact Doctrine," Justin Cummins, professor at the University of Minnesota Law School, and his law student co-author, Beth Bell Isle, show how discrimination case analysis can be changed to better serve the purpose of equal protection. They point out that prior to *Washington v Davis*, the Courts vigorously applied the disparate impact doctrine to civil rights cases.[24] In employment discrimination cases, rights of minority applicants and employees were protected by Title VII of the Civil Rights Act of 1964, which outlawed discrimination by employers. In *Griggs v Duke Power Co.* (1971), the Court first applied the disparate impact doctrine. In assessing claims, the Court not only examined the intent of an employer, but also the effects of the employer's actions. In *Griggs*, the Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[25] As we see here, the Court did not limit itself to questions of intent or purpose but instead looked to see the impact of the policies. In *Griggs*, the Court established that the burden of proof would shift from the aggrieved party to the employers. In *Albemarle Paper Co. v Moody*, the Court clarified the guide to shifting the burden of proof. According to *Albemarle*, if the plaintiff presents statistical evidence that establishes a disparate impact, it becomes the employers' burden to prove that the policy is directly related to job qualification. If the employer is successful, it becomes the plaintiff's burden to prove that the employers' justification is just a pretext disguising their true intent.[26] This complex system which allows for multiple levels of checks and balances

helped many employees of color attain redress to employer's discriminatory tactics. If the *Albemarle* methodology were applied to *McCleskey*, the Baldus study findings would have triggered the burden of proof to shift from McCleskey to the state of Georgia. If the Court had accepted Georgia's claim that this system of racially disparate executions was neutral, McCleskey's team would still have another opportunity to refute Georgia's argument. The *Albemarle* system would have allowed for a much more in-depth examination of both side's rationale. The outcome of *McCleskey* could possibly have been avoided if the disparate impact doctrine had been applied.

Unfortunately, the disparate impact doctrine was dismantled by conservative forces and prevented from being applied to the Fourteenth Amendment before McCleskey's case even occurred. Cummins and Isle document how Reagan appointed Supreme Court justices who would be able to roll back the gains of disparate impact theory. By appointing conservative justices, Sandra Day O'Connor and Antonin Scalia and promoting right-wing justice, William Rehnquist, to Chief Justice, Reagan shaped the Court in a way that was hostile to a framework of discriminatory impact. It was this Court that decided *McCleskey v Kemp*. In order to return to the robust protection of those who have suffered discrimination at the hands of their state, the Court should revive the foregrounding of impact. Though the discriminatory impact doctrine was originally applied to Title VII civil rights cases, disparate impact analysis should be applied to the Fourteenth Amendment Equal Protection Clause as well. The Court should examine such cases with strict scrutiny.

Some argue that disparate outcomes do not always result from an equal protection violation, and I agree. Sometimes disparate outcomes result from different groups having different preferences. Disparate outcomes could also result from cultural patterns or genuine cases in which one group randomly does better or worse

than another in that specific sample set. The courts are rightfully attuned to this and careful not to mandate perfect equality where it is not applicable. The question that follows is if the Court is prioritizing impact over intent, how does the Court determine when disparate outcomes are valid versus when they result from discrimination? To determine this, the Court should analyze patterns of historical discrimination, the size of the disparity, and the nature of the consequences of that disparity.

First, the Court must not ignore America's long history of racial discrimination. Just because more overt forms of racism are no longer legal does not follow that our laws today are free from White supremacy. Many failed to see Jim Crow laws as unjust because the new system of racial subjugation was not as directly oppressive as slavery. Today, many fail to see that our current laws are oppressive because they are not as overtly oppressive as Jim Crow. In "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," legal scholar, Reva Siegel, argues that justifications for discriminatory policies "evolve as they are contested."[27] For this reason, the Court must be constantly vigilant in seeking to address the ways that racism shapeshifts into new forms. As applied to the *McCleskey* case, the Court should have paid close attention to Georgia's long-enduring legacy of anti-Black policies. As Justice Brennan argued in his dissent in *McCleskey*, "Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence"[28] He pointed to the fact that "For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against Blacks and Whites, distinctions whose lineage traced back to the time of slavery."[29] Given Georgia's history of discrimination combined with the data from the Baldus study, this

should have strongly suggested that the disparities were not innocent random abnormalities, but instead evidence of race-based discrimination.

Second, the Court must examine the evidence to determine the magnitude of the disparities. Small differences in outcomes among racial groups are normal and likely to happen because of chance. If disparities are large, this should clue the Court in to examine the situation more closely. In *McCleskey,* criminal defendants charged with killing White victims were 4.3 times as likely to receive a death sentence as criminal defendants charged with killing black victims.[30] This is a statistically significant disparity which strongly suggests that these results were not due to chance. As Justice Stevens asserted in his concurring opinion in *Washington v Davis*, "I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion v Lightfoot*, 364 U.S. 339, or *Yick Wo v* Hopkins, 118 U.S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect."[31] The Court must not tolerate large disparities unless they are proven to result from neutral differences.

Third, the Court must examine the effects of the disparity. In cases where the disparity results in minimal or minor harm to one group, the Court should still examine the case, but the consequence alone might not be important enough to warrant an equal protection violation. Whereas the stakes in *Washington* and *Feeney* were employment, the disparity in *McCleskey* was a matter of life and death. Capital punishment represents the highest cost the state can impose on its citizens. Once people are executed there is no way to bring them back. For this reason, the Court should have been extremely strict in determining whether it would allow disparities to remain. In Brennan's dissent, he expressed shock that the Court held a lower bar for disparities in capital punishment than it did for the civil rights employment discrimination cases. If

the disparate impact doctrine was implemented to protect workers in fair employment cases, the bar for state executions should at the very least match up with this. Since the stakes are so much higher, it is essential that the courts ensure there is no discrimination in the capital sentencing process.

VII. Conclusion

In order to achieve true justice through equal protection jurisprudence, the Court should not rely solely on analysis of state actors' intent. In summary, though examining the state's intent is instructive in some cases, it should not be the only way to establish an equal protection violation. In order to better protect the rights of marginalized groups and ensure equal protection, the analysis standard must change from one of intent to one of impact. Evaluating the history of discrimination, the size of the disparity, and the implications of the outcome will help the Court prevent making mistakes like the decision in *McCleskey*.

Ultimately, a disparate impact lens would lead us to centering the victim rather than the guilty party. Rather than asking, *Who did something wrong? Are they to blame?*, the key questions would become *Who has been affected? How can we remedy the harm?* Centering the marginalized would allow us to address injustices as we work toward building a future free of racial oppression. This would require us to remedy wrongs even when we are unsure of whether the actor's actions were unconscious or not explicitly racially motivated, the marginalized person or group would still have recourse to remedy. While we can and should punish those who knowingly perpetuate White supremacy, it is naive to believe that these are the only individuals who perpetuate harm. As Lawrence argues, "Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication. We cannot be

individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism. And without the necessity for blame, our resistance to accepting the need and responsibility for remedy will be lessened."[32] It is time that we take collective responsibility for the history of this country. We must shed our fear of "too much justice" and embrace our duty to ensure equal protection for all.[33]

[1] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (W.W. Norton & Company 2019).
[2] *Washington v Davis*, 426 US 229, 235 (1976).
[3] Ibid, 240.
[4] Ibid, 246.
[5] Ibid, 242.
[6] Ibid, 253.
[7] Ibid, 242.
[8] *Personnel Administrator of Massachusetts v Feeney*, 442 US 256, 258 (1979).
[9] Reva B. Siegel, "Blind Justice: Why the Court Refused to Accept Statistical
Evidence of Discriminatory Purpose in McCleskey v Kemp And Some Pathways for
Charge," *Northwestern University Law Review*, 112, no. 6 (2018): 1269-1292.
[10] Jeffrey Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death
Penalty.* (Oxford University Press, 2014).
[11] David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74, no. 3, (Fall 1983): 661-753.
[12] *McCleskey v Kemp*, 481 U.S. 279, 280 (1987).
[13] Ibid, 298.
[14] Ibid, 312.
[15] Ibid, 339.
[16] *The Legacy and Importance of McCleskey vs Kemp,* (*NAACP* Legal Defense and Educational Fund), online at https://www.naacpldf.org/case-issue/landmark-mccleskey-v-kemp/.
[17] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2011), 107.

[18] Richard Fausset and Tariro Mzezewa, "Nearly All-White Jury in Arbery Killing Draws Scrutiny," *New York Times*, updated November 24, 2021, https://www.nytimes.com/2021/11/04/us/ahmaud-arbery-killing-trial-jury.html.
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[21] Charles R. Lawrence, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious
Racism," *Stanford Law Review*, 39, no. 2 (1987): 317-388.
[22] Ibid.
[23] David Strauss, "Discriminatory Intent and the Taming of Brown," *The University of Chicago*
Law Review. 56, no. 3 (1989): 935-1015.
[24] Justin D. Cummins and Beth Belle Isle, "Toward Systemic Equality: Reinvigorating a Progressive Application of the Disparate Impact Doctrine," Mitchell Hamline Law Review 43, no. 1 (2017): 102-139.
[25] *Griggs v Duke Power Co.* 401 US 424, 431 (1971).
[26] *Albemarle Paper Co. v Moody*, 422 US 405 (1975).
[27] Reva B. Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of
Status-Enforcing State Action," *Stanford Law Review*, 49, no. 5 (1997): 1111-1148.
[28] Ibid, xi.
[29] Ibid, xi.
[30] Ibid, x.
[31] Ibid, i.
[32] Lawrence, 317-388.

