Davis Journal of Legal Studies

Spring 2025

Volume V

Davis Journal of Legal Studies

Volume V: Spring 2025

Developed with the University of California National Center for Free Speech and Civic Engagement, ASUCD, and the Club Finance Council.

Davis Journal of Legal Studies Editorial Staff

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Letter from the Editor-in-Chief

Dear Reader,

It is with great enthusiasm that I present to you *Davis Journal of Legal Studies: Volume V, Spring 2025*.

Founded in 2020 at the University of California, Davis, the *Davis Journal of Legal Studies* (DJLS) is a student-run publication committed to contributing to public legal scholarship, developing a community of undergraduate legal researchers, and creating opportunities in publication for undergraduate students. With pieces from the University of California, Santa Barbara, and the University of California, Santa Cruz, Volume V marks the largest publication in DJLS history.

In this fifth anniversary edition, we highlight the pressing issues that continue to confront the justice system and legal field. In examining racial exclusion in *Dred Scott v. Sandford*, reproductive healthcare in the overturning of *Roe v. Wade,* and the limitations of Indigenous freedoms under the Marshall Trilogy, the pieces herein demonstrate our authors' dedication to advancing novel legal research on a diversity of contemporary social issues.

I would like to thank the DJLS editorial staff for their tireless dedication, without which Volume V would not have been possible. The countless hours they have spent contributing their ideas to each piece have been essential in shaping the integrity of this publication, and their productive conversations on scholarship, research, and free speech underscore their commitment to uplifting student voices on university campuses.

I am also especially grateful for the generous support from the University of California National Center for Free Speech and Civic Engagement, with a special thanks to the Center's Executive Director, Michelle Deutchman, and Program Associate, Melanie Ziment; our four-year-long partnership has helped cultivate a dynamic undergraduate academic environment that promotes the research and discussions of vital ideas. Now more than ever, providing students with a platform to critically engage with our rapidly changing legal environment is an essential first step toward ensuring the vitality of our democracy.

Happy reading,
Michael Hayden
Editor-in-Chief
Davis Journal of Legal Studies, Volume V: Spring 2025

Fair Use in Focus: The Need for a Proper Fair Use Framework

By Phoebe Lee

Phoebe Lee is a student at the University of California, Davis, studying Economics and Science and Technology Studies. She is also the Editor-in-Chief and President of Her Campus at UCD.

The concept of fair use has evolved since the 1976 Copyright Act, particularly following the Supreme Court's landmark decision in *Campbell v. Acuff-Rose Music* (1994), which expanded protections for creative works. However, the recent decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith* (2023) has created new ambiguities in applying fair use principles, especially concerning the "transformative" factor under the Copyright Act. This paper examines the inconsistencies in fair use rulings, comparing *Campbell* and *Warhol* to highlight the uneven application of the four fair use factors, which explain the purpose of the factors. The paper argues that the shift from analyzing transformative content to evaluating transformative purpose in *Warhol* has created legal uncertainties for artists and creative industries. The paper then concludes by advocating for a more standardized fair use framework that equally weighs all factors so that copyright protections are well-balanced while promoting creativity.

Introduction

Artistic works have significantly grown in importance since the 1976 Copyright Act as artists continued to rely on both the ability to copyright their works or exercise a fair use defense to protect their secondary creative work. Fair use, in particular, was accelerated by the Supreme Court's decision in *Campbell v. Acuff-Rose Music* (1994), which concerned 2 Live Crew's parody of a classic song. Over the years, several cases have emerged determining what constitutes fair use, such as *Google LLC v. Oracle America Inc.* (2021) which reaffirmed

Campbell's message that the transformative factor is the most important in evaluating fair use. However, in the case of *Andy Warhol Foundation for the Visual Arts v. Goldsmith* (2023), the Supreme Court's decision raised important questions about what entails a proper fair use test. *Warhol* had placed more significance on the commercial use factor, deviating from the precedent established in *Campbell.* As a result, a standardized fair use test is needed—one that can be applied broadly and clearly defines fair use without stifling creativity.

As stated in Section 107 of the Copyright Act, when determining whether fair use applies to a work, four factors are included: the purpose and character of use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the original work, and the effect of the use upon the potential market for the copyrighted work. The first factor determines how transformative and different the work was from the original, looking at whether new meaning was added. The second considers the type and media of the work; using factual or published material is more likely to be fair use than using creative or unpublished work. The third factor examines how much of the original work was used and the fourth factor evaluates whether the commercial use harms the market value of the original work. Each factor is weighed in relation to the others, but in practice, courts may prioritize some factors over others, leading to inconsistent interpretations and outcomes while complicating how creatives can evaluate whether their work is fair use.

Background

In 1981, plaintiff Lynn Goldsmith took a series of photographic portraits of Prince, a popular American musician. Then in 1984, Goldsmith's agency, Lynn Goldsmith, Ltd. (LGL), licensed one of her photographs to *Vanity Fair* magazine. *Vanity Fair* hired Andy Warhol, a famous contemporary artist, to create artwork based on the photograph which was later published

in the magazine, with credits given to Goldsmith. However, without Goldsmith's consent or knowledge, Warhol created additional artworks based on her photograph in a collection referred to as the Prince Series. In 2016, *Vanity Fair* sought permission from the defendant Andy Warhol Foundation for the Visual Arts, Inc. (AWF), to reprint Warhol's Prince Series but the magazine had not credited Goldsmith. After seeing the 2016 *Vanity Fair* issue, Goldsmith notified AWF that it was an unauthorized use of her work and she then registered copyright for her photograph as an unpublished work. AWF sued Goldsmith and the district court granted AWF summary judgment, a judgment entered by a court for one party and against another party without a full trial. It held that the Prince Series was not transformative use, as it did not add new expression or convey a different meaning to make Warhol's use of Goldsmith fair.[1] Goldsmith appealed and the Supreme Court eventually ruled that Warhol did infringe on Goldsmith's copyright because both works served the same purpose: to commemorate the late musician on magazine covers.

The main legal issue in *Warhol* concerns what the proper test is for determining whether a work is "transformative enough" under the first factor of the Copyright Act's fair use doctrine. In *Campbell v. Acuff-Rose Music*, the court had ruled that 2 Live Crew's parody was considered fair use despite its commercial use. However, in *Warhol*, this ruling appears reversed; the Supreme Court focused on the fact that Warhol's use of the photograph was not only for a similar purpose, but also for the same commercial use. Thus, the differences in how the fair use factors were applied in these two cases highlight a trend of courts giving uneven weight to each factor in fair use decisions.

[1] *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, Oyez, https://www.oyez.org/cases/2022/21-869 (Accessed March 23, 2025).

Campbell and *Warhol*

In *Campbell*, Acuff-Rose Music, Inc. sued 2 Live Crew, claiming that their song "Pretty Woman" infringed on Acuff-Rose's copyright over Roy Orbison's "Oh, Pretty Woman". By definition, a parody is a comedic commentary about a work, requiring an imitation of the work. Parodies use copyrighted works for purposes that fair use was designed to protect, but it should be weighed more equally and with the other factors. In *Campbell*, the Court held that a parody's commercial character is only one element to be weighed in a fair use inquiry and that insufficient consideration was given to the nature of 2 Live Crew's parody in examining the degree of copying in the lower courts.[2] However, the commercial use factor appeared to be weighed more heavily in *Warhol*. Andy Warhol's "Orange Prince", one of the images in the Prince Series derived from Lynn Goldsmith's photography, appeared on the cover of a Vanity Fair magazine for a fee of $10,000. Similarly, Goldsmith's photographs were licensed and used in several other magazines commemorating Prince. Because the Orange Prince photograph used on the cover of Vanity Fair served essentially the same commercial purpose as Goldsmith's original, the Court concluded that its commercial use weighed against Warhol's fair use defense.

The most striking aspect of the Supreme Court's decision was how it determined the "transformativeness" of an artwork. Under the *Warhol* framework, if a practicing artist uses a copyrighted source for a purpose that is "highly similar" to the purpose of the original work, that artist is liable for infringement of the transformative fair use factor.[3] While significant changes in meaning or message still hold some relevance in fair use inquiries, commercial use for an artwork that has a similar "purpose" to the original, should be different by adding new meaning or expression. This reasoning deviates from the principles of *Campbell,* which established that

[2] *Campbell v. Acuff-Rose Music, Inc.*, Oyez, https://www.oyez.org/cases/1993/92-1292 (Accessed May 9, 2024).
[3] Peter J. Karol, "After Warhol," Artforum, January 30, 2025, https://www.artforum.com/columns/the-transformative-impact-of-warhol-v-goldsmith-252757/.

commercial use could count as fair use as long as the work was transformative enough. Now, in the context of appropriation artworks, *Warhol* announced modifications in the first-factor analysis.[4] A work's commercial purpose must also be "transformed", which did not seem to be the case in *Campbell* where commercial use was analyzed based on whether the new work impeded the original creator's potential market. Hence, by redirecting focus from whether a secondary work's content is transformative to whether the work has transformed in purpose, the courts have shifted the *Campbell* principles—a framework that has applied to several past fair use cases—into a more problematic method that leaves room for more inconsistencies in rulings.

Trends in Fair Use Opinions

While each factor should be weighed the same and play an equal role in validating a fair use defense, this does not always happen in practice. Since the *Campbell* case, the consideration of whether a defendant's fair use qualifies as "transformative" has emerged as one of the most important to a court's overall fair use determination.[5] As a result, many court cases have been determined almost solely on the existence of the first fair use factor, transformativeness. For instance, in *Campbell*, the court ruled that 2 Live Crew's parody was "transformative enough", which, in turn, meant that the market effect it had was less significant in the overall ruling. But here, as *Warhol* recasts it, the less transformative, the more a commercial use will weigh against fair use.[6] That is, the less a creative work adds new expression, meaning, or purpose, the more likely it is that its commercial nature and whether the secondary work infringes on the original work's market value will be prioritized in the four-factor fair use analysis. The trend of issuing rulings based on the uneven weight distribution of the fair use factors has become quite prevalent

[4] Karen Shatzkin and Dale Cohen, "Picture This: Applying the Fair Use Doctrine to Documentary Films after Google/Oracle and Warhol," *UCLA Ent. L. Rev.* 30 (2022), 1.
[5] Barton Beebe, "An Empirical Study of US Copyright Fair Use Opinions Updated, 1978-2019," *NYU J. Intell. Prop. & Ent. L.* 10 (2020), 1.
[6] *Id.*

and as a result, has led to inconsistencies in understanding what types of works are fair use and copyrighted as demonstrated by the rulings of *Campbell* and *Warhol*. Thus, these inconsistencies demonstrate why there needs to be a proper fair use framework to prevent further variability in rulings about how fair use is applied.

The Need for a Proper Fair Use Framework: Application to *Warhol*

The current fair use analysis is inherently subjective, leading to significant inconsistencies in its application. Courts have considerable discretion in weighing each of the four factors and can openly admit when a factor doesn't fit their overall determination. In *Warhol*, the court found that Goldsmith's photograph and Warhol's Orange Prince portrait had substantially the same commercial purpose because both were licensed to be used in a magazine.[7] Meanwhile, the other factors—transformativeness, nature of the copyrighted work, and the amount and substantiality used—were included in the evaluation but were ultimately implied as less of a determinant relative to the commercial similarity found in *Warhol*. Hence, it seems that the commercial nature of this particular work played a larger role in the court's conclusion.

This inconsistent application was further exemplified in the procedural history of the case. First, in 2019, the US District Court for the Southern District of New York granted summary judgment to AWF under its assertion of fair use and dismissed Goldsmith's claims with prejudice. In weighing the first factor more heavily, the District Court held that Warhol's portrayal of Prince was for a different purpose or character from the photographer's as Goldsmith's work portrayed Prince as a "vulnerable human being" whereas Warhol depicted

[7] Robert J. Labate, Tanisha Pankins, and Cindy A. Gierhart, "U.S. Supreme Court Holds That First Factor of Fair Use Test Favors Photographer: Insights," Holland & Knight, June 15, 2023, https://www.hklaw.com/en/insights/publications/2023/06/us-supreme-court-holds-that-first-factor-of-fair-use.

Prince as an "iconic figure."[8] Then, in the Second Circuit Court of Appeals, the Appeals Court reversed the District Court's ruling, holding that all four fair use factors favored Goldsmith. In so holding, the Second Circuit determined that the photograph was not distinct enough and faulted the District Court for playing art critic by evaluating the aesthetic meaning of the art.[9] Following this ruling, AWF appealed to the Supreme Court where it affirmed the Second Circuit's ruling. Thus, as demonstrated in *Warhol*, the creators involved faced ongoing legal uncertainty without consistency in how the fair use framework should be applied. Without clear guidelines on what constitutes permissible use of copyrighted works, creators are often thrown into unnecessary legal disputes.