[33] *McCleskey*, 280.

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The Broken Promise: Restoring the Constitution's Guarantee of Tribal Sovereignty

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Abstract

Native American tribes are an often-neglected part of the discussion of sovereignty in the United States. This article begins with an examination of the federal plenary power doctrine in federal Indian law. The doctrine grants to Congress essentially unlimited authority over Native American tribes. This work analyzes the legal roots of the plenary power doctrine, and concludes that the purported power of the federal government to intervene in a tribe's wholly internal affairs is unsupported by the Constitution's text and history. The power is instead based on a view of tribes and their citizens as racially inferior and incapable of proper governance. This article traces those attitudes into the realm of tribal criminal and civil jurisdiction, criticizing the Supreme Court's abandonment of the legal principle of territorial sovereignty through which tribes could exercise jurisdiction over their own territory without regard to an individual's membership in the tribe or the land's ownership status. After highlighting the disarray in the Court's precedents about tribal jurisdiction, the piece turns to an examination of treaty-making between the United States and Native American tribes. Arguing that the 1871 Act ending the process of treaty-making with tribes unconstitutionally infringes on the President's authority, the work explains that a return to treaty-making with Native American tribes would enhance the sovereign status of tribes. The article concludes by emphasizing that both juridical and political changes are required to restore the framework for relations with Native American tribes envisioned by the Framers.

I. The Federal Plenary Power Doctrine: Background and Problems

Native American tribes are in an untenable legal position. On the one hand, tribes are sovereigns; yet on the other, their sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."[1] Justice Clarence Thomas aptly characterized the current state of federal Indian law:

> It seems to me that much of the confusion in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity … Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.[2]

How can the congressional plenary power doctrine and tribal sovereignty coexist? Justice Thomas noted that "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."[3] It appears that there are only two possible ways of escaping the twisted mess that exists within the "schizophrenic"[4] field of federal Indian law. One approach would involve the United States ending the charade and proceeding as though tribes are not true sovereigns. The federal government could admit that tribes exist solely because the United States—for the time being—tolerates their existence. But tribal leaders, for whom sovereignty is an inextricable part of their tribe's self-definition, may take issue with this approach. Alternatively, a mixture of judicial and policy changes could restore tribal sovereignty to that promised by treaties and guaranteed by the Constitution. This article asserts that the federal plenary power doctrine is inconsistent with the Constitution and the existence of true tribal sovereignty, and that restoring tribal sovereignty requires an effort by the entirety of the federal government. The Supreme Court must reign in its prec-

edents to return the presumption of territorial sovereignty to tribal governments, and the political branches must reassert treaty-making as the primary method of interacting with tribes.

Federal plenary power arises, we are told, out of the Indian Commerce Clause. In fact, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[5] The Commerce Clause authorizes Congress "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[6] The first constitutional clue toward identifying tribes as sovereigns lies in the company they keep. "The Framers generally accepted the notion that the Indian tribes constituted separate sovereign people who were totally self-governing within their territory" and "relied on the federal government solely for external relations, i.e., diplomatic representation with foreign governments."[7] Foreign nations and states are both separate sovereigns, and it logically follows that the entirety of the clause deals with Congress's authority to regulate commerce with separate sovereigns.

In one of the earliest Supreme Court cases dealing tangentially with Native Americans, the Court identified the sovereign nature of tribes. "The Europeans found the territory in possession of a rude and uncivilized people," wrote Chief Justice John Marshall in *Fletcher v Peck*,[8] "consisting of separate and independent nations."[9] The seminal Cherokee Cases offer further support for the notion that tribes are separate sovereigns. In *Cherokee Nation v Georgia*,[10] Chief Justice Marshall explained that Native American tribes may "be denominated domestic dependent nations."[11] And in *Worcester v Georgia*,[12] the Court added that the relationship between Native tribes and colonizing European powers was that of "a dependent ally," with Native Americans "claiming the protection of a powerful friend and neighbour … without involving a surrender of their national character."[13] Clearly, the Court in the early nineteenth century was committed to a view of tribes as nations sepa-

rate from the United States.

The Court has continued to recognize the fundamentally national character of Native American tribes in the modern era. Describing the negotiation of treaties between the United States and Native nations, the Court in *Washington v Washington State Commercial Passenger Fishing Vessel Association*[14] explained that, "[w]hen the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length."[15] By characterizing the tribal nations as "equals," the Court implies that the level of sovereignty retained by the tribes was comparable to that of the United States.

Despite the clear articulation of the principle of tribal sovereignty, the plenary power doctrine has been developed and embraced by centuries of jurists. We should take careful notice of the language used by the Court in the line of cases that developed the basis for the federal plenary power doctrine. The "ward to guardian" relationship announced in *Cherokee Nation* was generally cast in a positive light. The tribes were not, to Chief Justice Marshall, an inferior race. Instead, "[t]hey look to our government for protection; rely upon its kindness and its power … and address the president as their great father."[16] The great irony in the field of federal Indian law is that the favorable decisions of the Marshall Court have been wiped out by the Court's decisions in the hostile eras of the late nineteenth and early twentieth centuries, and the horrific decisions of the past have been whitewashed and continue to serve as the basis of the Court's modern precedents.

The plenary power doctrine falls into the latter category: its racist foundation has been obscured and it now serves as the basis of federal Indian law. In the 1913 case *United States v Sandoval*,[17] Justice Willis Van Devanter, writing for a unanimous Court, contorted the characterization of domestic dependent nations. Instead of a dependent ally situated within the domestic United States, Native tribes were—at the height of the Assimilation Era—"a simple,

uniformed and inferior people" "adhering to primitive modes of life" and "governed according to the crude customs inherited from their ancestors."[18] When cloaked in the language of cases from the 1970s and later, plenary power seems rather unremarkable. Pointing to the Indian Commerce Clause and the Treaty Clause, the Court in *Morton v Mancari*[19] explained that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."[20] But the true genesis of the plenary power doctrine has much more sinister origins.

The Court has made clear that the original motivations of legal regimes are not an insignificant portion of the legal analysis.[21] How does the federal plenary power doctrine stand up under similar scrutiny? Plenary power finds its origin in the 1886 case *United States v Kagama*,[22] in which the Court grappled with the constitutionality of the Major Crimes Act, a federal law granting the federal government jurisdiction over major felonies committed by Native Americans against other Native Americans in Indian Country. In characterizing the tribes as "semi-independent" and "not possessed of the full attributes of sovereignty," the Court once again twisted the language of earlier Supreme Court decisions.[23] By misusing the language of "wards," "pupils," and "local dependent communities," the Court transformed the prior recognition of tribal nationhood and allyship into a declaration of the tribes' "weakness and helplessness."[24] In *Cherokee Nation*, dependency did not indicate a completely inferior status. Instead, dependency was used primarily in the context of foreign relations. The tribes were dependent on the United States in the sense that they were "under the protection" of the federal government for purposes of foreign invasion, not in the sense that they ceded their ability to govern internal tribal matters.[25] In *Worcester*, the Court explained that Native nations are "independent political communities, retaining their original natural rights."[26] One could not be faulted for wondering

whether Justice Samuel Miller and the unanimous Court were either completely confused or deliberately misleading in restyling domestic dependency to mean that tribes were "[d]ependent largely for their daily food" and "[d]ependent for their political rights."[27]

Thus, "in a whirlwind of circular reasoning," the Court's belief that Native Americans "were incapable of providing for themselves" allowed them to grant Congress plenary power of Indian affairs.[28] Professor Philip Frickey succinctly analyzes the Court's reasoning in *Kagama*:

> Its apparent inconsistency with the most fundamental of constitutional principles—the *McCulloch* understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution—is an embarrassment of constitutional theory. Its slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity.[29]

The basis of the plenary power doctrine is an understanding of Native life untethered from reality. To the Court, steeped in the assimilationist attitudes of its era, Native Americans were helpless, lawless, and racially inferior. The Court's views of Native communities are illustrated by Justice Stephen Field's explanation of Congress's understanding that Wisconsin "would be settled by white people, and the semi-barbarous condition of the Indians tribes would give place to the higher civilization of our race."[30]

The racist undertones of the federal plenary power doctrine are further illustrated in *Lone Wolf v Hitchcock*, in which the Court held that plenary power permitted Congress to unilaterally abrogate provisions of a treaty with Native American tribes.[31] Through a citation to the *Chae Chan Ping v United States*[32] that went unelaborated on, the Court revealed its true rationale.[33] Describing Chinese immigrants, Justice Field wrote in *Chae Chan Ping*

(better known as the *Chinese Exclusion Case*) that "[i]t seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living," and that Congress was perfectly legitimate in considering "the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."[34] The General Allotment Act, a product of the desire to dissolve tribal communal structure and encourage assimilation into a more "American" way of life, required tribal consent to the cession of surplus lands.[35] If tribes were as lawless as the Court seemed to believe, then refusal to assimilate posed a dire threat to their America. The racial attitudes that infused *Chae Chan Ping* persisted into *Lone Wolf*, striking another blow to tribal sovereignty.

As demonstrated by *Chae Chan Ping*, contemporary cases in federal Indian law, and the Insular Cases, the Court was exceptionally willing to allow Congress to exert essentially unbounded power over non-white and quasi-foreign people. In a recent opinion, Justice Neil Gorsuch wrote that "The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."[36] The Supreme Court ought to say the same about the federal plenary power doctrine.