By establishing a standardized fair use test, creators can better understand their rights and obligations. Moreover, a consistent approach ensures that similar cases are treated alike, promoting fairness in judicial decisions. To achieve the proposed consistency in fair use tests, all fair use factors should be weighed equally, or the primary emphasis should be on transformative use, but have this principle clearly outlined in the law. Weighing each factor equally may be more difficult when certain factors do not necessarily apply to a particular work, but placing primary consideration on the purpose and character of a work could help establish consistency since most, if not all fair use works have a transformative component to it. In addition, with the strong correlation between the first and fourth factors, market harm should be weighed against the transformative factor rather than something that adds to whether a work is transformative enough. In this way, there can be a stronger challenge against whether a work is or is not fair use instead of associating a lack of transformativeness with a threat to the potential market of the copyrighted work. Clear guidelines should also delineate when market harm becomes a decisive

[8] *Id.*
[9] *Id.*

factor. Lastly, the nature of the copyrighted work should be assessed in context, recognizing the different levels of protection afforded to various types of works such as factual vs. creative. In standardizing the fair use test, subjectivity and variability can be reduced in judicial decisions, allowing creators themselves to determine whether a work they are creating would constitute fair use.

Creativity and Art After *Warhol*

Under the *Warhol* framework, if an artist is using a copyrighted source that is "highly similar" to the purpose of the original work, it is more likely that the transformative factor won't act in favor of the fair use defense. The shift from transforming content to transforming purpose has made it so that artists who wish to use a copyrighted source must now be prepared to demonstrate that their choices were "reasonably necessary" to achieve clear goals.[10] Yet, it is still unclear how much, or how little, an artist's work should deviate from the original. However, most artists can follow this general rule: the more transformative the use, the greater the likelihood that use is considered fair.[11] Creators cannot reliably predict whether their use of copyrighted material will be deemed fair or infringing. This uncertainty can make individuals risk-averse, deterring them from engaging in transformative or derivative works that might fall within the scope of fair use.

There are also economic barriers to pursuing creative projects, especially while lacking a proper fair use test. The threat of expensive litigation serves as a powerful deterrent, discouraging some creators from pursuing creative projects when the risk of copyright infringement is much higher without a set of guidelines for artists to follow that would allow them to avoid infringement. According to the American Intellectual Property Law Association,

[10] *Id.*
[11] Benjamin A. Spencer, "It Ain't Real Funky Unless It's Got That Pop: Artistic Fair Use after Goldsmith," *Duke J. Const. L. & Pub. Pol'y Sidebar* 18 (2022), 103.

the average cost, per side, to litigate a copyright case through trial is $1.4 million.[12] Furthermore, the cost of obtaining licenses for every piece of copyrighted material, even when fair use might apply, can be prohibitive. This economic burden further restricts access to creative sources, disproportionately affecting artists with limited financial means.

As a result, following *Warhol*, creativity could be stifled given that the definition of certain fair use factors can easily change depending on certain court decisions. Additionally, the differences in relevant case law mean that applying one ruling over another can discount a work as copyrighted when it might have been fair use. This inconsistency makes it difficult for artists to take on creative projects which often stems from the inspiration of past artworks. Therefore, by establishing a proper fair use framework, there can be a better balance between the incentive of exclusive ownership rights and the incentive of a fair use safe harbor that also continues to promote creativity.

Conclusion

Ultimately, a standardized fair use test is necessary to bring consistency and clarity to the application of fair use. Establishing a more predictable legal framework for fair use is not only beneficial to artists but can continue to foster creativity. As seen in *Campbell* and *Warhol*, the difference in how fair use factors were weighed makes it unclear whether counting one factor more than others is enough to determine a fair judgment about a copyrighted work. Moreover, especially when secondary creative works stem from past works, the lack of an established fair use framework can stifle creativity in an industry where artists are in a cycle of continuously deriving art from each other. Thus, as current legal uncertainties in these fair use cases could hinder important creative expression, a proper fair use framework is needed to prevent further subjectivity and variability in court decisions.

[12] Amer. Intellectual Prop. L. Assoc'n, Report of the Economic Survey 2023 (2023).

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United States v. Skrmetti: Amendment XIV and Privacy in Healthcare

By Kevin Ying

Kevin Ying is a first-year undergraduate student at the University of California, Santa Barbara. He is currently pursuing a degree in Statistics and Data Science, and minoring in linguistics. After graduation, he plans to become an attorney, specifically in constitutional or intellectual property law.

This paper will analyze the history surrounding legal interpretations of privacy and Amendment XIV by the United States Supreme Court, especially considering its opinion on the status of unenumerated rights in relation to the Due Process and Equal Protections clauses. Furthermore, it will examine the consequential decision of *Dobbs v. Jackson Women's Health Organization* in overturning precedent set by *Roe v. Wade* and *Planned Parenthood v. Casey*, as well as the implications those rulings had on the usage of substantive due process, particularly with respect to a general "right to privacy", as argument for expanding constitutional protections. Specifically, this analysis will focus on the impact of the *Dobbs* decision on the 2024 Supreme Court case *United States v. Skrmetti*, which looks at an alleged violation of the Equal Protections Clause by a Tennessee state senate bill which prohibited access to gender-affirming care for transgender persons under the age of eighteen. Through this and prior Supreme Court cases, this paper looks at the validity of using a *Roe*-style classification under substantive due process in application to gender-affirming care in *Skrmetti*. Lastly, this paper will speculate on the prospective implications new precedent introduced by *Skrmetti* will set for the relationship between the powers of state government and constitutional guarantees of privacy, especially in medical and civil liberty contexts.

Privacy and Amendment XIV

Constitutionally, there is no explicit guarantee of privacy in the United States. However, the Supreme Court has on several occasions argued that the guarantee was implicit under

penumbras of certain amendments in the Bill of Rights. Perhaps the most famous defense of this in the Supreme Court in recent history was in *Griswold v. Connecticut* (1965), the majority opinion—authored by Justice William O. Douglas—of which cited several amendments in the Bill of Rights to argue against a Connecticut statute forbidding the use of contraceptives for married couples.[1] Amendments included the First, which by Douglas's words "protected [privacy] from governmental intrusion", and the Fourth and Fifth, "described in *Boyd v. United States* . . . as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life'".[2] Furthermore, Douglas also cited multiple court cases, including *Mapp v. Ohio* (1961), which saw Amendment IV as creating a "right to privacy, no less important than any other right carefully [and] particularly reserved to the people".[3]

In his concurrence of the court ruling in *Griswold*, Justice Arthur Goldberg argued that, rather than looking to the penumbras of the Bill of Rights, the guarantee of privacy should instead be based in the Due Process Clause of Amendment XIV. In his opinion, Goldberg wrote that "[the Fourteenth Amendment's] concept of liberty protects . . . personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights".[4]

The amendment he discusses, since its ratification in 1868 as a part of three post-Civil War Reconstruction amendments, has invited considerable debate from the Supreme Court and the legal community at large. Section 1 of the amendment specifically, containing the Due Process Clause cited by Justice Goldberg, is remarkably short, summarily stating the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

[1] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[2] *Id., 484.*
[3] *Id.*, 485, citing *Mapp v. Ohio*, 367 U. S. 643 (1961) .
[4] *Id.*, 486 (Goldberg, J., concurring).

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

The vagueness in these statements left many questions as to the magnitude and scope of which this addition to the Constitution may impact the legal system. In turn, there has been particular and persistent disagreement over the legal criteria under which substantive due process may incorporate some candidate right. To define, substantive due process represents the protection of certain fundamental rights from government interference under the Fifth and Fourteenth Amendments; namely, it is to deter against the deprivation of "life, liberty, or property without due process of law".[6] The Fifth Amendment concerns protection against federal actions, and the Fourteenth concerns state actions. In regards to this, there have been two doctrines governing the attitude towards substantive due process each unified by a respective landmark Supreme Court case: *Washington v. Glucksberg* (1997) and *Obergefell v. Hodges* (2015).

Washington v. Glucksberg determined, based on historical precedent from a variety of sources ranging from contemporary state policy to centuries-old "Anglo-American common-law tradition",[7] that legislation leading to the prohibition of physician-assisted suicide was not in violation of the Due Process Clause.[8] In the court's history-based opinion, Chief Justice William Rehnquist cited cases like *Moore v. East Cleveland* (1977) and *Reno v. Flores* (1993) to proclaim a two-feature standard to analyze whether a right should be protected under substantive due process. Namely, the two features are whether (1) the right or liberty is "deeply rooted in [United States] history and tradition", and if (2) there exists a "'careful description' of the asserted

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[5] US Constitution, amend. 14, sec. 1.
[6] Substantive due process contrasts with procedural due process, which protects citizens against arbitrary government infringement of constitutional rights. However, the Fifth and Fourteenth Amendments also hold that substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided" unless that infringement is approved under strict scrutiny. See *Reno v. Flores*, 507 U.S. 292 (1993).
[7] *Washington v. Glucksberg*, 521 U.S. 702 (1997), 711.
[8] *Id.*, 702.

fundamental liberty interest";[9] essentially whether there is a concretely defined "boundary" defining what the Constitution would or would not be guaranteeing. In this, Justice Rehnquist bases the decision of whether some right should be guaranteed under substantive due process almost entirely upon preexisting state statutes.

Contrastingly, the court in *Obergefell v. Hodges*, which stated that the Due Process Clause guaranteed the right to marriage regardless of the couples' sexes, argued that fundamental rights should be considered more holistically—not only through historical precedent, but also through factors surrounding "developments in law and society".[10] Justice Anthony Kennedy, who authored the majority opinion, drew an analogy between same-sex marriage with the evolution of rights for women in opposite-sex marriages. Namely, a centuries-old law also rooted in Anglo-American common-law tradition known as coverture, which disenfranchised women under "a single, male-dominated legal entity",[11] was abandoned as women gained more legal, political and property rights. Paralleling this, Justice Kennedy argued that, as the gay community began gaining more legal and political rights, the law should reconsider its position on same-sex marriage to reflect the social development.[12]

The dynamic between *Obergefell* and *Glucksberg* sets the backdrop for more modern cases regarding how substantive due process is argued. They can be seen as rhetorical synopses for arguers on both sides of the issue. However, in trying to unify each position, nuances of historical precedent, particularly the intricacies of negotiations between state government and the Supreme Court, often fell through the cracks. To truly contextualize prevailing attitudes towards

[9] *Id.*, 703.
[10] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[11] *Id.*, 6.
[12] *Id.*, 6-8.

due process today, it is important to not only look at broad-strokes doctrinal analysis, but also consider how individual cases were reviewed, both before and after *Glucksberg* and *Obergefell*.

Substantive Due Process and Pre-*Dobbs* Abortion Policy

In 1973, the Supreme Court made a landmark ruling in the case *Roe v. Wade*, which held that access to abortion procedures before viability was constitutionally guaranteed under the right to privacy outlined in the Due Process Clause of Amendment XIV.[13] Justice Harry Blackmun wrote in the court opinion that "the Texas statutes [restricting abortion] improperly [invaded] a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy . . . . [rooted] in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause".[14] Blackmun goes on to cite *Griswold v. Connecticut* in determining that the penumbras of the Bill of Rights also guaranteed "personal, marital, familial, and sexual privacy".[15]

In the opinion, Justice Blackmun implicitly challenged the two-feature standard established in *Washington v. Glucksberg*. Throughout the former half of the opinion, Blackmun conducted a thorough examination of the history of abortion policy, ranging from the Persian Empire to contemporary attitudes towards the issue in America. He concedes that historical perspectives on the right to abortion have generally been against its practice. However, he also gives weight to changing social attitudes towards abortion: due to "a trend towards liberalization of abortion statutes [by about one-third of the States] . . . law continued for some time to treat less punitively an abortion procured in early pregnancy".[16] This inclined the court to rule against the Texas statute, citing a "feeling 'that [the] trend [of liberalization] will continue'".[17] Indeed, it

[13] *Roe v. Wade*, 410 U.S. 113 (1973).
[14] *Id.*, 129.
[15] *Id.*
[16] *Id.*, 141.
[17] *Id.*, quoting American Medical Association, *Proceedings of the AMA House of Delegates*, June 1967.

seems that a plurality of the court was persuaded by the argument set out by Justice Kennedy in *Obergefell v. Hodges*, calling for a holistic approach to substantive due process which would allow the court to be directly receptive to societal trends.

Less than two decades following the *Roe* opinion, another court case, *Planned Parenthood v. Casey*, reaffirmed the Supreme Court's decision regarding the role of substantive due process in constitutional law. This case, which amended certain specific policies established in *Roe v. Wade*, declared that, while the Constitution indeed guaranteed a right to abortion, states have a compelling interest in protecting the life of an unborn child, meaning that legislatures can make restrictions on a mother's access to abortion post-viability.[18] In the beginning of the opinion, the court reiterated its commitment towards substantive due process: "it is settled that the due process clause of [Amendment XIV] applies to matters of substantive law as well as to matters of procedure",[19] quoting that "'the guaranties of due process . . . have in this country 'become bulwarks also against arbitrary legislation'"".[20]

While *Planned Parenthood v. Casey*, by many measures, reinforced the precedent set by *Roe v. Wade*, verdant opposition against the "liberal use of substantive due process" to justify certain constitutional protections was evident. In his dissenting opinion, Chief Justice Rehnquist declared his discontent towards the liberal interpretation of substantive due process in a similar way to his stance in *Glucksberg*, arguing that:

> "[In] construing the phrase "liberty" incorporated in the Due Process Clause... [the court has] recognized that its meaning extends beyond freedom from physical restraint...But a reading of these opinions makes clear that they do not endorse any all-encompassing 'right of privacy'.... [The dissent] are now of the view that, in terming this [right to abortion] fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly."[21]

[18] *Planned Parenthood of Southeastern Pa. v. Casey*, 404 U.S. 833 (1992).
[19] *Id.*, 846-847.
[20] *Id.*, 847.
[21] *Id.*, 951.

Therefore, Chief Justice Rehnquist argues, the right to abortion (and indeed all candidate rights to substantive due process) should instead be considered *sui generis*.[22] Clearly, precedent set by previous court cases like *Mapp v. Ohio* was regarded by some to not constitute a sufficient basis for a blanket "unenumerated right to privacy" in the Constitution. Chief Justice Rehnquist would later go on to write the opinion of the court for *Washington v. Glucksberg*, and in doing so cement his position on the importance of judicial restraint with regard to privacy and due process.

Dobbs v. Jackson Women's Health and "Deeply Rooted" Criterion

Chief Justice Rehnquist's grievances on the liberal application of substantive due process seem to have found new advocates in the Supreme Court in recent years. In 2022, the court ruled on the consequential *Dobbs v. Jackson Women's Health Organization*, and through the decision dismantled almost five decades of legal precedent governing federal abortion policy in the United States. Writing the opinion of the court, Justice Samuel Alito echoed the words of Chief Justice Rehnquist in *Washington v. Glucksberg*, iterating that "the Due Process Clause of the Fourteenth Amendment . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in [United States] history and tradition' and 'implicit in the concept of ordered liberty'".[23] He goes on to argue that the right to abortion is not protected under this consideration because legalization of the procedure was not widespread enough until after the latter part of the 20th century; Alito notes that "when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy",[24] and therefore should not be considered "deeply rooted" in American history. He

[22] *Id.*, 952, citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting).
[23] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 5 (2022).
[24] *Id.*

similarly rejected the qualifications of a right to abortion under substantive due process on a second notion, declaring that "abortion is fundamentally different [from other rights that qualify as "implicit in the concept of ordered liberty"], [since] as both *Roe* and *Casey* acknowledged . . . it destroys what those decisions called 'fetal life' and what the law now . . . describes as an 'unborn human being.'"[25] Compounded with the aforementioned lack of immediate *de jure* support for legalization at the outset of the abortion conversation, Alito emphasizes that the liberty was not fundamental nor inherent in American social and jurisprudential tradition.

At the same time, Justice Clarence Thomas, who concurred with the court, criticized *Roe*'s determination that abortion was a fundamental liberty interest, stating that "[respondents had proposed] no fewer than three different interests that supposedly [justify abortion using] the Due Process Clause . . . [but that] 50 years [had] passed since *Roe* and abortion advocates still cannot coherently articulate the right . . . at stake proves . . . [that] the right to abortion is ultimately a policy goal in desperate search of a constitutional justification.'"[26] Justice Alito corroborated this, stating that "*Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of . . . constitutional provisions to which it vaguely pointed."[27]

In rather oscillatory fashion, it seems that the *Dobbs* decision has demonstrated a desire for the current Supreme Court to pursue a doctrine comparable to the one from the Rehnquist court. This could mean that, similar to how Chief Justice Rehnquist rejected many liberal interpretations of substantive due process by emphasizing need for scrutiny towards particular rights, the current court's inclination towards judicial restraint may have considerable implications for how future cases regarding privacy and substantive due process are considered. It is no surprise, then, that the salient argument for Justice Alito in the rest of the *Dobbs* opinion

[25] *Id.*
[26] *Id.*, slip op. at 1 (Thomas, J., concurring).
[27] *Id.*, 44.

was emphasizing the need for the issue of abortion to be "returned to the people and their elected representatives."[28] In *Washington v. Glucksberg*, Chief Justice Rehnquist argued that the Supreme Court should be "reluctant to expand the concept of substantive due process . . . [because it would] place the matter outside the arena of public debate and legislative action."[29] Clearly, Alito shares in similar jurisprudential values as Rehnquist: as Rehnquist was reluctant to expand constitutional protections unilaterally for fear of "irresponsible decisionmaking" when looking at physician-assisted suicide, Alito seems to feel the same about abortion, emphasizing the need for state legislatures to decide for their constituents in lieu of a nationwide decree.

United States v. Skrmetti **and** ***Dobbs*****' Impacts**

In 2024, the United States federal government, through the Department of Justice, intervened on behalf of the petitioner in the court case now referred to as *United States v. Skrmetti*.[30] This lawsuit brought by a plurality of plaintiffs argued that a Tennessee state senate bill that was passed (known as SB1) was unconstitutional on the basis of violating both the Due Process Clause and Equal Protections because of its prohibition on gender-affirming care for individuals under the age of eighteen. Specifically, plaintiffs argued that implementing a wholesale ban on access to the procedure for gender-affirming purposes, which was explicit throughout the bill as a major motivation,[31] infringed upon the "right of a minor's parents to direct the medical care of their children" protected under the Due Process Clause.[32] Furthermore, they contend that the Equal Protections Clause was violated due to disparate treatment based on sex and transgender status. This was initially argued in the District Court for the Middle District

[28] *Id.*, 1.
[29] *Griswold*, 720.
[30] US Department of Justice. Memorandum of Law in Support of United States' Motion to Intervene, Case No. 3:23-cv-00376, filed April 26, 2023. U.S. District Court for the Middle District of Tennessee.
[31] Tennessee General Assembly. Senate Bill 1: An Act Relative to the Medical Care of Minors. 113th General Assembly, 2023.
[32] US District Court for the Middle District of Tennessee. *Memorandum Opinion, L.W. et al. v. Skrmetti et al.*, No. 3:23-cv-00376, filed June 28, 2023.

of Tennessee, and both counts were ruled on in favor of the plaintiffs. The Court of Appeals for the Sixth Circuit, on behalf of the respondent, ruled to reverse both rulings: firstly that SB1 did not violate Amendment XIV protections on substantive due process grounds because access to gender-affirming care was not "deeply rooted" in United States history and tradition, and secondly that Equal Protections did not apply because the ban would treat minors the same regardless of sex, only whether the individual intended the treatment for gender-affirming purposes.[33]

Under this pretense, and with the intervention of the United States government, the plaintiffs appealed this action to the Supreme Court. It is important to note, however, that by intervening under 42 U.S.C. 2000h-2, the government was only permitted intervention on the grounds of a violation of equal protections. As such, the case of substantive due process, while briefly discussed, was not within the scope of the case before the Supreme Court.[34]

Solicitor General Elizabeth Prelogar, representing the United States, in response to a question from Justice Clarence Thomas on the restriction of the prohibition to minors, stated the following: "the State [Tennessee] so far has not banned this care for adults, although I think that the arguments it's making that [the restriction] isn't a sex-based line in the first place would equally apply in that context."[35] Undoubtedly, to supporters of constitutional access to gender-affirming care, that this is a concerning statement. *Dobbs v. Jackson Women's Health Organization*, rather similarly, was also heavily based on a rationale stemming from a lack of qualification for equal protections. Justice Alito, in the *Dobbs* opinion, wrote explicitly that "a State's regulation of abortion is not a sex-based classification and is thus not subject to the

[33] *L.W., et al. v. Skrmetti, et al.* Nos. 23-5600. United States Court of Appeals for the Sixth Circuit. Decided September 28, 2023.
[34] United States. *Petition for a Writ of Certiorari, United States v. Skrmetti*, No. 23-477. Filed November 6, 2023. Supreme Court of the United States.
[35] *United States v. Skrmetti*, No. 23-477. Oral argument, December 4, 2024. Supreme Court of the United States, 7.

heightened scrutiny that applies to such classifications."[36] Coupled with the court's dismissal of *Dobbs*'s due process argument which retreated standard of review requirements for state abortion policies even further, the constitutional protection standards set by *Roe* were eroded from strict or intermediate scrutiny to a simple rational basis test, which the vast majority of legislation is able to pass.[37] Indeed, it seems like the future of constitutionally guaranteed rights to gender-affirming care for minors, and potentially all transgender individuals, rests upon the decision of *United States v. Skrmetti*. If the plaintiffs were unable to convince the court that SB1 did in fact infringe upon Equal Protections, and therefore would not meet the threshold for intermediate scrutiny to be applied to legislation addressing the care (as per General Prelogar's comments on the matter),[38] then there is no case of *stare decisis* or historical precedent that may neatly defend from an extension of the court's ruling to a wider constituency, suggesting a potential restriction of access to gender-affirming care for adults (as General Prelogar expresses would be a legal implication), and may set precedent against the transgender community at large, since transgender identity is not classified under either a suspect nor quasi-suspect classification.[39,40]

***Skrmetti*'s Indefinitive Attitude Towards Due Process**

Despite the dire anticipation for many supporters of transgender rights, especially considering the originalist nature of many justices currently on the Supreme Court, there is certain recourse. Specifically, it centers on the inconclusive judgement on the status of the Due

[36] *Dobbs*, 2.
[37] The overwhelming majority of legislation subject to rational basis passes the standard. Essentially, it requires that any statute subject to the standard must have a legitimate state interest; there must be a "rational connection" between the statute's goals and means. Statutes can even be based on "rational speculation unsupported by evidence", which allows legislation (like SB1 in *Skrmetti*) to pass based on a simple heuristic assessment. See *FCC v. Beach Communications, Inc.* 508 U.S. 307, 315 (1993).
[38] *Skrmetti Oral Argument*, 12.
[39] Cornell Law School. "Quasi-Suspect Classifications: Doctrine and Practice." Legal Information Institute. Accessed April 22, 2025.
[40] Cornell Law School. "Suspect Classification." Legal Information Institute. Accessed April 22, 2025.

Process Clause in application to this case. In *Skrmetti*'s writ of certiorari, little attention was given to substantive due process, as the Sixth Circuit court rather definitively rejected its premise. However, in the footnote that substantive due process was referred to, it states that "[the Middle District Court of Tennessee] held that private petitioners are likely to succeed on their claim that SB1 violates parents' substantive due process right."[41] Because the United States intervened under an alleged violation of equal protection only, the Supreme Court "would not address that separate due-process claim."[42] This means that this omission affords the private petitioners an opportunity to appeal the decision from the Sixth Circuit on grounds of due process violations. This was even noted in an exchange between General Prelogar and Justice Amy Coney Barrett, where the justice comments that, "even if [the Supreme Court] decided that this wasn't a sex-based classification that triggered intermediate scrutiny [and therefore rejects the case on basis of Equal Protections], that would not prevent parents from still asserting the substantive due process right."[43]

Conclusion

United States v. Skrmetti shall mark a critical juncture in the canon of American civil rights, just as cases like *Brown v. Board* and *Roe v. Wade* have. Uniquely though, this opinion, with its wealth of conflicting arguments and revisions of precedent fueling a special significance to Amendment XIV, can serve either as a marker of change away from reliance on historical rulings in favor of *Obergefell*-esque holistic analysis, or a first step towards shrinking the jurisdiction of substantive due process. With a collapse of the precedent set by *Roe*, *Griswold* and *Casey* brought about by *Dobbs*, states will have even more control in regulating healthcare. Perhaps, this represents a return of power to democratic levers of decision making, allowing

[41] *Skrmetti*, *Petition for a Writ of Certiorari,* 12.
[42] *Id.*
[43] *Skrmetti* Oral Argument, 65.

constituents to directly support or oppose legislation that would govern their communities; or, it could be the catalyst for unfettered majoritarianism, leading to the diminishment of minority liberties. The peculiar balance between a need for certain fundamental guarantees and the right for individual constituencies to self-determination is complex and perpetually unsatisfying. Regardless of its outcome, *United States v. Skrmetti* shall stand as a monumental decision directing the future understanding of "privacy" in American jurisprudence.

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Traditions and Transformations: The Intersections Between Early American Traditions and Understanding Civil and Political Right

By Stephanie H. Lee

Stephanie Lee is a third-year student at the University of California, Santa Cruz, majoring in legal studies with a minor in literature. She actively participates in campus organizations such as the Chinese Student Association and Phi Alpha Delta. Currently, she is also conducting a research project for UCSC Pathways to Research.