Even setting aside the racial basis of the federal plenary power principle, the doctrine as a legal matter is intellectually bankrupt. Justice Thomas has been perhaps the most prominent critic of the plenary power doctrine in federal Indian law. In addition to his pointed discussion of the Indian Commerce Clause in *United States v Lara*,[37] his concurring opinion in *Adoptive Couple v Baby Girl*[38] asserted that, during the founding era, the Indian Commerce Clause "was understood to reserve to the States general police powers with respect to Indians who were citizens of the several States."[39]

Justice Thomas is not without critics of his own. But even his critics do not uniformly object to his characterizations of the

misguided nature of the plenary power doctrine. George Ablavsky, a professor at Stanford Law School, has illustrated an important distinction. Ablavsky argues that the founding generation would have understood the "interplay" of the Commerce, Treaty, Supremacy, and Guarantee Clauses, along with Article III jurisdiction, restrictions on the states, and military powers as creating a form of "field preemption" that gave the federal government the sole power over Indian affairs.[40] Ablavsky cites convincing evidence of the Washington Administration's understanding of the federal power over Indian affairs, including a letter from Secretary of War Henry Knox declaring that the United States was entrusted with "the sole regulation of Indian affairs, in all matters whatsoever."[41] He also cites recognitions from South Carolina and Georgia in which the states conceded that "the sole management of India[n] affairs is now committed" to the federal government.[42]

Even if we accept the proposition that the Indian Commerce Clause, in conjunction with various other aspects of the Constitution's structure, served to concentrate power over Indian affairs in the federal government to the exclusion of the states, Ablavsky agrees that it does not follow that the Indian Commerce Clause grants "plenary" authority over all subject matters. To Ablavsky, it is incorrect to assert that the Indian Commerce Clause gives rise to federal plenary power. Instead, the Constitution represents "the repudiation of a theory of Native peoples as conquered in favor of a grudging acknowledgment of Native independence."[43] When the United States was founded, tribes were a powerful military force. In fact, the Constitution's vesting of sole power over Indian affairs "stemmed from Native power, not weakness," and was designed "to prevent Native alliances and forestall warfare," rather than justify federal power due to "Indian incapacity," as the *Kagama* Court would have us believe.[44] In sum, Ablavsky argues, federal power over Native American tribes "was not plenary; it acknowledged tribal sovereignty and restricted the authority of the

United State to the regulation of Natives' international alliances and land sales … Unbridled, unchecked federal power over Indians has not always been with us."[45]

The proper scope of the federal government's power in Indian affairs under the Constitution can be ascertained by careful comparison to the preceding Articles of Confederation. Article IX of the Articles of Confederation read:

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of … regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated.[46]

As James Madison wrote in Federalist No. 42, the Articles of Confederation's "obscure and contradictory" wording amounted to an attempt to "subvert a mathematical axiom, by taking away a part, and letting the whole remain."[47] Although the Constitution more or less resolved the question of which entity would have authority over relations with the tribes, two important distinctions become consequential. First, the Constitution did not incorporate the language of the Articles of Confederation that provided the national government with the power of "managing all affairs with the Indians." Secondly, instead of using the word "Indians," the Constitution's Commerce Clause uses the phrase "Indian Tribes." To the latter distinction, Justice Thomas aptly notes that "Congress is given the power to regulate Commerce 'with the Indian *tribes*.' The Clause does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States."[48]

The failure to include an Indian Affairs Clause in the new Constitution "was almost assuredly intentional" and "has major significance for congressional plenary power."[49] The "preconstitu-

tional powers necessarily inherent in any Federal Government"[50] recognized by Justice Stephen Breyer in *Lara* did not actually find their way into the constitutional framework. "Without an Indian Affairs Clause, Congress's power over external tribal affairs is limited by … the War, Spending, Property, or Commerce Clauses, and all things necessary and property thereto," precluding federal power to exercise authority over internal tribal affairs.[51] After expressing general agreement with Justice Thomas's assertion that "commerce" in the context of the Indian Commerce Clause has been afforded too broad a meaning, Professor Lorianne Toler, an Olin Searle Fellow at Yale Law School, breaks from Justice Thomas's analysis. Where Justice Thomas assumes that "if Congress is without plenary power, the residue is reserved to the states under the Tenth Amendment," Toler invokes the Declaration of Independence's "consent of the governed" language to suggest that "by not yielding any powers to the federal (or state) governments by participating in the Constitution's process, tribes retained their powers and sovereignty over internal affairs."[52] While Justice Thomas would allow states to assume the power to manage the affairs of Native tribes within their borders, Toler argues that it must be the tribes that exercise sovereign power over their own internal affairs, rather than the state or national government.

II. Territorial Sovereignty in the Criminal and Civil Contexts

The Framers' decision to not include an Indian Affairs in the Constitution, whether inadvertent or intentional, cemented the status of tribes as sovereigns and "[i]nternal Indian affairs powers thus reverted to the tribes."[53] Having been incorporated into the United States, it is conceivable that tribes may have divested themselves over the powers retained by a fully autonomous state. The "quasi-sovereign"[54] nature of tribes suggests that they have necessarily ceded some of their authority to the federal govern-

ment. Much like the states ceded the power to enter into treaties with foreign nations, lay tariffs on imports and exports, and engage in war, tribes too ceded power over external affairs.[55] Because the Constitution "does not comprehend Indian tribes in the general term 'foreign nations,'"[56] tribes lack the power to enter into treaties or form military alliances with other foreign nations, authority that a fully foreign nation would certainly retain.

However, with respect to authority over tribal affairs, Native tribes have not ceded their jurisdiction. Justice William Johnson, writing separately in *Fletcher*, noted that "The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. *To part with it is to commit a species of political suicide*."[57] Even the *Kagama* Court acknowledged the principle that tribes were "a separate people, with the power of regulating their internal and social relations."[58] However, in the 1978 case *Oliphant v Suquamish Indian Tribe*,[59] then-Justice William Rehnquist misconstrued the nature of the national rights ceded by the tribes in his claim that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers '*inconsistent with their status*.'"[60] *Oliphant* scrapped the long-held principle in international law of territorial sovereignty: the notion that a sovereign exercises jurisdiction within the boundaries of its territory.

The Court's decision to abandon territorial sovereignty with respect to the Native American tribes was based on the principle of "implicit divestiture," a legal doctrine similarly founded on a misimpression of tribal government and society. In *Wheeler*, the Court named the concept it had created in *Oliphant*—the principle that there were some parts "of sovereignty which the Indians implicitly lost by virtue of their dependent status."[61] The Court seemed dubious of the ability of tribes to actually govern themselves. Describing tribal judicial processes, the Court explained that "[o]ffenses by one Indian against another were usually handled by social and

religious pressure," and that even present-day tribal courts that "embody dramatic advances over their historical antecedents" do not permit "unwarranted intrusions" on the "personal liberty" of American citizens.[62] Despite the fact that "tribal courts are often no more inadequate than rural state courts," the Court "implicitly characterized tribal courts as incapable of providing non-Indians with a fair trial" to justify its "erosion of tribal sovereignty through judicial fiat."[63]

Understanding the incomprehensibility of *Oliphant* and its descendant, *Duro v Reina*,[64] which held that tribes lacked criminal jurisdiction over nonmember Native Americans, requires stepping outside the context of federal Indian law. In *Duro*, Justice Anthony Kennedy explained that "[r]etained criminal jurisdiction over members is … justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."[65] But would this rationale hold in analogous scenarios? When an American travels abroad—or even to another state, for that matter—they become subject to that sovereign's criminal laws despite never having participated in that sovereign's political process. The voluntary nature of the decision to travel onto or reside on tribal land should negate the problem of political consent.

Indeed, "the doctrines of separateness and tribal sovereignty suggest that Indian tribes should not be expected to conform to Western standards of justice. Non-Indians who choose to enter the reservation and violate the tribal code should expect the same penalties and procedures provided for Indian offenders."[66] The so-called "consent paradigm" began in *United States v Mazurie*,[67] in which the Court held that the Wind River Tribes possess attributes of territorial sovereigns over members and nonmembers based on a congressional delegation.[68] Although the case was based on a congressional delegation of power, "territorial sovereignty formed the very basis on which the Court upheld the congressional delegation

of authority" because the Court implied that, for the delegation to be valid, tribes needed to be "more than associations of consenting members."[69] Consent-based limitations on tribal authority are incompatible with the Constitution's promise that "tribes must possess inherent, land-based sovereign rights" that "extend beyond the tribal membership."[70] The limitations that Justice Kennedy would impose on tribal jurisdiction are not applied anywhere else and denigrate the constitutionally-mandated sovereign status of tribes.

As the Court recognized in *Talton v Mayes*,[71] the powers of self-government exercised by tribes did not arise from the Constitution and instead "existed prior to the Constitution."[72] This implies that, at least prior to the adoption of the Constitution, tribes must have retained the inherent power to punish offenders, regardless of their status. After the Constitution's adoption, tribes necessarily ceded their authority over external affairs to the United States. Therefore, if a foreigner were to commit a crime on a reservation, the tribes would likely lack criminal jurisdiction, having ceded the authority over foreign affairs and implicated powers to the national government. However, *Cherokee Nation* explained that tribes are not foreign nations to the United States. The logical inference that must be drawn is that American citizens are not foreigners from the perspective of the tribes. Therefore, the power to try non-Natives for violations of tribal law is not one of those powers divested by virtue of the tribes' incorporation "under the territorial sovereignty of the United States" because it is not related to the power over foreign relations that must necessarily be exercised by the "overriding sovereignty."[73] As Justice Thurgood Marshall powerfully articulated in his *Oliphant* dissent, "Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."[74] A reassertion of territorial sovereignty would cure the ills perpetuated by *Oliphant* and *Duro*, allowing tribes to exercise the comprehensive criminal jurisdiction that would enable them to

protect their citizens.