This paper examines the complex and often contradictory nature of early American traditions—specifically ascriptivism, liberalism, republicanism, and Puritan heritage—and their influence on the trajectory of rights. From the country's founding to the mid-nineteenth century, these four ideologies intersected, shaping landmark cases like *Dred Scott v. Sandford* and the restrictive voting requirements of the time. This research argues that the early American leaders' attempts to establish a framework for protecting rights were simultaneously limited by their own biases and the constraints of federalism, resulting in the marginalization of specific groups and the reinforcement of ascriptive behaviors. Through a critical analysis of historical works and other writings, this paper explores the ways in which these traditions constrained the path dependence of civil and political rights, offering insights for those seeking to understand the history of American democracy and its relevance today. Ultimately, this research demonstrates the importance of understanding the historical development of rights in building a more just society.

Introduction

The institution of slavery in the United States had far-reaching consequences for the country's moral development and the lives of millions of people. Between the early 16th and late 18th centuries, approximately 10 million slaves lived in the United States, where they contributed a staggering 410 billion hours of labor, as estimated by the National Library of

Medicine.[1] This figure not only underscores the immense economic value of enslaved labor in America but also highlights the reality of a system that treated human beings as property, thereby perpetuating a legacy of exploitation and oppression.

This legacy continues to shape American society and politics to this day. Ongoing debates over issues such as voting rights, police reform, and other concerns highlight persistent racial disparities in areas like education and wealth opportunities for all communities of color. The early American republic was characterized by a unique blend of ideological traditions, which influenced the framework for individual rights.[2] However, this framework was not without its limitations, and the constraints of federalism, combined with especially the ascriptive behaviors of early leaders, ultimately shaped a dynamic that both advanced and constrained the development of civil and political rights, particularly for people of color, women and the less wealthy. This paper will explore the turbulent history of civil and political rights in the United States, with a focus on the ways in which early American traditions, with reference to the *Dred Scott* decision, have influenced the struggle for equality and justice in American society.

Ascriptivism

Ascriptivism, which refers to an assignment of status based on individual characteristics such as race, gender, or class, significantly shaped the rights and opportunities available to different groups. The ascriptive ideologies that dominated early American society often manifested in an "us vs. them" dichotomy, where certain groups were deemed "true Americans" and others were relegated as "un-American."[3] This notion of "true Americans" was rooted in the idea that certain people were "chosen" by God, history, or nature to possess superior traits. As a

[1] J. David, Hacker. "From '20. and odd' to 10 Million: The Growth of the Slave Population in the United States." *Slavery & Abolition* vol. 41, no. 4 (2020): accessed March 27, 2025, pmc.ncbi.nlm.nih.gov/articles/PMC7716878/.
[2] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).
[3] Morone, James A. *The Oxford Handbook of American Political Development*. Oxford Academic, 2014.

result, a hierarchy of rights emerged, where those deemed "true Americans" were granted greater privileges and protections, while others were excluded. Skin color in particular was a powerful determinant of one's status. Similarly, religion was also used to draw lines between those who were considered truly American and those who were not. The path dependence created by ascriptive thinking shapes current and future states or actions, as past decisions and institutional arrangements constrained the trajectory of these results. These long-standing structures have had lasting effects on the development of civil and political rights in America.[4]

Ascriptivism has had a profound impact on American society; however, it is only one of four traditions that has influenced the country's history. Liberalism, republicanism, and Puritan heritage have also left their mark.

Liberalism

Liberalism is a political ideology that emphasizes the values of freedom, individualism, and liberty, and is centered around the protection and promotion of individual rights.[5] Rooted in the Enlightenment era, liberalism posits that individuals possess natural rights that exist outside of government. As articulated by thinkers such as John Locke, the primary role of government is to protect and enshrine these natural rights, and the government derives its authority from the consent of the governed and is responsible for safeguarding the rights and freedoms of individuals.[6] In this sense, liberalism seeks to limit the power of government to intervene in personal affairs, while also promoting the values of self.

Puritan Heritage

Puritan heritage reflects a shared emphasis on community values and moral responsibility, rooted in religious beliefs. This ideology underscores a necessity to search for

[4] Melanie Springer, "What is American Political Development (APD)?," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 9, 2025).
[5] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).
[6] Tuckness, Alex. "Locke's Political Philosophy." *The Stanford Encyclopedia of Philosophy* (2024): accessed March 27, 2025, https://plato.stanford.edu/archives/sum2024/entries/locke-political/.

God and a commitment to establishing a community that embodies divine values.[7] Building on this foundation, Puritan heritage is also characterized particularly by a strong sense of exceptionalism, with the community viewing itself as chosen by God to fulfill a unique and divine mission. As Morone notes in *The Oxford Handbook of American Political Development*, specifically in his chapter "*Political Culture: Consensus, Conflict and Culture War*", this sense of superiority can lead to the need to identify "dangerous others," or in other words, those who are seen as threats to the community's values and way of life.[8] In the Puritan tradition, membership in the church was often seen as a prerequisite for participation in government. Puritan heritage was deeply grounded in the belief that the church played a central role in both the general community and politics.

Ascriptivism, compared to Puritan heritage, is a broader ideological concept that also involves forms of exclusion, but rather based on factors like ethnicity, class, or identity, and is not limited to religious beliefs like Puritan heritage. Characterized by a strong sense of moral purpose, Puritan heritage sought to build a just and righteous society, but under a limited definition.

Republicanism

To avoid confusion, it is important to clarify that republican and liberal ideologies referenced in this study are rooted more so in eighteenth- and nineteenth-century political philosophies, rather than the values of the modern Republican and Democratic parties. Republicanism is an ideological perspective focused on civic virtue and the common good. Often misunderstood as being in opposition to liberalism, the two ideologies are actually complementary, with liberalism providing a moral foundation and republicanism offering a

[7] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).
[8] Morone, James A. *The Oxford Handbook of American Political Development*. Oxford Academic, 2014.

framework for applying those principles in a governmental context. Liberalism is often thought of as the first step then, where individuals are granted certain rights and freedoms, and then republicanism comes in as the next step, where those people come together to form a community and apply those principles. While liberalism focuses on individual rights and freedoms, republicanism is more concerned with the role of government and how it can facilitate the pursuit of the public good.[9] Republicanism is about civil participation, where citizens come together to make decisions and shape the direction of their community. The concept of republicanism has evolved over time, and its meaning has been shaped by various historical and cultural contexts.

Civil and Political Rights

From the founding of the nation to the present day, the balance of power between state and federal authorities has significantly shaped the development of civil and political rights, influencing both individual freedoms and democratic participation. Civil rights refer to the fundamental elements necessary for individual freedom, which are often considered inherent or natural rights.[10] These rights are essential for ensuring the dignity, autonomy, and well-being of individuals. Political rights are essential for creating a democratic and participatory system of government, enabling individuals to participate in the governance of their society and ensure they have a say in the decisions that affect their lives while holding those in power accountable. An example of a civil right is the right to free speech, while an example of a political right is the right to run for office.

Federalism, the Four Traditions, and *Dred Scott v. Sandford* (1857)

Federalism refers to a system of government where the same region is governed by two

[9] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).
[10] *Id.*

levels of authority.[11] Typically, a national government oversees broader governance for larger areas, while states and cities handle local issues, and neither level of government is dependent on the other for its power. As philosopher Alexis de Tocqueville observed in *Democracy in America*, the purpose of a federal system is to "combine the advantages that peoples gain from the largeness and the smallness of their territory."[12] In other words, a federal system seeks to blend the benefits of both scale and proximity, ensuring that local interests are represented while also providing the coordination of a unified nation. This division of power created a complicated dynamic however, since the federal government and individual states often had competing interests and priorities.

The relationship between federalism and early American traditions often led to conflicting outcomes. For instance, the framers of the US Constitution created a system that could evolve over time, particularly through Article V, which states that future generations may amend the Constitution.[13] This provision reflects the broader tension between a strong central government and the ability of states to influence national policy through constitutional changes. However, in the *Dred Scott v. Sandford* (1857) decision, the same Constitution was used by the Supreme Court of the United States to deny the legality of black citizenship, perpetuating the institution of slavery and limiting the rights of people of color.[14] This dichotomy reflects the tension between the liberal emphasis on individual rights and the republican focus on the pursuit of public good, which often prioritized the interests of the majority over those of marginalized groups.

A further look into the *Dred Scott* decision exemplifies the degree of how federalism

[11] Melanie Springer, "American Federalism and Ideals at the Founding," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 14, 2025).
[12] De Tocqueville, Alexis. *Democracy in America*. Indianapolis: Liberty Fund, 2010.
[13] National Constitution Center. "Amendment Process: Article V." Accessed March 27, 2025, https://constitutioncenter.org/the-constitution/articles/article-v.
[14] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).

and prevailing ideological traditions constrained the expansion of civil rights. Dred Scott, an enslaved man who sought freedom through the Supreme Court, was denied his appeal by Chief Justice Roger B. Taney. Taney argued that the Constitution did not recognize Black people as citizens of the United States, stating, "the Framers of the Constitution believed that blacks had no rights which the white man was bound to respect," and that "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration."[15] This ruling was shaped by the entrenched belief in state sovereignty, a core tenet of federalism, which allowed states to decide whether or not to uphold the institution of slavery within their borders. By relying on the notion that Black people were excluded from the constitutional framework, Taney reinforced the notion that the federal government lacked authority to challenge the power of states in regulating slavery. The decision not only reflected the racist ideologies of the time but also highlighted how federalism, when interpreted in a way that prioritized state rights over federal intervention, could impede the expansion of civil rights. Taney's ruling underscores the tension between the federal government's limited role in protecting equality and the power of states to preserve discriminatory practices, a conflict that would persist in the nation for decades.

The dissenting opinions of Justices Benjamin Robbins Curtis and John McLean offered a stark contrast to Taney's majority opinion. Curtis criticized Taney for addressing the substance of Scott's claim after determining that the Court lacked jurisdiction, arguing that this was unnecessary and improper. McLean echoed Curtis's concerns, adding that men of African descent could be considered citizens, as they already had the right to vote in certain states. Taney's ruling not only denied Scott's freedom but also declared that slaves were property under the Fifth Amendment, making any law that would deprive a slave owner of that property unconstitutional. The dissenting opinions highlighted the deep divisions within the court and

[15] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).

the country at large, underscoring the contentious nature of the slavery debate still existing today.

The *Dred Scott v. Sandford* decision was a major setback for the abolitionist movement, and it contributed to growing tensions. The language and tone used by Taney in his opinion reinforced the idea that Black people were not considered a part of American society, and this has had a lasting impact on the struggle for civil rights in the United States. Taney's opinion set the tone for societal views of Black Americans as outsiders or inferior and bolstered the widespread acceptance of racial discrimination in social, economic, and political spheres. This mindset contributed to the perpetuation of segregation and disenfranchisement. Modern-day racism, from microaggressions to more overt forms of discrimination, can often be traced back to the ideas and attitudes upheld by figures like Taney.

While being a case that involves both political and civil rights, *Dred Scott v. Sanford* primarily serves as a reminder of the need for continued advocacy in the pursuit of civil rights specifically. In his speech regarding the *Dred Scott* decision, Frederick Douglas, a former enslaved man who had gone on to become a respected author, stated, "in conclusion, let me say, all I ask of the American people is, that they live up to the Constitution, adopt its principles, imbibe its spirit, and enforce its provisions. When this is done, the wounds of my bleeding people will be healed . . ."[16] His use of the phrase "live up to the Constitution" implies that the nation had failed to honor the original intent of the Constitution, especially regarding human rights. By asking Americans to "adopt its principles" and "imbibe its spirit," Douglass emphasizes that true justice and equality go beyond the literal text of the Constitution; they must be enacted with sincerity, compassion, and a full understanding of the rights it was meant to protect. Finally, when Douglass says, "enforce its provisions," he

[16] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).

underscores the need for ongoing action. The American people cannot just passively accept the Constitution but must work to ensure that its principles of freedom and equality are applied to everyone, including Black Americans. This call to action highlights Douglass's belief in the power of the Constitution as a tool for social change—a tool that had yet to be fully utilized for Black liberation.

By examining the ways in which federalism and early American traditions intersected, it becomes clear that the path to civil and political rights in early America was shaped by a multifaceted relationship of competing values and interests as a result of liberalism, ascriptivism, republicanism, and Puritan heritage.

Voting Restrictions in Early America

The federal system of government in early America also significantly affected the political rights of its citizens drastically. An illustration of this is the use of property requirements as a means of restricting voting rights.[17] In early America, only those who owned a certain amount of land were allowed to cast ballots, limiting the right to vote to primarily white men who owned property. This not only disenfranchised many citizens but also perpetuated a system of economic and social inequality.

Furthermore, residency requirements also played a significant role in restricting voting rights. In order to vote, citizens had to reside in a particular place for a certain duration of time, which made it difficult for people who moved frequently or didn't have a fixed residence to participate in the electoral process. In addition to these restrictions, women were also barred from voting due to societal attitudes that viewed them as being too delicate or incapable of making informed decisions. This sexist stereotype perpetuated women's subordination in society.

[17] Melanie Springer, "Inclusion and Exclusion in the 19th Century," (Lecture, LGST 120B: Society and Democracy in American Political Development, University of California, Santa Cruz, January 21, 2025).

As the country continued to grow and evolve, the legacy of ascriptivism persisted, influencing the ways in which rights are allocated and restricted. This ongoing struggle to balance liberties with the demands of federal power and ascriptive ideologies has continued to shape the path dependence of civil and political rights in America, often reinforcing the very inequalities these rights were intended to address.

Fourteenth Amendment

The Fourteenth Amendment of the US Constitution, ratified in 1868, marked a significant turning point in the ongoing struggle to balance rights with the demands of federal power and the four ideologies. In an effort to address the legacy of slavery and the persistent inequalities reinforced by the Supreme Court's decision in *Dred Scott*, among other cases, the Fourteenth Amendment established a new framework for citizenship and equal protection under the law. As stated in Section 1 of the Amendment, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[18] These words, enshrined in the Constitution, represented a profound shift in the country's approach to citizenship and equality.

The phrase "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside" defines birthright citizenship, ensuring that anyone born on U.S. soil or naturalized is automatically granted citizenship, a provision that remains central to modern debates on

[18] Legal Information Institute. "14th Amendment." Accessed March 27, 2025. https://www.law.cornell.edu/constitution/amendmentxiv.

immigration. Furthermore, the clause "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" prevents states from passing discriminatory laws that infringe upon the fundamental rights of citizens, ensuring that states cannot diminish the freedoms guaranteed at the federal level. The Due Process Clause, which states, "nor shall any state deprive any person of life, liberty, or property, without due process of law," ensures that individuals are protected from arbitrary actions by the state and requires that legal procedures be followed fairly and consistently. Finally, the Equal Protection Clause, asserting, "nor deny to any person within its jurisdiction the equal protection of the laws," mandates that no state can deny any person within its jurisdiction the same legal protections as others. The Fourteenth Amendment provided a foundation for dismantling institutionalized racial discrimination by establishing legal principles that guaranteed equal protection and rights.

Conclusion

The particular intersections of republicanism and liberalism in early America created a dynamic that both advanced and constrained civil and political rights, as evident in the *Dred Scott* decision and the restrictive requirements for voting, thus reinforcing ascriptive behaviors. The Puritan emphasis on a morally ordered society, where adherence to strict religious and social codes was paramount, laid the groundwork for a conservative worldview on citizenship and rights, further shaping this dynamic by defining who was considered worthy of citizenship. The federal system of government, while intended to protect individual rights, often allowed states to restrict the rights of marginalized groups. The path created by these ideologies have had long-lasting effects, influencing the ways in which rights are allocated and restricted to this day. Ultimately, the story of the development of early American civil and political rights serves as a reminder that the protection of liberties is an ongoing project, requiring constant effort to

ensure that the promises of freedom and equality are extended to all. By examining the relationship between federalism and the ideological traditions of republicanism, liberalism, Puritan heritage, and ascriptivism in early America, we can better understand the persistent and deeply ingrained challenges that have shaped the course of American history, as well as work toward a future where the rights of all individuals are truly protected and respected.

Education and awareness are critical components of promoting social justice and protecting rights. It is crucial for individuals to understand their own rights and to stand in solidarity with those who are vulnerable or oppressed. Now is the time for us to turn outrage into action, empathy into advocacy, and knowledge into a force for change.

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The International Legality of the Killing of Qasem Soleimani

By Siyona Roychoudhury

Siyona Roychoudhury is a third-year Political Science student at the University of California, Davis. In addition to being one of the editors for the Davis Journal of Legal Studies, she competes for UC Davis' mock trial team and serves as the Vice President of Finance at Davis' chapter of Kappa Kappa Gamma. In the future, she wants to be an attorney specializing in criminal litigation.

This paper examines the legality of the United States' drone strike that killed Iranian Major General Qasem Soleimani under international law. It evaluates the incident through the lens of the United Nations Charter, customary international law, and material sources of law, including principles of sovereignty and precedents from the International Court of Justice. The Trump Administration justified the strike as an act of self-defense, citing Soleimani's alleged involvement in threatening US national security interests. However, this paper questions the validity of this defense, given the lack of evidence for an immediate threat and Soleimani's diplomatic presence in Iraq at the time of the strike. The paper also explores issues of jurisdiction, highlighting the competing claims of Iraq, Iran, and the United States. The analysis also identifies noncompliance with the UN Charter and challenges its enforcement, particularly regarding the ambiguity of treaty language and the power dynamics of the UN Security Council. Ultimately the paper concludes that without further evidence, the drone strike likely constitutes a violation of international law, reflecting broader issues in enforcing international legal standards.

Introduction

Early on the morning of Friday, January 3, 2020, Iranian Major General Qasem Soleimani stepped off a plane at Baghdad International Airport in Iraq.[1] Soleimani was leaving

[1] Michael Crowley, Falih Hassan, and Eric Schmitt, "U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces," The New York Times, January 3, 2020

the airport to meet with the Iraqi Prime Minister when an American M-Q9 Reaper drone fired missiles into his convoy.[2] Soleimani and several Iraqi officials were killed in the drone strike.[3] Reports suggested that this act by the United States was an assassination. Under relevant sources of international law, the United States' actions appeared initially unlawful—though the Trump Administration did attempt to provide legal justification for its actions.[4] The Trump administration claimed that Soleimani was planning attacks on American diplomats and military personnel across the region.[5] This paper will analyze how international law applies to the United States' killing of Qasem Soleimani, with an emphasis on the UN Charter and customary international laws of war. First, I will examine how international treaty, customary, and material sources of law are tied to the drone strike. Second, I will consider the jurisdictional issues that might complicate approaching this case from an international legal standpoint. Third, I will discuss the problem of noncompliance with the UN Charter, as well as the obstacles that accompany enforcing compliance with the treaty.

Background

The conflict between Iran and the United States has existed since the Islamic Revolution in the 1980s, when the Islamic Revolution overthrew the regime of Shah Mohammad Reza Pahlavi, who was an ally of the US government.[6] The uprising was a catalyst for the shift in the relationship between Iran and the United States, and what was once allyship became adversity.[7] Throughout the twenty-first century, tensions between the two states intensified. From 2019 to

[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Dina Yulianti, Hasan Sidik, and Mu'min, 2021, "International Law Review in the Assassination of General Qasem Soleimani," *Indonesian Journal of International Law* vol. 18, no. 4, 571–592.
[7] *Id*.

2020, there were fourteen attacks on U.S. forces carried out by either Iran or militias supported by the Iranian government.[8] The United States, meanwhile, imposed economic sanctions on Iran and supported Iranian anti-government groups. However, none of the actions from the United States were as extreme or confrontational as its drone strike in January of 2020.[9] The killing of an elite military figure from one state, by another state, in the territory of yet another state, had never before been executed in modern history.[10] Furthermore, Qasem Soleimani's name was known, given that he had assembled forces to fight ISIS in Iran and become instrumental in bringing down the extremist group. He had been the second-most powerful person in Iran at the time of his death. Because of these factors, the United States' actions drew attention and scrutiny from around the world. Not only was the drone strike analyzed for the motivations behind it, but also for its lawfulness under international legal standards.[11]

Relevant Sources of Law: Treaty Law

The UN charter is highly relevant to the killing of Qasem Soleimani. The UN Charter has set widely accepted regulations regarding the use of force by states.[12] The Charter, which was drafted with the primary goal of preventing the possibility of a third world war, is a multilateral treaty describing guidelines for maintaining international security and protecting human rights across the globe.[13] In doing so, the Charter centralizes power in the UN Security Council, an

[8] Stefan AG Talmon and Miriam Heipertz, 2020, "The US killing of Iranian General Qasem Soleimani: Of Wrong Trees and Red Herrings, and Why the Killing May Be Lawful After All," *German Practice in International Law*.
[9] Michael Crowley, Falih Hassan, and Eric Schmitt, "U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces," The New York Times, January 3, 2020
[10] *Id.*
[11] *Id.*
[12] Miriam Sapiro, "Iraq: The Shifting Sands of Preemptive Self-Defense," *American Journal of International Law* 97, no. 3 (2003), 599–607, https://doi.org/10.2307/3109845.
[13] George A. Finch, 1945, "The United Nations Charter," *American Journal of International Law* vol. 39, no. 3, 541-546.

organ of the United Nations tasked with determining when there is an international threat and deciding upon the course of action to address it.[14] On paper, the precision, delegation, and obligations of the treaty are quite strong, classifying it as hard law. The United States, as a signatory of the UN Charter, is legally bound by its regulations.[15] Article 2(4) of the Charter prohibits countries from "use of force against the territorial integrity or political independence of any state."[16] Article 51, however, holds an exception to Article 2(4): countries are permitted to exercise their right to self-defense "if an armed attack occurs," until the UN Security Council has taken some action to organize some kind of countermeasure.[17] The ambiguity of this language has resulted in frequent debate over what "self-defense" constitutes, and whether or not an act of preemptive self-defense is valid.[18]

The Trump Administration justified the strike by stating it had been an act of self-defense.[19] In the past, the United States has expressed an interpretation of the UN Charter that views the idea of "imminence" more loosely. For instance, during the presidency of President Barack Obama, the US Department of State thought that even without concrete evidence of where and by what means an attack will occur, that attack can still be considered imminent.[20] This interpretation may be the reason why the Trump Administration thought it

[14] *Id*.
[15] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 35–107.
[16] Miriam Sapiro, 2003, "Iraq: The Shifting Sands of Preemptive Self-Defense," *American Journal of International Law* vol. 97, no. 3, 599–607.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Jean Galbraith, 2020, "U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani," *The American Journal of International Law* vol. 114, no. 2, 313–23.

could lawfully execute the strike on Soleimani.[21] Iran openly disagreed with this interpretation as a signatory of the UN Charter itself, even designating all American combatants as "terrorists" after the airstrike occurred.[22] US officials also stated that they had complied with the UN Charter by properly notifying the United Nations of the strike.[23] However, the defense, particularly regarding notification, is precarious, as the US government failed to explicitly mention imminence when following its obligation to inform the United Nations.[24]

The validity of the United States' self-defense argument overall must also be questioned. Based on existing evidence, there was no attack by Iran occurring in real time when Qasem Soleimani was killed. This also was no interceptive attack, as Soleimani was on a diplomatic trip in Iraq, and there has been no evidence to suggest that his visit served any purpose other than diplomacy. While the UN Charter does permit preemptive attacks in some cases, State A cannot simply attack State B just because it is afraid State B might attack it in the distant future.[25] Additionally, the United States claimed that Soleimani was planning an attack against Americans—in this case, American forces.[26] There would have to be evidence that an attack from Iran—an attack that would have been stopped by killing Soleimani—was imminent.

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[21] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 35–107.
[22] Jean Galbraith, 2020, "U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani," *The American Journal of International Law* vol. 114, no. 2, 313–23.
[23] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 35–107.
[24] Jean Galbraith, 2020, "U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani," *The American Journal of International Law* vol. 114, no. 2, 313–23.
[25] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 35–107.
[26] Michael Crowley, Falih Hassan, and Eric Schmitt, "U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces," The New York Times, January 3, 2020.

Relevant Sources of Law

Customary Law

The circumstances of the drone strike can further be examined through the lens of customary international law. According to this law, self-defense preceding an attack is permissible when the threat is "instant, overwhelming and leaving no choice and means, and leaves no moment for deliberation."[27] In terms of the "instant, overwhelming," and "no moment for deliberation" criteria, there is not sufficient evidence that there was a close, impending attack by Iran upon the United States or its citizens.[28]

However, if the US government was able to present the intelligence that had led them to believe there was an imminent attack, these conditions might be satisfied. To address the "no choice and means" condition is more difficult. Typically, the usage of lethal weapons must come as a result of some necessity; armed action should be used when there is no possible alternative.[29] The United States' decision to kill Soleimani alone begs the question of why the government did not pursue an alternative route, such as targeting Iranian military facilities, supplies, or forces. If there was truly an attack occurring, the United States could have chosen to target the weapons or forces that would have been deployed for the attack in question. Moreover, even if Soleimani was planning the supposed attack upon Americans, there is no method of determining whether or not his death would have actually stopped an attack. Iran's military did

[27] William H. Taft and Todd F. Buchwald, 2003, "Preemption, Iraq, and International Law," *American Journal of International Law* vol. 97, no. 3, 557–63.
[28] Michael Crowley, Falih Hassan, and Eric Schmitt, "U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces," The New York Times, January 3, 2020.
[29] Dina Yulianti, Hasan Sidik, and Mu'min, 2021, "International Law Review in the Assassination of General Qasem Soleimani," *Indonesian Journal of International Law* vol. 18, no. 4, 571–592.

launch several missiles at Iraqi military bases housing US forces just days after the drone strike.[30] However, it is unclear whether these strikes were the part of the attacks Soleimani was supposedly planning or whether they were solely a form of retaliation for his death. If those attacks were indeed the attacks that Soleimani was planning, they would be considered evidence that the US government's decision to carry out the airstrike may have been justified. However, it is unlikely that the intention behind these attacks, as well as when they were planned or by whom, will ever come to light.