The harmful ramifications of the Court's error in *Oliphant* are further compounded in the civil context. In *Montana v United States*,[75] the Court explained that "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[76] Unlike in the criminal context, the actual status of the land ownership plays a vital role in determining whether a tribe may exercise civil regulatory jurisdiction. The result is a set of incoherent and contradictory precedents that leave tribes and nonmembers perpetually uncertain about who may lawfully regulate specific areas and certain conduct. Much like in the criminal context, a return to territorial sovereignty would remedy the intense confusion present in the Court's precedents regarding the regulatory authority of tribes.

In *Montana*, the Court created two avenues through which a tribe may exercise civil jurisdiction over non-Natives, even on non-Native fee lands. "A tribe may regulate … the activities of nonmembers who enter consensual relationships with the tribe or its members" and a tribe also retains "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[77] *Montana*'s vague language led the "ownership status of land" to "sometimes be a dispositive factor."[78] By making land status a key factor in the analysis of tribal civil jurisdiction, the Court ingrained the anti-Native policies of the Allotment Era into the modern era of self-determination. In *Montana*, Justice Potter Stewart includes extensive footnotes describing the history of allotment. Therefore, the Court's entire analysis is based on the racist motivations of the Congress of the 1870s and 1880s. For example, Justice Stewart cites an 1885 report from the

Department of the Interior for the proposition that "[t]he Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations" and that there is "no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority."[79] It is no surprise that an analysis so focused on the intentions of a Congress set on entirely destroying tribal governments does not produce legal reasoning that favors tribal sovereignty.

Montana's second prong is so broad that it necessarily becomes vacuous and offers tribes little comfort. The lower courts, at first, construed the expansive statement broadly—as conferring "a general regulatory and governing capacity with the tribes."[80] In fact, the Ninth Circuit upheld tribal building codes as well as health and safety regulations applied to a business owned by a non-Native on land owned in fee.[81] Subsequent cases have raised the burden of proof placed upon the tribes to such an exacting degree that they will find it nearly impossible to satisfy *Montana*'s second prong and exercise civil jurisdiction over non-Natives on fee land. As Justice Antonin Scalia has commented, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land."[82] The untenability of the land status distinction is further illustrated in *Nevada v Hicks*,[83] in which the Court held that a tribal court did not have inherent sovereign authority to hear tort claims brought by a tribal member against state officers who had conducted a search at the tribal member's home, located on trust land.[84] Professor Judith Royster, a prominent scholar of federal Indian law at the University of Tulsa, has highlighted the confusion: "Does *Hicks* instead mean that every action of a nonmember on tribal lands is now subject to the *Montana*

exceptions?"[85]

A restoration of territorial sovereignty, whereby tribes may exercise civil jurisdiction over the entirety of their reservation land, regardless of the specific ownership of individual parcels, would remedy the immense confusion in the case law and represent an acknowledgment of tribes as political entities with internal sovereign authority. In the criminal context, this Article argues that residence on or travel in the bounds of a tribe's reservations functions as implicit consent to the tribe's criminal jurisdiction. That logic applies with equal force in the civil context. *Montana*'s first "consensual relationships" prong defines consent in generally economic terms such as "commercial dealing, contracts, leases."[86] This is far too narrow. Paralleling the criminal context, residence or activities undertaken within the boundaries of a reservation, even if the land is owned in fee simple by a non-Native, ought to serve as implicit consent to the tribe's civil jurisdiction. Even though the Court has deemed general tribal services "patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land," a reinvigoration of territorial sovereignty would not base jurisdiction on nonmembers' having "consented to the Tribes' adjudicatory authority by availing themselves of the benefit of tribal police protection while traveling within the reservation."[87] Instead, the mere action of traveling within the reservation would suffice to grant tribes jurisdiction.

Though the Court may be concerned that, under this legal regime, "the exception would swallow the rule,"[88] this is perhaps not a bad development. As Justice Marshall explained in *Merrion v Jicarilla Apache Tribe*,[89] "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."[90] The justification for denying territorial sovereignty is "analogous to saying that the City of Palo Alto cannot regulate properties within its borders if they are

owned by residents of the neighboring city, Menlo Park."[91] Indeed, the implicit divestiture principle of *Oliphant* and *Wheeler*, applied in the civil context by *Montana* and its progeny, demean the sovereignty of tribal nations and are based on a faulty understanding of the powers ceded by incorporation into the United States. Returning to the presumption of territorial sovereignty would eliminate the barriers imposed by the woeful period of allotment and restore to tribes the sovereign authority that they exercised far before the existence of the United States.

III. A Return to Treaty-Making to Enhance Tribal Sovereignty

While there are important doctrinal areas of the law that the Supreme Court must revisit in order to bring about a reinstatement of territorial sovereignty for tribes, the political branches have an equally important role to play in restoring tribal sovereignty. Specifically, the United States must resume the traditional practice of handling tribal affairs through treaty-making. As Justice Thomas noted in *Lara*, the 1871 statute that purported to prohibit treaty-making with Native American tribes "is constitutionally suspect."[92] In *Zivotofsky v Kerry*,[93] a case unrelated to federal Indian law, the Court held that the President alone has the power to recognize foreign states and governments.[94] Professors David Moore and Michalyn Steele make the argument that *Zivotofsky*, when read in the context of federal Indian policy, strongly implies that the 1871 act effectively ending treaty-making with Native American tribes is unconstitutional.[95] Based on the Court's rationale in *Zivotofsky*, the pair of scholars conclude that "the President possesses an exclusive power to recognize the sovereignty of Indian tribes to enter treaties," and that the 1871 statute unconstitutionally infringes on that power.[96] Because treaty-making requires presidential action, the 1871 statute that permits Congress to legislate in tribal affairs without presidential input infringes on the president's power as

chief diplomat.

Even absent the constitutional argument against the statutory end of treaty-making, treaty-making with the tribes ought to be reinstated as policy matter. *Worcester* declared that the Constitution, by approving of treaties made with Native nations, acknowledges that tribes "rank among those powers who are capable of making treaties."[97] "The words 'treaty' and 'nation,'" stated Chief Justice Marshall, have been "applied … to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[98] The Constitution provides for treaty-making as the primary mechanism of managing relations with Native nations precisely because it affords those governments the respect to which their sovereign status entitles them. And if the Court chooses to limit the authority of Congress by constraining the plenary power doctrine,[99] as this Essay argues it should, treaty-making offers an added benefit. Under a far narrower construction of the Indian Commerce Clause, many statutes that deal with matters wholly removed from commerce—such as the Indian Child Welfare Act,[100] which governs the placement of Native American adoptees—may need to fall. However, as the Court noted in *Missouri v Holland*,[101] "there may be matters … that an act of Congress could not deal with but that a treaty followed by such an act could."[102] Not only would a return to treaty-making enhance the sovereign nature of tribes, but it would also allow the government to act in areas where commerce is not directly at issue to the benefit of consenting tribes.

IV. The United States' Obligation to Tribes

The Constitution promises to Native American tribes a sovereign status. By the mid-1860s, hampered by war and confronted by the pressure to extend its territory and expand its resources, "the United States' commitment to the founding principles of treatymaking with the tribes waned."[103] Justice Gorsuch's words

in *McGirt v Oklahoma*[104] apply with equal force to the generation that gave rise to allotment and the expansion of the plenary power doctrine: "Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking."[105] To continue our current legal treatment of Native American tribes "would be to elevate the most brazen and longstanding injustices over law."[106] Therefore, we must reign in the federal plenary power doctrine, restore territorial sovereignty to tribes, and resume treaty-making with tribal governments. Only then may we truly realize the promise of the Constitution and—in the words of President Nixon over a half century ago—"break decisively with the past" to "create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[107]

[1] *United States v Wheeler*, 435 U.S. 313, 323 (1978).
[2] *United States v Lara*, 541 U.S. 193, 214-15 (2004) (Thomas concurring in judgment).
[3] Ibid, 218.
[4] Ibid, 219.
[5] *Cotton Petroleum Corporation v New Mexico*, 490 U.S. 163, 192 (1989).
[6] U.S. Const, Art I, § 8, cl 3.
[7] Robert N. Clinton, "There is No Federal Supremacy Clause for Indian Tribes," 34 Ariz. St. L.J. 113, 147 (2002).
[8] 10 U.S. (6 Cranch) 87 (1810).
[9] Ibid, 122.
[10] 30 U.S. 1, 17 (1831).
[11] Ibid, 17.
[12] 31 U.S. (6 Pet.) 515 (1832).
[13] Ibid, 552.
[14] 443 U.S. 658 (1979).
[15] Ibid, 675.
[16] *Cherokee Nation*, 30 U.S. at 17.
[17] 231 U.S. 28 (1913).
[18] Ibid, 39.
[19] 417 U.S. 535 (1974)
[20] Ibid, 551-52.
[21] See, e.g., *Ramos v Louisiana*, 590 U.S. ____ (2020) (slip op., at 21) (noting the "racist origins" of Louisiana and Oregon laws permitting nonunanimous jury verdicts); *Espinoza v Montana Department of Revenue*, 591 U.S. ____ (2020) (Alito concurring) (noting the anti-Catholic bias that motivated several state Blaine Amendments).
[22] 118 U.S. 375 (1886).
[23] Ibid, 381.
[24] Ibid, 382, 384.
[25] *Cherokee Nation*, 30 U.S. at 17.
[26] *Worcester*, 31 U.S. (6 Pet.) at 559.