Customary law can also be used to defend the actions of the United States. In accordance with the *Caroline* case—a series of letters between Great Britain and the United States creating guidelines for anticipatory self-defense—customary international law allows a state to defend itself against enemy combatants within a certain country if that country has not attempted to put a stop to the aggression.[31] The Obama Administration used the justification established in the *Caroline* doctrine when targeting terrorist operatives across the world.[32] Because the government of Iraq was aware of Soleimani's past attacks on U.S. forces within Iraq, it can be argued that Iraq was either unable or unwilling to stop this aggression.[33] Therefore, the United States could use Iraq's inaction as a basis for its targeting of Soleimani being lawful.[34]

There is some evidence of *opinio juris*, or the perceived legal obligation to follow customary law, in the situation at hand. Typically, *opinio juris* can be difficult to gauge or

[30] Courtney Kube and Doha Madani, "Iran Retaliates for Gen. Soleimani's Killing by Firing Missiles at U.S. Forces in Iraq," NBCNews.com, January 8, 2020.
[31] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 66–70.
[32] *Id.*
[33] *Id.*
[34] *Id.*

measure, as it involves the psychology of adhering to universally known international practices, rather than any objective factor.[35] However, this perceived responsibility to follow customary international law can be seen in the claims made by the United States after the fact. The Trump Administration defended itself by claiming that it was anticipating an attack from Iran and that Soleimani was the mastermind behind it. In this argument, there appears to be some understanding of customary law by the US government and a belief of what should be followed. At least, the US government has interpreted customary law in a sense that justifies the attack. In issuing its statement, the U.S. government explained that this drone strike was self-defense and an attack from Iran was imminent.[36] The rationale in the statement aligns with general international practices, if it was to be believed. The United States' usage of wording in its justification, that parallels customary international law, is evidence of *opinio juris*.

Material Sources

There are several material sources of international law which can be applied to this case. For one, the general principles of law are highly relevant. An Iranian representative expressed outrage at the fact that the United States had violated the principle of sovereign equality for all states. [37] Iraq also condemned the attack, stating that conducting such a military operation on its soil without its government's explicit consent was a violation of its sovereignty, and, therefore, a violation of a fundamental principle of international law.[38] Additionally, precedents set by the

[35] Patrick Dumberry, 2016, "Opinio Juris," in *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge: Cambridge University Press.
[36] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 66–70.
[37] Jean Galbraith, 2020, "U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani," *The American Journal of International Law* vol. 114, no. 2, 317–319, https://www.jstor.org/stable/26910493.
[38] *Id.*

International Court of Justice are relevant and in fact further incriminate the United States' actions. In the case of *The Republic of Nicaragua v. The United States of America* (1986), the International Court of Justice found that it was not admissible "to ascribe to States' legal views which they do not themselves formulate."[39] This means that regardless of what justification outside parties provide for the United States, it is up to the country itself to argue the legality of what it has done. Third parties can consider the United States' actions to be a lawful self-defense against the string of attacks committed by Iran, but the U.S. has not provided this information in its own argument. The status quo is that the use of force is unlawful, and any exceptions must be proven. As the country fighting, the burden of proof is on the United States itself to justify its actions.[40]

Relevant Actors and Issues of Jurisdiction

The three primary actors involved in this case were the United States, Iran, and Iraq. All three are sovereign states, and therefore, all three have original legal personality. However, the United Nations, a non-state actor, was brought into the issue as its role is to maintain international peace, and Iran and the United States are both member states.[41]Moreover, several levels of jurisdictional issues are present in this conflict. Because the attack occurred in Baghdad, on Iraq's land, Iraq could exercise territorial jurisdiction over the situation. However, seeing as an Iranian national and high-ranking military officer was killed, Iran could impose jurisdiction

[39] Stefan AG Talmon and Miriam Heipertz, 2020, "The US killing of Iranian General Qasem Soleimani: Of Wrong Trees and Red Herrings, and Why the Killing May Be Lawful After All," *German Practice in International Law*.
[40] Dina Yulianti, Hasan Sidik, and Mu'min, 2021, "International Law Review in the Assassination of General Qasem Soleimani," *Indonesian Journal of International Law* vol. 18, no. 4, 583, https://doi.org/10.17304/ijil.vol18.4.824. [24] George A. Finch, 1945, "The United Nations Charter," *American Journal of International Law* vol. 39, no. 3, 541-546
[41] Jean Galbraith, 2020, "U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani," *The American Journal of International Law* vol. 114, no. 2, 313–23.

on the basis of nationality. These competing claims could be an issue if either country wanted to prosecute US government officials for the targeted killing.

Issues of Noncompliance

There are clearly signs of noncompliance with international law by the United States. Whether or not the United States was acting in self-interest or made a good faith effort to follow international law remains to be seen. The United States certainly could have been pursuing state interests. Being the commander of Iran's Islamic Revolutionary Guard Corp, Soleimani was instrumental to the strategizing, planning, and execution of his country's military operations.[42] Eliminating him could easily have been a strategic move by the United States to give itself a strategic advantage in its costly ongoing conflict with Iran. While the United States has signed the UN Charter, the ambiguity in the treaty's description of self-defense has created a loophole within the treaty for self-interested countries to exploit. Countries can manipulate the idea of an imminent threat with the purpose of carrying out attacks for their own benefit. In spite of that, there also exists the possibility that the US government's apparent defiance of international law was not in bad faith. Its aforementioned liberal interpretation of the UN Charter could have constituted an unwitting breach of the rules. Perhaps the treaty design, and the fact that different countries often have different understandings of treaty language, led to this apparent noncompliance with the UN Charter. Amending the UN Charter to have more precise guidelines could improve compliance issues, and drive the treaty closer to becoming truly hard law. However, there is no guarantee that powerful countries concerned about sovereignty costs, such

[42] Stephen Jackson, 2023, "An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan," *Penn State Journal of Law and International Affairs* vol. 11, no. 1, 35–36.

as the United States, would ratify or even sign such amendments. Therefore, remedying any compliance issues regarding the UN Charter would be a difficult task.

Issues of Enforcement

There is evidence of enforcement issues in the design of the UN Charter, making it difficult to impose any consequences upon either the United States or Iran. Generally, when it comes to enforcing the UN Charter, states do not care to defend the status quo when their own interests are not directly affected.[43] States typically find difficulty in agreeing on which party is the aggressor and which is the victim, which complicates penalization. There might be confusion regarding which state should face more consequences—the United States for killing Qasem Soleimani or Iran for its continued attacks upon Americans in the Middle East. States also tend to be unwilling to volunteer control of their forces to an international actor, and even when they are, aggressors are not always countries that can be subjugated by such force.[44] The United States, a global superpower, cannot easily be controlled. There also exists the question of which enforcement measures can be implemented to deter the United States from taking such actions in the future. The United States may not adhere to such a sovereignty cost, and being one of the five permanent members of the UN Security Council, can even veto any action the Security Council takes to maintain international security.[45] Consequently, dealing out any punishment would be next to impossible. It is possible other states would refuse to enter into future agreements with the United States as a consequence of its actions, but because of the power and influence of the United States, this also seems unlikely.

[43] Jerzy Ciechanski, 1996, "Enforcement Measures Under Chapter VII of the UN Charter: UN Practice After the Cold War." *International Peacekeeping* vol. 3, no. 4: 83–96.
[44] *Id.*
[45] *Id.*

Conclusion

There are many ways by which international law relates to the killing of Qasem Soleimani. International standards regarding jurisdictional issues apply because of the multiple actors involved in this killing. Based on the defense the United States has provided for its actions, it appears to have violated Article 2(4) of the UN Charter in its drone strike at the Baghdad International Airport. However, if examined from other perspectives, it is possible that the United States could have acted within the bounds of international law—though statements from the U.S. government seem to suggest otherwise. Customary international law can both defend or condemn the United States' actions. In terms of some customary international law regarding self-defense, such as the typical criteria for meeting a self-defense justification, the drone strike seems to be unlawful. In accordance with the *Caroline* doctrine, on the other hand, just cause for the drone strike could be proven. The United States would simply have to bring evidence that Iraq was allowing aggression from Iran and unwilling to put a stop to it, and therefore, the U.S. government had to take matters into its own hands. Material sources of law, such as general principles of law and precedents from past International Court of Justice decisions, seem to condemn the drone strike. Perhaps the United States was attempting to follow the UN Charter in good faith and deviated due to the ambiguity in the treaty language, or perhaps it was acting in self-interest to gain a military advantage against its enemy. Either way, considering that four years have passed since the drone strike and no legal action has been taken against the United States, it is not likely the government will face punishment for its actions. Ultimately, without more evidence to support the justification of Soleimani's killing, it appears to constitute a violation of the law under international legal standards.

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The Reality of Recycling

By Arianna Blandon

Arianna Blandon is a third-year transfer student at University of California, Davis, studying Environmental Policy Analysis and Planning and minoring in Geographic Information System (GIS). Currently, she is the advocacy director for the Campus Center for the Environment in ASUCD and an undergraduate researcher at the Center for Environmental Policy and Behavior. She aspires to be an environmental attorney focusing on environmental justice and health issues.

To curtail plastics' impact on the environment and the climate crisis, we have utilized recycling in our everyday lives and even in advertisements. However, a new lawsuit filed by Attorney Rob Bonta has illuminated the role that plastic-producing petroleum industries, such as ExxonMobil, have played in pushing single-use plastics consumption while misleading the public about the impact of plastics and the "solution" of recycling. This paper examines the upcoming lawsuit filed by California Attorney General Rob Bonta against ExxonMobil. This analysis will dive into both legal and historical aspects, looking into ExxonMobil's history of misleading the public through performative recycling campaigns. In addition, the paper will also examine the environmental and legal implications of these actions over the previous years. The main issues tackled are public nuisance, misleading advertising, and action for equitable relief regarding pollution and destruction of natural resources.

This analysis will also provide a tentative prediction for the case result. This examination predicts that ExxonMobil will be held liable based on the preponderance of evidence, provided through its deception of the public, contribution to the climate crisis, and overall negligence.

Introduction

For decades, ExxonMobil has promoted recycling as the ultimate solution to effectively mitigating the environmental damage of single-use plastics. Yet, Rob Bonta, Attorney General of California (plaintiff), alleges that ExxonMobil played a significant role in deceiving Californians into believing that it is sustainable to continually use single use plastics.[1] The misconception and deception came from the belief that recycling is effective when in reality, the only way to make effective change is through reduced consumption. This has allowed consumers to continue to consume such products without concern for environmental impact, while ExxonMobil can continue production without repercussions. Furthermore, deception has allowed consumers to continue to consume such products without concern for environmental impact; consequently, ExxonMobil can continue production without repercussions.[2] This is a critical issue because ExxonMobil has shifted the blame to consumers and has used deceptive tactics to fight against plastic restrictions and regulations.[3]

The consequences in this case are climate change, environmental laws and policies, how companies interact with their audience, and the lack of transparency. Plastics are a significant factor in pushing the imminent issues of climate change and environmental harm, and cases like this have forced accountability for those who have perpetuated these hazards. This case marks the first time that a U.S. government official is holding a fossil fuel company accountable to this

[1] "Attorney General Bonta Sues ExxonMobil for Deceiving the Public on Recyclability of Plastic Products." *State of California Department of Justice: Attorney General Rob Bonta*, 23 Sept. 2024, oag.ca.gov/news/press-releases/attorney-general-bonta-sues-exxonmobil-deceiving-public-recyclability-plasti cwww.npr.org/2024/09/23/nx-s1-5123619/california-sues-exxonmobil-for-misleading-public-on-plastic-recycl ing.
[2] *Id.*
[3] *Id.*

degree of environmental harm and deception in marketing.[4] The legal claims alleged in this case involve misleading consumers and continuing harmful, aggressive, and false campaigns.[5]

Parties

The Defendant

ExxonMobil is a fossil fuel company that produces petrochemicals that make plastics derived from petroleum gas for example, ethylene, polyethylene, and polypropylene. The case demonstrates the direct relationship between the rapid increase in plastic production globally and the increasing production of these petrochemicals to keep up with demand.[6] This relationship has allowed ExxonMobil to make these chemicals the core of economic profits, and rely on the usage of single-use plastics and production of them to continue this upward trajectory. Their promotion of recycling and its benefits led consumers to believe they could consume plastics without worrying about the detrimental consequences due to the "solution" of recycling.[7]

The Plaintiff

AG Bonta brought this case on behalf of the People as the plaintiff in the San Francisco County Superior Court. His goal is to reportedly hold ExxonMobil accountable for its actions in misleading and deceiving Californian consumers. Bonta also seeks to demonstrate the plastics' harm on California's natural resources through global warming, wildfires and other climate change-related issues. In a long-term sense, they seek to set a precedent and improve regulation

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[4] Borunda, Alejandra, and Michael Copley. "California sues ExxonMobil for Misleading the Public on Plastic Recycling." *National Public Radio (NPR)*, 23 Sept. 2024, www.npr.org/2024/09/23/nx-s1-5123619/california-sues-exxonmobil-for-misleading-public-on-plastic-recycling.
[5] State of California Department of Justice, *Bonta Sues ExxonMobil*, oag.ca.gov/news/press-releases/attorney-general-bonta-sues-exxonmobil-deceiving-public-recyclability-plastic.
[6] Pls. Compl., The People of California v. Exxon Mobil Corp., No. CGG-24-618323 (Cal. Super. Ct. filed Sept. 23, 2024). The People's case has been coordinated with nine other climate change actions, under the caption *Fuel Industry Climate Cases,* Case No. CJC-24-005310
[7] *Id.*

of the petroleum industry, especially as companies like ExxonMobil have lobbied to stop legislation and regulation to avoid liability.[8]

Issue

The case alleges that ExxonMobil's claims are deceptive, considering that California's recycling infrastructure is unable to recycle plastic in the manner that ExxonMobil's claim suggests, leaving 92 percent of plastics coming in untouched.[9] Now the considerable issue is who is going to face the brunt of the damages of single-use plastic use, which are mainly borne by the public. The plaintiff argues this public impact through the positive relation between the microplastic presence in daily human consumption with increased use of single-use plastics produced by industries like the defendant.[10] The main facts for this case are that ExxonMobil had prior knowledge of the environmental impact of plastics and that it is not feasible to have recycling keep up with the consumer demand to prevent any climate impacts.

This issue stretches back to the 1990s when the public began to see an influx in recycling plastic advertisements funded by companies like ExxonMobil. This strategy stemmed from the backlash this industry faced at the time due to the consequences of plastics deteriorating and overfilled landfills. Plastic chemical manufacturers were able to continue production and profitability by promoting the concept of recycling.[11]

Scientific studies have increasingly demonstrated the harmful effects of single-use plastics on both human and environmental health. Armed with this knowledge, AG Bonta

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[8] Borunda and Copley, "California Sues ExxonMobil," *NPR*, www.npr.org/2024/09/23/nx-s1-5123619/california-sues-exxonmobil-for-misleading-public-on-plastic-recycling.
[9] State of California Department of Justice, *Bonta Sues ExxonMobil*, oag.ca.gov/news/press-releases/attorney-general-bonta-sues-exxonmobil-deceiving-public-recyclability-plastic.
[10] *The People of California v. Exxon Mobil Corp.*, No. #:##-cv-#### (Cal. Super. Ct. filed Sept. 23, 2024).
[11] Sullivan, Laura. "How Big Oil Misled The Public Into Believing Plastic Would Be Recycled." *National Public Radio (NPR)*, 11 Sept. 2020.

launched an investigation into fossil fuel and petrochemical industries like ExxonMobil that have played a role in the plastic pollution crisis in April 2022.[12] AG Bonta began the investigation, stating, "Enough is enough. For more than half a century, the plastics industry has engaged in an aggressive campaign to deceive the public, perpetuating a myth that recycling can solve the plastics crisis."[13]

Even in the 1970s, internal research from ExxonMobil departments revealed, ". . . that recycling was 'infeasible' and that there was 'serious doubt' that plastic recycling 'can ever be made viable on an economic basis'"[14]. Bonta emphasizes that, ". . . despite the industry's decades-long recycling campaign, the vast majority of plastic products, by design, cannot be recycled and the US plastic recycling rate has never broken 9 percent."[15] The investigation sought to determine if these industries had violated California laws through their aggressive campaigning, deceptive advertising strategies, or impacting community members through the production of petrochemicals through a half-century work from the industry. This investigation made way for the current lawsuit to begin. AG Bonta found that ExxonMobil had violated multiple California legislations and precedents through internal documents not previously made available to the public.[16]

[12] "Attorney General Bonta Announces Investigation into Fossil Fuel and Petrochemical Industries for Role in Causing Global Plastics Pollution Crisis" State of California Department of Justice: Attorney General Rob Bonta, 28 Apr. 2022, https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-investigation-fossil-fuel-and-petrochemical.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] The People of California v. Exxon Mobil Corp., No. CGG-24-618323 (Cal. Super. Ct. filed Sept. 23, 2024).

Relevant Laws

The plaintiff's complaint alleges six causes of action. The People allege that ExxonMobil's misleading environmental marketing and advertising has led to the violation of public nuisance, water quality, and unfair competition and false advertising laws. Ultimately, the People seek action for Relief for Pollution, Impairment and Destruction of Natural Resources.[17]

Public Nuisance

Public nuisance, in this case, serves to address: "Unreasonable, substantial, interference with the interest of the community or the rights of the public."[18] The plaintiff cites Civil Code § 3479, 3480, and 3494 for the claim of public nuisances that fall under the enforcement of the Attorney General. Civil Code § 3479 defines nuisance as "anything which is injurious to health, including, but not limited to . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . ."[19] In Civil Code § 3480, *public* nuisance is further defined as anything that "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[20] To satisfy the public nuisance claim, the plaintiff refers to the defendant's actions in producing the plastic polymers, which serves as the building block for the creation of plastic products. Hence, increased production and promotion of single-use plastics have caused more imminent plastic pollution, which leads to increased harm to wildlife, natural

[17] *Id.*
[18] ESP 161 Lecture Sources of the Law. Professor Winsor, University of California, Davis.
[19] *The People of California v. Exxon Mobil Corp.*, No.CGG-24-618323 (Cal. Super. Ct. filed Sept. 23, 2024).
[20] *Id.*

resources, and communities. Plastic has created these disturbances in many ways. This included groundwater, waterway and beach contamination, which impacts the public's access to clean water and comfort in their own communities as well as ability to utilize the area for recreation. The plaintiff alleges that the public does not consent to the defendant's actions (not transparent about their motives and the consequences). The plaintiff is now burdened with the extensive resources and costs needed to mitigate and alleviate the damage caused by plastics.

Action for Equitable Relief

In this cause of action, the plaintiff relies on Government Code § 12607, which provides equitable relief for, "pollution, impairment, and destruction of natural Resources".[21] This code has been used by the Attorney General to exercise authority over environmental protection issues. Government Code § 12607 origins stem from the nuisance action case, *People v. New Penn Mines*, involving toxic mine waste discharged into Mokelumne River, in which the court decided that the Attorney General would not be able to independently pursue a civil action to prevent water pollution without following the Dickey Act, which established the State Water Pollution Control Board and nine regional Water Pollution Control Boards in California.[22] This ultimately prompted California's Legislature to enact Government Code § 12000-612, which included 12607 and specifically states that, "The Attorney General may maintain an action for equitable relief in the name of The People of the State of California against any person for the protection of the natural resources of the state from pollution, impairment, or destruction".[23] Natural resources is defined under Government Code Sect. 12605 as including: "'land, water,

[21] *Id.*
[22] James P. Wagoner, Environmental Protection in California: Court Action Powers of State and Local Government Attorneys, 14 Santa Clara Lawyer 296 (1974).
[23] *Id.*

air, minerals, vegetation, wildlife, silence, historic or aesthetic sites . . .' and any resource that contributes '. . . to the health, safety, welfare, or enjoyment of a substantial number of persons'".[24] The plaintiff alleges that the defendant has engaged in environmental degradation in forms of pollution, and destruction of natural resources due to their entire involvement (promoting, marketing, developing, selling, manufacturing, etc.) in the plastic usage of Californians.[25] The plaintiff alleges that ExxonMobil is directly responsible for the consequences that single-use plastics have had on contamination and pollution of California communities (socially and ecologically). Pointing out that the defendant was aware of the consequences and dangers of plastic due to their studies and documentation, instead they continued to promote plastics. Hence, by concealing this knowledge, the plastic industry has impacted waterways, public parks, wildlife, and public health, with pollution continuing to increase.[26] For that reason, the Attorney General has the authority (based on the previously stated code) to step in and demand legal remediation and treatment from the defendant to aid the environment and harmed communities.

Untrue or Misleading Advertising

Finally, a significant part of the investigation that was uncovered and brought as a cause of action was untrue or misleading advertising under the Business and Professions Code § 17500. Business and Professions Code § 17500 states that it is unlawful for an individual, corporation, or association to "'make or disseminate or cause to be made or disseminated before the public in this state . . . any statement . . . which is untrue or misleading, and which is known,

[24] *The People of California v. Exxon Mobil Corp.*, No. CGG-24-618323 (Cal. Super. Ct. filed Sept. 23, 2024).
[25] *Id.*
[26] *Id.*

or which by the exercise of reasonable care should be known, to be untrue or misleading,' to induce the public to enter into an obligation relating to goods or services".[27] AG Bonta's investigation discovered evidence in the form of documents from various scientists and environmental organizations including studies that were presented to ExxonMobil, demonstrating the harm of plastics and recycling's inability to compensate for the issue. The plaintiff alleges that the defendant was not transparent and honest about the consequences of plastic products they continued to market and spread misinformation about recycling and single-use plastics.[28] Some of the other claims the defendant made include: creating and marketing a plastics recycling infrastructure knowing it was inadequate to address the volume of plastic produced, claiming "advanced recycling" was breakthrough technology, single-use plastic was beneficial for the environment, and not arguing that there were no hazards associated with plastics.[29] A notable part of the cause of action is that the Business and Professions Code § 17500 has been utilized in a previous case of *People v. Enso Plastics, LLC; AquaMantra, INC*.; *Balance Water*.[30] In this case, then Attorney General, Kamala Harris, tackled "greenwashing" claims (marketing tactic that promotes false solutions to the climate crisis) by using this similar cause of action and law, and could be used to set a precedent for this case as the court ruled in the Attorney General's favor, thus establishing significant injunctive relief.[31]

[27] Business and Professions Code, § 17500
[28] *The People of California v. Exxon Mobil Corp.*, .No. CGG-24-618323 (Cal. Super. Ct. filed Sept. 23, 2024).
[29] *Id.*
[30] *People of the State of California v. Endo Plastics, LLC*, No.30 -2011-00518091 (Cal. Super. Ct. 2011). https://climate.law.columbia.edu/sites/default/files/content/Enso-Plastic-Settlement.pdf [31]
[31] *Id*.

Evaluation

Considering the comprehensive investigative background work that went into this case and the number of causes of action, it is likely that the court will support the request for a preliminary and permanent injunction. This research began in 2022 and found multiple forms of documentation and evidence from several decades since the 1970s. The plaintiff demonstrates in detail how ExxonMobil lobbied against plastic bans and regulations, formed and integrated themselves into "environmental" coalitions (Alliance to End Plastic Waste, American Chemistry Council) to market that recycling, incineration, and landfills were the solution knowing otherwise.[32] While the causes of action may tackle large and broad jurisdictional scopes when it comes to *all* plastic pollution or *all* environmental harm, the People's evidence is that this could be considered a far-fetched claim. Both statistical and historical evidence has demonstrated the considerable role that ExxonMobil has played in being the top producer of plastic polymers and being behind widespread campaigns and corporations that create plastic products. Logistically, this will settle through financial relief (including fines from violation of the Business and Professions Code) to help with environmental aid programs (clean-up, preventative measures, and infrastructure) for the damages caused by the defendant.[33] While idealistically, one of the solutions would involve releasing public statements from the Defendants regarding their claims and deceptive practices in the past.

Nevertheless, with this case being intersectional across different legal disciplines, I believe that it will set a significant precedent for future litigation on how California (and possibly other states) regulates the plastic industry. This level of investigation will hopefully

[32] The People of California v. Exxon Mobil Corp., No.CGG-24-618323 (Cal. Super. Ct. filed Sept. 23, 2024).
[33] *Id.*

continue to uncover other deceptive practices from institutions that have harmed the environment and consumers.

Conclusion

In the case of *The People of the State of California v. ExxonMobil Corporation.*, Attorney General Bonta seeks to hold ExxonMobil and other associated groups accountable for the role they have played in deceiving the public into continually using single-use plastics while believing that recycling could make a substantial difference. Yet the plastic industry knew decades prior that plastic usage and consumption would have irreversible damage to wildlife and our communities. In this case, the People seek to hold them legally accountable through public nuisance, action for equitable relief for pollution, impairment, and destruction of natural resources, water pollution, unfair competition, misleading environmental marketing, and untrue or misleading advertising. These target the environmental damage via plastic pollution and the marketing/spread of misinformation in recycling that ExxonMobil has contributed to directly. A case like this should be on the minds of more people because it demonstrates that we need to be cautious of the relationship between companies and the environment. We need to be aware that environmental damage is not to be blamed solely on individuals.