[27] *Kagama*, 118 U.S. at 384.
[28] Philip P. Frickey, "Domesticating Federal Indian Law," 81 Minn. L. Rev. 31, 34 (1996).
[29] Ibid, 35 (footnote omitted).
[30] *Beecher v Wetherby*, 95 U.S. 517, 526 (1877).
[31] 187 U.S. 553 (1903).
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Seeking Asylum Under Title 42: Weaponizing Public Health Law to Expel Migrants at The Border

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Abstract

On March 20, 2020, the Centers for Disease Control and Prevention (CDC), under the Department of Health and Human Services, issued a rule expanding 42 USC § 265. This rule, known as Title 42, granted the U.S. Department of Homeland Security the ability to prevent migrants from seeking asylum at the US-Mexico border and expel them back to their home countries under the pretense that such action limited the transmission of COVID-19 from entering the United States. Despite the lack of public health data supporting this argument, both the Trump and Biden administrations have used Title 42 to restrict movement at the border. The consequences have been disastrous: hundreds of thousands of migrants have been expelled from the United States to face horrific conditions abroad. This paper examines the evolution of immigration law by chronologically tracing various epidemics and virus outbreaks that pushed policy-makers to pass new laws for immigrants entering the United States, maintaining that these policies have contributed to the false narrative that immigrants spread and carry disease—a misconception that the Trump administration used to justify the use of Title 42 and the corresponding executive overreach into immigration law. Applying Title 42's history, consequences, and legal implications to the court's holding in *Huisha-Huisha v Mayorkas*[1], this paper argues that Title 42 should be struck down on the grounds that it fails to adhere to non-refoulement, a principle that guarantees the right to not return an asylee to life-threatening violence or torture.

I. Introduction

Nine days after COVID-19 was officially declared a pandemic by the World Health Organization, the Trump administration used the public's ensuing fear to strategically announce one of the most aggressive immigration policies seen today: Title 42, formally known as 42 USC § 265, a public emergency health order issued by the Department of Health and Human Services (HHS) that grants the director of the Centers for Disease Control and Prevention (CDC) authority to regulate and prevent migrants from seeking asylum across all U.S. land and coastal borders, expelling them under the pretense of limiting transmission of communicable disease.

In collaboration with the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) officers are tasked with implementing this order. While the world grappled with the rapid and deadly spread of COVID-19, Title 42's enactment was a swift and severe action against asylum seekers at the United States-Mexico border under the guise of protecting public health.[2] Before the implementation of Title 42 expulsions, the process to expel a migrant included questioning and paperwork lasting about two hours. With Title 42 expulsions in place, that same process now takes about 15 minutes per person.[3]

When Title 42 first went into effect under the Trump administration, public health experts were skeptical: no scientific evidence exists to suggest that such an aggressive policy against admitting asylum seekers would effectively limit the transmission of COVID-19. Meanwhile, the immediate consequences of Title 42 have been devastating. Asylum seekers fleeing the cyclical violence they experience at home are already vulnerable to disruption and displacement. Their immediate expulsion under Title 42 has stripped them of due process and their right to properly seek asylum, forcing many migrants to return to life-threatening conditions

after they have been expelled by the United States. The roots of Title 42 can be traced to medicalized nativism, or the exclusion of migrants based on the grounds that they are a health menace to the public,[4] utilizing xenophobic rationale to justify restrictive immigration policies.

Although Title 42 has been publicly denounced by policymakers, health experts, activists, and attorneys around the world, it remains in effect with little to no oversight from other federal entities. Even as groups have pushed to challenge Title 42's constitutionality, federal courts have limited their focus to the bounds of executive power rather than the outcomes of its application. While the Biden administration has announced its decision to end the policy in 2022, Title 42 has proven to be an effective and deadly tool that future presidential administrations can use to weaponize public health and immediately deny asylum seekers refuge. As such, Title 42 under the executive branch should be struck down based on its deadly application and inaccurate historical premises which are rooted in medicalized nativism. When executed, Title 42 exhibits significant executive overreach and overrides long-standing U.S. immigration law. This overreach is most notably demonstrated by Title 42's failure to adhere to the non-refoulement principle, an international law that prohibits states from expelling or returning refugees to a country where they would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. By implementing Title 42, the United States government actively sentences thousands of migrants to their death.

This paper will emphasize the United States' continued utilization of immigrants as scapegoats for the spread of disease, tracing the chronology of different immigration policies executed by the United States government following past epidemics and virus outbreaks. Concurrently, the impacts of the "Remain in Mexico" policy and Title 42 under both the Trump and Biden adminis-

trations are discussed, along with the judicial rationale given by the United States Court of Appeals for the District of Columbia Circuit in the Title 42 class action suit *Huisha-Huisha v Mayorkas*[5]. This paper discusses how the court has based its decision on false assumptions surrounding Title 42's execution, where reports prove that the rule encourages implementation that *does not* follow expectations that the court may suggest, specifically by failing to protect due process and expelling asylum seekers to countries where they will be subject to life-threatening violence. Finally, this paper discusses the additional contemporary example of the Haitian migrant crisis at the United States-Mexico border to reveal how Title 42 further stigmatizes asylum seekers requesting admission into the United States. At a time when political leaders have embraced violence and xenophobia against migration, it is essential that pressure is placed on policymakers to instead actively advocate for the protection of migrant rights. The health, safety, and dignity of migrants should be guarded, reinforcing that migrants are humans, not vectors of disease.

II. The Historical Origins of Title 42

The United States has a long-standing history of cloaking nativism under the guise of public health. From as early as the nineteenth century, immigrants have been scapegoated for introducing foreign disease and illness across the United States. At Ellis Island, famously a prominent entrance for immigrants coming to the United States in the nineteenth and twentieth centuries, a physician would be one of the first Americans an immigrant encountered. As Alan Kraut outlines in his book *Silent Travelers: Germs, Genes, and the Immigrant Menace*, immigrants would be directed to climb the stairs to Ellis' main hall immediately following their arrival to the island where, unbeknownst to them, a physician would be waiting at the top, examining the immigrant's ability to

endure physical stress by climbing with heavy luggage in hand. After categorizing their performance as strong or weak, the physician would then closely examine their hands, eyes, and throat.[6] This process is one example of the cultural history of medicalized nativism that enables policymakers in the United States to pass legislation painting immigrants as threats to public health. Since the emergence of COVID-19 in March 2020, the United States government has pushed for aggressive action to bar and expel migrant families in the name of public health, while using inaccurate historical policies to justify its overreach in enacting harmful immigration policies.

One of the first notable instances where immigration became publicly associated with public health was in the 1830s, when a cholera outbreak originating in Asia resulted in mass panic across the globe. The United States experienced three serious waves of cholera throughout the 1800s, which coincided with widespread immigration from Europe—specifically, from Ireland—into the United States. As a result, many Americans associated cholera with Irish immigrants, while policymakers wrote legislation fueling these misconceptions.[7] By the mid-1850s, new procedures like the aforementioned examination by a physician were implemented for migrants entering all U.S. ports.[8] In 1891, federal immigration law mandated steamship companies to vaccinate and medically examine all emigrants abroad before they departed.[9] Those who were deemed ill were returned to the port they had embarked from; meanwhile, those who reached the United States encountered a second medical examination by physicians who were authorized to return anyone home who was deemed "unfit".[10]

Medicalized nativism inflicts serious consequences on arriving immigrant groups and the way they are perceived over time. As Kraut outlines in his book, medicalized nativism refers to the exclusion of members of a particular group based on the perception

that this group is a health menace and consequently will endanger members of the host society.[11] Despite the fact that few members of said immigrant group are sick with a contagious disease, the perception becomes that all members are carriers of that disease, resulting in the entire group facing stigmatization. Medicalized nativism finds its roots in American exceptionalism, which has promoted false notions that good health is the status quo in the United States while disease is foreign—something that could only be brought in from the outside.[12] For example, during the polio epidemic in the 1940s, rumors spread that the epidemic had reached the United States via immigrants traveling from Italy. However, many Italian immigrants had actually contracted polio once they had arrived in the United States, a result of poor and extremely condensed living conditions that facilitated the spread of disease. These circumstances were the result of socioeconomic status and immigrant stigmatization that left many immigrant groups living in squalor.

Perhaps the greatest misconception that has fueled the continuous weaponization of public health law is the idea that migration itself is the source of disease transmission. Some scholars argue that this perception can be tied to the way societies perceive and react to risk that is associated with disease. [13] In other words, aggressive responses to disease may have more to do with social factors than the disease itself. These social factors fixate on those who either have the disease or are falsely perceived to have the disease. They also lend to the false belief that one's home is safe and secure, as contagious diseases are viewed as an outside threat.[14]

Many federal policies opened the door to limiting immigration based on what policymakers falsely argued to be objective criteria. Physicians could deny entry to immigrants simply by conflating facial expressions with certain mental and physical disorders.[15] As xenophobia intensified across the nation, immigrants

were stigmatized and could be expelled on false premises about their appearance and country of origin. Approaching the 1890s and early 1900s, Congress continued to support these misconceptions and passed a series of laws excluding certain immigrants from entering the United States, such as the Immigration Acts of 1891 and 1893, which further outlined grounds for exclusion and established a federal immigration office that would determine whether an immigrant should be admitted into the United States.[16] Eventually, physicians were granted the authority to state on medical records whether an immigrant was likely to become a public charge if they had a medical condition.

Expelling immigrants on medical grounds became increasingly common into the early twentieth century. The percentage of immigrants excluded increased from less than 2 percent in 1898 to 57 percent in 1913 and 69 percent by 1916.[17] Support from policymakers for excluding immigrants based on health concerns contributed to the revision of Section 7 of the 1893 Act. This section was revised and codified in the 1944 Public Health Act, the predecessor and historical foundation to Title 42. However, it is important to note that the 1944 Public Health Act's original purpose was to regulate the transportation of individuals coming into the United States.[18] It did not address the power to expel or deport individuals, like Title 42 currently does today. Regardless, the 1944 Public Health Act's focus on penalizing steamship companies who failed to conduct medical examinations for all passengers immigrating to the United States was highly strategic: at the time, Americans saw the largest waves of immigrants traveling overseas on a steamship rather than crossing by land. With multiple diseases rapidly spreading, policymakers viewed immigration by steamship as a threat to the country's public health and wellbeing.[19] Today, this mentality has shifted to those who cross by land at the United States-Mexico border, which has become increasingly militarized to limit the flow

of migration and, concurrently, the perceived threat of disease.

The discovery of AIDS in Haitian immigrants at Guantanamo Bay provides yet another example of militarized immigration policy in the name of public health. The United States government's response in this instance—revoking these immigrants' admission, and swiftly sending them away—was based entirely in medical nativism. Additionally, following 9/11 and the 2003 SARS outbreak, public health became conflated with national security as the United States government grew concerned about facing a potential bio-terrorist attack or lethal infection.[20] However, high-level officials and scholars continued to denounce governments that have restricted or halted immigration altogether in the name of protecting public health. During the Ebola epidemic in 2014, Zsuzanna Jakab, regional director of the World Health Organization in Europe, released a statement explaining that "there is 'no systemic association' between infectious disease and migration, and that the risk of exotic infectious agents such as MERS and Ebola is higher from regular travelers and traveling health care workers than from migrants."[21]

The consequences of enacting policies that deny entry into a country under the guise of public health can be far-reaching. Taking the example of the Ebola epidemic in 2014, attempts by countries to discourage travel and deny entry into their borders undermined the effort to provide regions impacted by the outbreak with medical supplies.[22] The same policies also provide a false assurance that public health dangers can be kept away, a misconception that was quickly debunked by the rapid worldwide spread of COVID-19 in 2020. Globalization has resulted in a world more interconnected than ever before; thus, it is becoming nearly impossible for a country to completely isolate itself from the rest of the world. Taking this into account, it becomes clear that attempts to protect public health by enacting restrictive immigration policies are futile.

III. Is it legal? Title 42 in the Executive and Judicial Branches

A. Remain in Mexico & Title 42 under the Trump and Biden Administrations:

Prior to Title 42's enactment, the Trump administration had attempted to deter migration and limit asylum seekers from entering the United States in other ways. In January 2019, the Trump Administration enacted the Migrant Protection Protocol (MPP), otherwise known as "Remain in Mexico," which forced individuals and families seeking admission into the United States to wait in Mexico throughout the duration of their immigration proceedings.[23] Throughout this process, which can take anywhere from a month to a year, migrants struggled to access US lawyers and found themselves in dangerous US-Mexico border cities facing high incidence of kidnappings and violence.[24] As the pandemic contributed to crippling conditions at the border, MPP aided in denying migrants basic rights, a situation that only worsened following the implementation of Title 42 a few months later.

While both laws worked together to strip migrants of their asylum rights, Title 42 has become the more convenient justification for border patrol agents to bar migrants from entering the United States, largely due to the way Title 42 immediately denies a migrant's ability to perform a credible fear interview and petition for asylum. Since the rule allows immigration officers to bypass the asylum process in its entirety, officials have defaulted to Title 42 rather than MPP in order to reduce the number of migrants seeking asylum at the border. Recognizing this pressing humanitarian crisis at the border spurred by both Trump-era policies, the Biden Administration has vowed to end both measures in 2022. However, this decision faced significant pushback from state governments like Texas and Missouri, who argued that terminating the MPP would be a violation of the Immigration and

Nationality Act (INA) and Administrative Procedure Act (APA). Their argument, which the District Court adopted, focused on the INA's two-pronged approach for handling illegal entrants: detention or contiguous-territory return. Nonetheless, on June 30, 2022, the Supreme Court decided *Biden v Texas*, holding that the Biden administration's termination of MPP did not violate the INA.[25] As the Biden administration continues the process to dismantle the program, this is by no means the definitive end of MPP,a as future administrations could decide to re-implement the program. Similar rationale used in favor of MPP is also being applied by federal courts to justify Title 42, which is still in effect today through a federal judge's preliminary injunction.

Previous court rulings in favor of Migrant Protection Protocols have been decided under the assumption that Mexico would grant humanitarian status and work visas to asylum seekers, two crucial protections that would help them maintain a dignified, humane livelihood.[26] However, a report conducted by the Human Rights Watch found that the aid the Trump administration claimed would be available for asylum seekers in Mexico was not available or extended to those waiting in Mexico as their claims processed in the United States.[27] Similarly, expulsions taking place under Title 42 have revealed an incredible lack of regard for international law or asylee well-being, with thousands of migrants being sent back to life-threatening conditions. These expulsions are clear violations of international law, subjecting thousands of children to dangerous conditions. According to the Office of The United Nations High Commissioner for Refugees' procedures in dealing with unaccompanied children seeking asylum, international law states that "because of their vulnerability, unaccompanied children seeking asylum should not be refused access to the territory."[28] After the Trump administration expelled more than 13,000 unaccompanied children under Title 42, on November 18, 2020, a federal judge declared the administration's actions unconstitutional.[29]

While unaccompanied children are no longer at the frontline of Title 42's expulsions, the number of expelled family and single adult migrants is also significant. A report conducted by U.S. Customs and Border Patrol found that "two-thirds of all migrant encounters ended in expulsion between April 2020, the first full month after Title 42 was invoked, and September 2021, the end of Fiscal Year 2021."[30] Although family and single adult expulsions have decreased since Title 42 was first implemented at the start of the COVID-19 pandemic, this is not due to an overall decrease in expulsions being carried out by US Customs and Border Patrol. Rather, the decrease from 90 percent to 54 percent in migrant expulsions is due to migrant families being exempted from Title 42 and instead expelled under Title 8.[31] Throughout the entirety of the COVID-19 pandemic, immigration officials and policies have prioritized the expulsion rather than the processing of migrant families and individuals.

Country of origin also plays a significant role when examining the consequences of Title 42 on different migrant groups, especially in relation to concerns regarding migrants being expelled to violent conditions. Mexican migrants are expelled at disproportionately higher rates compared to migrants from other countries: in 2021, 92 percent of apprehended Mexican migrants faced expulsions compared to non-Mexican apprehended migrants, who faced expulsion only 46 percent of the time.[32] Oftentimes, migrants from other countries find themselves expelled to Mexico rather than their home country. Meanwhile, the Mexican government has declared that it will only accept migrants meeting certain criteria from either Mexico or the Northern Triangle countries, excluding other countries sending large numbers of migrants such as Haiti.[33] However, it is important to note that Title 42 does not specify where a migrant must be expelled to. The US government's ability to dictate where migrants can be expelled increases concerns about the conditions migrants are being condemned to, especially in

countries with high rates of violence.

Title 42 expulsions of migrants arriving from Northern Triangle countries, which include El Salvador, Guatemala, and Honduras, also raise many concerns due to the fact that migrants are likely to be sent back to those same countries. Currently, all three countries are experiencing high levels of violence with governments that are unable to adequately protect their citizens.[34] In these countries, the United Nations has explicitly noted how violence has internally displaced hundreds of thousands of migrants or has led them to relocate to another country like the United States.[35] The scale of this displacement is significant. Government reports revealed how these three countries are among the top sending countries for migrants attempting to cross the border and enter the United States—often to no avail, as a report conducted by the Department of Homeland Security suggests that migrants from the Northern Triangle also have faced high rates of expulsion under Title 42.[36]

Crucially, in the same DHS report, the number of migrants arriving from Mexico and facing expulsion at the United States-Mexico border trumps those arriving from the Northern Triangle countries and Ecuador. In one year, Honduras, Guatemala, and El Salvador had 308,931 migrants, 279,033 migrants, and 95,930 migrants apprehended respectively, compared to Mexico's 608,037 apprehensions.[37] Brazil, Nicaragua, Venezuela, Haiti, and Cuba were also countries whose nationals faced expulsion, though at much lower numbers.[38] However, migrants from these countries would most likely return to their country of origin, given that Mexico has agreed to only accept its own migrants or those from the Northern Triangle. These contradictory circumstances become relevant when a court attempts to evaluate Title 42 on the grounds of U.S. and international law.

B. The United States Court of Appeals for the District of Columbia Circuit

On March 4, 2022, the United States Court of Appeals for the District of Columbia Circuit decided the case *Huisha-Huisha v Mayorkas*[39], a class action suit filed on behalf of all families seeking asylum who are facing expulsion under Title 42. The plaintiffs argued that Title 42 illegally provides the Executive with the power to expel asylum seekers, seeing as it "violates the Immigration and Nationality Act's provisions for asylum, withholding of removal, and relief under the Convention Against Torture."[40] However, the court held that migrants are, in fact, subject to expulsion by the Executive under Title 42. Judge Justin R. Walker delivered the following opinion:

> [Plaintiffs] argue that expulsions under § 265 are illegal. We disagree. At least at this stage of the case. We find it likely that aliens covered by a valid § 265 order have no right to be in the United States, and the Executive can immediately expel them.[41]

It is important to note that at the same time, the court upheld the injunction by the District Court that prevented the Executive from expelling these migrants who would encounter "extreme violence" if expelled to their respective home countries. This decision was based on 8 USC § 1231, which states that the Executive is not allowed to expel migrants to a country where they would face torture or persecution. Given that Title 42 does not specify where the Executive is allowed to expel migrants to, the Court both upheld Title 42 and struck down any expulsions that would result in migrants being subjugated to extreme violence. Judge Walker summarizes: "For now, the Executive may expel the Plaintiffs, but only to places where they will not be persecuted or tortured."[42] One of the greatest drawbacks to the Court's ruling is the fact that there is no proper enforcement mechanism to ensure that the Executive does not expel migrants to countries where they may face persecution

or torture. In making their decision, the Court even points to the Executive branch's acknowledgement of the "horrific circumstances that non-citizens are in in some of the countries that are at issue here."[43]

Nonetheless, there is significant subjectivity around what conditions are grounds for persecution or torture. In the case of Mexico, the United States government relies heavily on the Mexican government to contain millions of migrants attempting to cross the border into the United States. Recent data from Human Rights First, however, suggests that parts of Mexico are becoming just as dangerous as other home countries that migrants have fled from.[44] In one of their most recent reports, researchers tracked over 8,705 migrants and asylum seekers who were reportedly victims of kidnappings or violent attacks following their expulsion by the United States government.[45] Since then, the UN High Commissioner for Refugees has also denounced Title 42 expulsions, stating that they can "often result in chain deportations that can expose people to grave risks." [46] Furthermore, a separate report by Human Rights Watch found that when migrants were questioned by border patrol agents under the "Remain in Mexico" policy, some agents documented incorrect information on a migrant's request for asylum, refused to take note if a migrant expressed a credible fear, or immediately denied their request regardless of what information was shared.[47] The government's ability to overlook a migrant's dire circumstances, which is not acknowledged by the Court in the case of Mexico, raises serious concerns around the Court's rationale and the future well-being of migrants facing expulsion.

Examples cited in *Huisha-Huisha v Mayorkas*[48] represent only a portion of the Department of Homeland Security's unchecked power when encountering asylum seekers at the United States border. One tool exemplifying this power is expedited removal, an immigrant enforcement procedure introduced in 1996 stating that non-citizens can be immediately deported without due

process protections such as access to a hearing.[49] Since the introduction of expedited removal, migrants have increasingly found themselves at the mercy of the border patrol agent they encounter. With Title 42, Department of Homeland Security agents increasingly have the prerogative to disregard proper procedures and violate the non-refoulement principle as migrants are returned to potentially hostile countries. On October 2, 2021, Harold Koh, a senior legal advisor for the State Department, resigned from his role in the Biden administration, citing Title 42's direct violation of non-refoulement, which is forbidden under Article thirty-three of the Refugee Convention and the Convention against Torture and Refugee Convention.[50] He wrote that migrants "were not even told where they were being taken when placed on deportation flights, learning only when they landed that they had been returned to their home country or place of possible persecution or torture."[51] Indeed, the *Huisha-Huisha* court falls notably short when applying Title 42's dangerous impact on returned migrants to its own rationale.

Reports of migrants facing violence as a direct consequence of Title 42 should be compared with the rationale cited by the Court in *Huisha-Huisha.* At the end of their reasoning, the Court affirmed the District Court's preliminary injunction to prevent the Plaintiffs from being immediately expelled. The Court's argument turned to the "balance of equities," agreeing that the Plaintiffs faced irreparable harm from violence and persecution if expelled under Title 42. While this concession may appear small, it contradicts the Court's prior rationale. By acknowledging the particular circumstances of one migrant family, the Court slyly acknowledges the cases of millions of similar families and the dangers of the countries they fled. The Court even points to the Executive's justification to end the "Remain in Mexico" policy because of the extreme violence it inflicts on migrants.[52] These policies share much in common, specifically the fact that migrants are expelled to or kept in Mexico or other Latin American countries. By acknowl-

edging the dangerous implications of Title 42 for one migrant family, yet still failing to apply this rationale to Title 42 as a whole, the Court's reasoning is both idealistic and inconsistent. Title 42 continues to create the opportunity for federal agents to exploit the immigration system and expose migrants seeking asylum to potentially detrimental situations—something even the *Huisha-Huisha* court noted by granting the Plaintiffs preliminary injunction.

IV. Looking Forward: Title 42 Stigmatizing Migration

Similar to other migrant groups, Haitians have historically been barred from achieving admission into the United States and currently face severe ramifications from the execution of Title 42. Since Title 42's enactment, Haitians have faced expulsions at an incredibly high rate and have encountered many atrocities after being returned home—a clear demonstration of Title 42's consistent disregard of non-refoulement and 8 USC § 123, which creates opportunities to further stigmatize migration by inspiring other forms of restrictive immigration policy.

A. The Rejection of Haitian Migrants:

During the late 1970s, thousands of Haitians attempted to travel via boat to the United States, escaping Haiti's widespread repression and persecution. At the time, Haitians had limited legal paths to take within the United States immigration system. Congress refused to allocate Haiti any refugee numbers from the quota in the Refugee Act of 1980, and Haitians were not granted parole like Cubans fleeing to the United States during the same period.[53] The only remaining option for Haitian migrants was to arrive without status at the United States border and apply for asylum, a move poorly received by the United States government. While racialization and anti-Blackness against Haitian migrants certainly

played a role in encouraging the United States to deny their requests for asylum, U.S. leaders and policymakers were uniquely hostile towards Haitian asylum seekers in particular. During the case *Haitian Refugee Center v Civiletti* in the U.S. District Court for the Southern District of Florida, Judge James Lawrence King went on record to say that Haitians seeking asylum present "unusual cases dealing with individuals that are threatening the community's well-being—socially and economically."[54] As a result, policymakers and government officials ultimately enforced and enacted aggressive immigration policies that reflected these sentiments. Throughout the 1980s, the Immigration and Naturalization Service refused to process Haitians, failed to give them fair asylum hearings, and barred them from leaving their country.[55] Haitians applying for legal aid were denied access to pro bono attorneys and faced deportation back to Haiti.

In 1992, at a U.S. Naval Base in Guantánamo Bay, Cuba, 140 Haitians were processed by American military officials in anticipation of leaving for the United States. However, their hopes and excitement were quickly met with the grim news from military officials that testing indicated they were HIV-positive.[56] The United States swiftly revoked their admission on health grounds, and all 140 Haitians found themselves detained in Guantánamo Bay for over a year and a half until a federal judge issued an injunction for their release.[57] With Title 42, the United States continues to follow its long-lasting precedent of acting with hostility towards Haitian migrants.

Since Title 42 has gone into effect, Haitian migrants have made national headlines for facing mass expulsions along the United States-Mexico border. On September 18, 2021, the Department of Homeland Security announced that they would expel thousands of Haitian asylum seekers under Title 42 who crossed into the United States near Del Rio, Texas.[58] These expulsions suppressed Haitians from making proper asylum claims, including the credible

fear screening, to determine if a migrant's fears warrant grounds for admission into the United States. By failing to provide Haitians access to the asylum process, the Department of Homeland Security blatantly violated both U.S. and international law. Since January 2021, more than twenty thousand Haitians have been expelled and placed on flights back to Haiti.[59]

The United States government is not oblivious to the conditions that currently burden Haiti. In fact, the Department of Homeland Security has concretely recognized these circumstances when extending Temporary Protected Status to Haitians on July 30, 2021, citing "extraordinary and temporary conditions in the foreign state prevent its nationals from returning safely."[60] The agency went even further in their explanation, declaring that "Haiti is grappling with a deteriorating political crisis, violence, and a staggering increase in human rights abuses."[61] Since this status extension, the country has plunged into greater turmoil following the assassination of President Moïse, a destructive earthquake on August 14, 2021, and Tropical Depression Grace on August 16, 2021.[62]

According to the United Nations Office for the Coordination of Humanitarian Affairs, Haitians continue to face an escalation of gang violence that has impacted over 1.5 million people and displaced nineteen thousand within the metropolitan area of Port-au-Prince.[63] The Haitian government has also warned its citizens about the surge in kidnappings and crimes being committed by gangs, indicating that any potential crackdowns against these crimes will elicit increased violence by two prominent crime bosses against Haitian police.[64] As Harold Koh mentioned in his resignation letter, "Persons targeted by Haitian gangs could easily have asylum claims as persons with well-founded fears of persecution because of their membership in a 'particular social group' for purposes of the Refugee Convention and its implementing statute."[65] The United States government's failure to recognize these facts denies Haitian migrants their right to safe entry and represents a

direct contradiction to its own word on the issue.

The human rights violations committed by the Department of Homeland Security against Haitian migrants while enforcing Title 42 supports the argument that the rule does not live up to asylum seeking standards put forth by international and U.S. law. Although President Biden has called for an examination of whether the United States is properly extending asylum protections for those fleeing violence, Haitian migrants continued to be denied asylum.[66] This reality further casts doubts on the Court's assumption in *Huisha-Huisha v Mayorkas*[67] that the powers granted by Title 42 do not inherently violate asylee rights.

V. Conclusion

Although the weaponization of Title 42 may be approaching an end for the time being, immigration policy in the United States remains at a crossroads. If Title 42 remains constitutional and within the authority of the executive branch, future presidential administrations could easily enforce this extremely restrictive, harmful, and inhumane immigration policy with little to no oversight. For asylum seekers and migrants reluctantly leaving their homes in search of a stable and safer livelihood, their future opportunity to enter the United States under a protected status appears increasingly uncertain and bleak. The weaponization of public health policy to expel migrants at the border will have long-term and far-reaching disastrous consequences on US immigration policy.

While the strategy behind Title 42's implementation is newly problematic, it is important to remember that U.S. policymakers have done this before. Since the 1830s, immigrants have been scapegoated for the spread of epidemics and disease. Consequently, restrictive immigration policies have been put in place to fuel the misconception that migrants pose a uniquely poignant threat to

the United States's public health. Nonetheless, this paper highlights how Title 42's historical basis from these misconceptions is inaccurate and insufficient to support a well-founded legal argument. In the same vein, evidence used in this paper reveals Title 42's overt violation of a migrant's right to non-refoulement and due process. This evidence also challenges the court's decision in *Huisha-Huisha v Mayorkas*[68], which makes the dangerous and inaccurate assumption that border patrol agents under Title 42 will provide accurate credible fear interviews and prevent migrants from being expelled into dangerous conditions. As the case of Haitian migrants points out, Title 42 blatantly ignores migrants already facing high risk and further condemns other migrants to dangerous, inhumane conditions.

Time after time, US history has revealed the dangerous consequences of falsely accusing migrants of spreading disease. These misconceptions hold power. Under the direction of policymakers, this misconception has manifested in dehumanizing policies that strip migrants of their due process. Title 42 is a repetition of history unfolding before our eyes, masked within the disarray of a frightening pandemic. It is now more important than ever to denounce Title 42's constitutionality. Pressure must be placed on policymakers and the United States legal system to revoke its legality, regardless of the Biden administration's plans to terminate it. If Title 42 remains constitutional, the future for migrants seeking asylum at the US-Mexico border will be precarious and perilous.

[1] *Huisha-Huisha v Mayorkas*, Huisha-Huisha v Mayorkas, 27 F4th 718, (DC Cir 2022)
[2] "Title 42" will be used in this paper to refer to the 42 USC § 265 Order under the Centers for Disease Control and Prevention.
[3] Eileen Sullivan, *Title 42 Has Allowed Many Migrants to Be Quickly Expelled, and Others to Stay*, (The New York Times 2021), online at nytimes.com/2021/12/02/us/politics/immigration-public-health-rule-mexico.html (visited April 8, 2022).
[4] Alan Kraut, *Silent Travelers: Germs, Genes, and the Immigrant Menace* 3 (Baltimore: The John Hopkins University Press 1995).
[5] *Huisha-Huisha v Mayorkas*, 27 F4th 718, (DC Cir 2022)
[6] Kraut, *Silent Travelers* 5.
[7] Ibid, 4.
[8] Ibid, 36.
[9] Ibid, 51.
[10] Ibid, 51-52.
[11] Ibid, 3.
[12] Ibid, 32-33.
[13] Patricia Illingworth and Wendy Parmet, *The Health of Newcomers: Immigration, Health Policy, and the Case for Global Solidarity* 29 (New York: NYU Press 2017).
[14] Ibid.
[15] Kraut, *Silent Travelers* 62.
[16] *INS Boards of Special Inquiry Records*, Research Our Records (U.S. National Archives and Records Administration 2021), online at https://www.archives.gov/research/immigration/boards-of-special-inquiry.
[17] Kraut, *Silent Travelers* 66.
[18] Brief for the American Civil Liberties Union as Amicus Curiae, p. 17, Huisha-Huisha v. Mayorkas, 27 F4th 718, (DC Cir 2022).
[19] Ibid.
[20] Illingworth and Parmet, *The Health of Newcomers* 41.
[21] *Statement by Dr Zsuzsanna Jakab, WHO Regional Director for Europe*, (World Health Organization 2015), online at euro.who.int/en/health-

topics/health-determinants/migration-and-health/news/news/2015/09/population-movement-is-a-challenge-for-refugees-and-migrants-as-well-as-for-the-receiving-population.

[22] Illingworth and Parmet, *The Health of Newcomers* 31.

[23] Ryan Ellington, *Supreme Court Agrees to Consider Repeal of 'Remain in Mexico' Policy*, (NPR 2022), online at npr.org/2022/02/18/1081835875/supreme-court-agrees-to-consider-repeal-of-remain-in-mexico-policy.

[24] Ashoka Mukpo, *Asylum-Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*, (ACLU), online at aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face.

[25] *Biden v Texas,* 142 S. Ct. 2528 (2022).

[26] Clara Long, *We Can't Help You Here*, (Human Rights Watch 2019), online at hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico.

[27] Ibid.

[28] *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, (Office of the United Nations High Commissioner for Refugees Geneva 1997), online at unhcr.org/3d4f91cf4.pdf.

[29] *Rising Border Encounters in 2021: An Overview and Analysis*, (American Immigration Council 2022), online at americanimmigrationcouncil.org/rising-border-encounters-in-2021.

[30] Ibid.

[31] Title 8 is a U.S. Customs and Border Patrol process in which a migrant may face apprehension or detention while navigating immigration procedures as a result of not being lawfully admitted into the United States. This is typically a longer process than a migrant would encounter under Title 42.

[32] William A. Kandel and Audrey Singer, *Immigration: Apprehensions and Expulsions at the Southwest Border* (Congressional Research Center 2021), online at sgp.fas.org/crs/homesec/R46999.pdf.

[33] Ibid.

[34] Long, *We Can't Help You Here*.

[35] *Armed Gangs Force 'growing Number' to Flee North and South, in*

Central America, (United Nations 2019), online at news.un.org/en/story/2018/05/1010362.

[36] "U.S. Border Patrol Southwest Border Apprehensions by Sector." (U.S. Department of Homeland Security 2022), online at cbp.gov/newsroom/stats/southwest-land-border-encounters/usbp-sw-border-apprehensions.

[37] Ibid.

[38] Ibid.

[39] *Huisha-Huisha v Mayorkas*, 27 F4th 718, (DC Cir 2022)

[40] Ibid, 13.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] "A Shameful Record: Biden Administration's Use of Trump Policies Endangers People Seeking Asylum," (Human Rights First 2020), online at humanrightsfirst.org/sites/default/files/ShamefulRecord.pdf.

[45] Ibid.

[46] Ibid.

[47] Long, *We Can't Help You Here*.

[48] *Huisha-Huisha v Mayorkas*, 27 F4th 718, (DC Cir 2022).

[49] *A Primer on Expedited Removal,* (American Immigration Council 2019), online at americanimmigrationcouncil.org/research/primer-expedited-removal#:~:text=%E2%80%9CExpedited%20removal%E2%80%9D%20refers%20to%20the,a%20hearing%20before%20a%20judge.

[50] Alex Thompson and Alexander Ward, "Top State Adviser Leaves Post, Rips Biden's Use of Trump-Era Title 42," (Politico 2021), online at politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029.

[51] Ibid.

[52] *Huisha-Huisha v Mayorkas*, 27 F.4th 718 (DC Cir 2022).

[53] Norman Zucker and Naomi Zucker, *Desperate Crossings: Seeking Refuge in America* Ch.4 at 65, (Routledge 1st edition 1996).

[54] *Haitian Refugee Center v Civiletti*, 503 F. Supp. 442, (SD Fla 1980).

[55] Zucker and Zucker, *Desperate Crossings*, 67.

[56] Kraut, *Silent Travelers,* 2.
[57] Ibid.
[58] "Biden Administration's Dangerous Haitian Expulsion Strategy Escalates the U.S. History of Illegal and Discriminatory Mistreatment of Haitians Seeking Safety in the United States," (Human Rights First2021), online at humanrightsfirst.org/resource/biden-administration-s-dangerous-haitian-expulsion-strategy-escalates-us-history-illegal.
[59] Kandel and Singer, *Immigration: Apprehensions and Expulsions*.
[60] "Designation of Haiti for Temporary Protected Status," (Federal Register2021), online at federalregister.gov/documents/2021/08/03/2021-16481/designation-of-haiti-for-temporary-protected-status.
[61] Ibid.
[62] Thompson and Ward, "Top State Adviser Leaves Post, Rips Biden's Use of Trump-Era Title 42."
[63] "Temporary Protected Status Designated Country: Haiti, (U.S. Citizenship and Immigration Services2021), online at uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti#:~:text=ALERT%3A%20On%20May%2022%2C%202021,instructions%20for%20applying%20for%20TPS.
[64] "Haiti: Earthquake Situation Report No. 4," (United Nations Office for the Coordination of Humanitarian Affairs 2021), online at reliefweb.int/report/haiti/haiti-earthquake-situation-report-no-4-7-september-2021.
[65] Thompson and Ward, "Top State Adviser Leaves Post, Rips Biden's Use of Trump-Era Title 42."
[66] "Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border," (The White House 2021), online at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/.
[67] *Huisha-Huisha v Mayorkas*, 27 F4th 718, (DC Cir 2022)

[68] *Huisha-Huisha v Mayorkas*, 27 F4th 718, (DC Cir 2022)

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