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All Roads Lead to Rome: The Doctrine of Discovery's Impact on American Federal Indian Law

By Nicolas Sardo

Nicolas Sardo is a fourth-year American Studies major and Political Science minor at the University of California, Davis. He is a commissioner on the Environmental Policy and Planning Commission of the ACUSD Senate, and a member of the UC Davis Rock Climbing Club. Nicolas plans on attending law school in the Fall of 2026 where he will study environmental and tribal law.

On March 30, 2023, the Vatican's Dicasteries for Culture and Education and for Promoting Integral Human Development released an official joint statement, distancing itself from one of its most infamous contributions to European colonialism. In this joint statement, the Catholic Church expressly denounced (or repudiated) the Doctrine of Discovery, a legal and religious principle that colonial nations have used to justify the conquest of indigenous peoples for hundreds of years. This paper, while critical of the Church's historic support of settler colonialism, is not a moral condemnation or exposé of the Vatican's complicated past and present. Rather, it specifically examines the impact that the Doctrine of Discovery has had on the very foundations of American Federal Indian law and policy, with further discussion on how its repudiation could disrupt centuries of legal precedence.

Introduction

Archaeological evidence suggests that humans have lived on the North American continent for around thirty thousand years.[1] Due to widespread indigenous traditions of recording history in an oral, and sometimes painted, fashion,[2] there exists no written records of the

[1] "The Earliest Americans Arrived in the New World 30,000 Years Ago," News and Events, University of Oxford, July 22, 2020. https://www.ox.ac.uk/news/2020-07-22-earliest-americans-arrived-new-world-30000-years-ago.
[2] "Celebrating Native Cultures through Words: Storytelling and Oral Traditions," Native Knowledge 360°, Smithsonian National Museum of the American Indian, Accessed Apr. 29, 2025, https://americanindian.si.edu/nk360/informational/storytelling-and-oral-traditions.

beginnings of such occupation. When tackling land rights issues between White settlers and Native American tribes, this unwritten timeline, combined with vast differences in understandings of land ownership, proved to be a large gray area. In the early American court system, this gray area most often benefitted White settlers.[3]

While Native American tribes have typically viewed land as a communal resource without private ownership, European countries drew primarily upon the so-called "elements of discovery" in their understanding of land rights.[4] These elements were based on a set of concrete principles, consistently present across legal colonial documents that the leading European nations all held as valid and binding. Given its historic ties to multiple European nations, the United States inherited similar land ownership principles from its origins. As a result, everything from early colonial laws to Supreme Court cases and Congressional Acts, and even the US Constitution, have used some number and variation of the ten elements of discovery,[5] in their approach to colonial-Tribal land disputes. These elements are (1) *first discovery*, (2) *actual possession or occupancy*, (3) *preemption and European title*, (4) *Indian title*, (5) *limitations on tribal sovereign and commercial rights*, (6) *contiguity*, (7) *terra nullius*, (8) *European superiority*, (9) *civilization*, and (10) *conquest*.[6]

All ten elements of discovery are drawn from the direct language of, or often concepts directly inspired by, the Doctrine of Discovery, which is a legal and religious framework brought forth by a series of papal decrees. This doctrinal framework set the stage for the brutal form of

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[3] Miller, Robert J. In *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (University of Nebraska Press), 4.
[4] "Different Views of Land: Native New York." Native Knowledge 360°, Smithsonian National Museum of the American Indian, Accessed April 29, 2025, https://americanindian.si.edu/nk360/manhattan/different-views-land/different-views-land.cshtml.
[5] In each case that an element of discovery is either first defined or emphasized in reference within this paper, it will be italicized, with the corresponding number of the element written beside it (i.e., *conquest* (10)).
[6] Miller, Robert J. Essay. In *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (University of Nebraska Press), 3-4.

settler colonialism that shaped the history of our nation, and created the historical conditions under which the elements of discovery took root in US law. Simply put, the Doctrine of Discovery has had a profound impact on the very foundations of American Federal Indian law and Congressional statutes.

The Doctrine of Discovery's Origins

For at least one hundred years prior to Christopher Columbus's 1492 expedition, the Kingdoms of both Spain and Portugal sought to further colonize lands in the Middle East. As a result, each nation separately vied for papal support, and sole vested authority, in their rivaling conquests. A string of 15th-century papal bulls, essentially official decrees made by the Pope, first supported Portugal's campaign in Africa, then later also supported Spain. Three of these bulls in particular—Dum Diversas, Romanus Pontifex, and Inter Caetera—would become the major doctrinal blueprint for Spain and Portugal's New World conquest. The blueprint became a framework that other European nations would soon follow.

As previously mentioned, many of the elements of discovery are not directly or textually derived from the Doctrine of Discovery itself. Rather, several of the European nations that sought to colonize the Americas had to get creative in the ways they could justify their land acquistions. In this process, a particular country would often re-interpret or infer certain principles from what textual basis the Doctrine did provide. This concept will be discussed further in later sections.

The first bull, Dum Diversas, was issued in June of 1452. In this decree, Pope Nicholas V granted Portugal the ability to perpetually enslave "[Arabs and Muslims] and pagans and any other unbelievers"[7] who lived in the African and Middle Eastern lands that Portuguese expeditions had overtaken. The Vatican believed that it was a Christian nation's duty to

[7] Dum Diversas, June 18, 1452, Pope Nicholas V.

dispossess nonbelievers and Muslims of goods and valuables, primarily through the implementation of slavery. If religious rivals were allowed to amass wealth and strategic global influence, then they posed a direct threat to the expansion and prosperity of Christianity. However, as the Portuguese conquest began to expand beyond the Middle East, notably into Africa, the country sought the Vatican's further support. Thus, around three years later, Pope Nicholas V issued *Romanus Pontifex*, the second papal bull, which further claimed "spiritual lordship"[8] over the world. This decree imbued a Christian dominion over all undiscovered lands and peoples, such as the Americas, that Portugal or Spain may similarly overtake and convert.

The third papal bull, Inter Caetera, was issued in 1493 by Pope Alexander VI. With Spain and Portugal preparing to greatly expand the scope of their colonial campaigns, Inter Caetera ensured that the two nations and their "said heirs and successors lords of them [may rule conquered lands] with full and free power, authority, and jurisdiction of every kind . . . "[9] In fact, this permission was extended to any Christian nation, as long as the lands they seized were not already claimed by another Christian king. Hardly any European nations took this offer up initially, given that they were not as closely linked to the Vatican, or as navally powerful, as Spain or Portugal.

As the Iberian nations continued to struggle with overlapping targets of territorial acquisition, complex diplomatic negotiations laid this issue to rest in 1494 with the signing of the Treaty of Tordesillas. A line was drawn north-to-south in the Atlantic Ocean, 370 leagues west of the Cape Verde islands, entitling Portugal to all uncolonized lands to the east of the demarcation, and leaving Spain everything to the west. Spanish colonists subsequently turned their full attention to the Americas. However, they weren't alone in this conquest for long.

[8] Romanus Pontifex, January 8, 1455, Pope Nicholas V.
[9] "Inter Caetera," May 4, 1493, Pope Alexander VI.

Colonial "Discovery" in North America

Amidst the Anglo-Spanish War of 1585, England began to understand the potential of creating a profitable empire on the North American continent. It could not only provide strategic positioning for naval battles against the formidable Spanish armada, serving as a counter to Spain's growing territory in the Americas, but would also generate money to fuel war efforts. England thus established the Thirteen Colonies and several territories in the West Indies throughout the early 1600s. By the mid-17th century, France had steadily followed suit. In each of these colonial empires, the Doctrine of Discovery was applied in slightly different ways.

Since Spain had arrived in the Americas first, England and France sought to establish legal loopholes that limited the conflict of their mutual colonial interests. Several of the elements of discovery were canonized in this fashion, having been created through interpretations of the Doctrine of Discovery and not necessarily direct textual language. For example, by exploiting a portion of Inter Caetera that barred the colonization of lands "in the *actual possession* of any Christian king or prince,"[10] England reasoned that, as long as its explorers only established colonies on land not already in *actual occupancy* (2) by Spain, there was no violation of papal law[11]. While the standard of occupancy was generally considered to be the establishment of a permanent structure (i.e., ports, fortifications, etc.) or a colonial settlement, Spanish explorers, for example, were known to simply leave small objects or tree engravings to mark discovered territory while passing through.[12] However, it was another related line of legal reasoning that became a staple in the future of European colonialism.

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[10] "Inter Caetera," May 4, 1493, Pope Alexander VI (emphasis added).
[11] Miller, Robert J. Essay. In *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (University of Nebraska Press), 19.
[12] Miller, Robert J. Essay. In *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (University of Nebraska Press), 3, 15.

Terra nullius (7), Latin for "vacant land," allowed European nations to justify the taking of any territory already occupied by Native peoples as long as the colonists saw it as vacant or not truly occupied. Some British colonies, though, as evidenced by legal cases decided upon by localized governing bodies, did use the idea of *terra nullius* to actually preserve Indian lands where they saw fit. For example, the General Assembly of the Massachusetts Colony enacted a law in 1633 stating that "what lands any of the Indians in this jurisdiction have *possessed and improved* . . . they have just right unto . . . "[13] Essentially, if the Native use of the land was seen as legitimate by the colonial government, then such use could not be intruded upon by Massachusetts colonists. In this same law, the Massachusetts Colony granted neighboring tribes full legal relief in English colonial courts in the case that either their hunting or fishing grounds were disturbed. With territorial expansion, however, came the bending and breaking of many similarly enacted laws.

As empires crowded in from all directions, tribes that were not overtaken either moved further into the un-intruded central part of the country, or began diplomatic relations with the nearest European colony. If a tribe's remaining territory was positioned between two colonies, they were *limited in their commercial rights* (5) and pressured into only trading with their "*first discovering*" (1) nation. Some tribes, though, still decided to trade with colonies of differing European affiliation. Additionally, colonies considered quantities of land in *contiguity* (6), or close proximity, to its borders to be a part of its claim. For example, if two colonies had nearby borders, each side would take ownership of the land halfway up to the other's neighboring territorial extent.[14] Contiguous land would then be bisected and respectively claimed without any

[13] *Laws of the Colonial and State Governments : Relating to Indians and Indian Affairs, from 1633 to 1831, Inclusive : with an Appendix Containing the Proceedings of the Congress of the Confederation : and the Laws of Congress, from 1800 to 1830, on the Same Subject* (Washington city: Thompson and Homans), 9 (emphasis added).
[14] *Supra* note 3.

regard for existing tribal occupancy. This principle would cause tension between European powers, whose progression of colonial expansion and trading conflicted. For example, the French and Indian War of 1754 saw French and British colonial troops siding with various tribal nations. Both European nations sought to contest each other's overlapping fur trading routes and land acquisition in the Ohio River valley.

Following England's victory in the war, all of France's territory east of the Mississippi River was ceded to the British crown. This prompted King George II of England to issue the Royal Proclamation of 1763 in order to assume a more organized control over Indian territory in these new lands. The proclamation stated that "the several Nations or Tribes of Indians . . . *who live under Our Protection*, should not be molested or disturbed in the Possession of [unsold Indian lands] reserved to them . . . "[15] This meant that, while the tribes were no longer legal owners of the land, only they could solely occupy and use the area until they decided to sell it. This decree is considered by scholars to be one of the first European recognitions of an *Indian title* (4) to land. Its establishment of a central holding of Indian lands in trust became a key aspect of later American Indian Law.

The sale of Indian land, however, could only be facilitated between either a tribe and its discovering nation, or between the discovering nation and another European country. This became known as a *preemptive right*, or a *European title* (3), to land sales, which severely hampered a colony's ability to negotiate with tribes in a way that was separate from the Crown. Despite colonial dissatisfaction with the Royal Proclamation, both the *preemptive right* (3) and *Indian title* (4) in this form were adopted into US law from the country's inception.

[15] Royal Proclamation of 1763, RSC 1985, App II, No. 1 (1985) (emphasis added).

Early Colonial-Tribal Affairs

Eventually, English colonies would attempt to inherit and use the Crown's discovery right in their own separate capacity. In 1663, the Rhode Island Colony passed an Act stating that no one "shall purchase any lands . . . within this Colony, of or from the native Indians . . . but such only as are allowed to do by the [Colony's governor]."[16] Not only did the Act omit any authoritative reference to the Crown itself, but it made all subsequent fines and penalties resulting from a violation of the Act payable only to the colony itself. Even further, all collected fines were directly utilized for the colony's sole economic benefit. With an increasing sense of autonomy regarding Indian affairs, colonies began to make decisions regarding Indian land rights, opening the doors to direct tribal litigation.

Mohegan Indians v. Connecticut (1705-1773) is considered by many to be the first legal challenge to indigenous land tenure in North America. After siding with English colonies in a successful war against the Pequot tribe, Mohegan Chief Uncas ceded most of his tribe's lands to the Connecticut Colony, while reserving a few hunting grounds. In 1659, Chief Uncas then granted those reserved hunting grounds to Major John Mason and his heirs as "Protector and Guardian In Trust for the whole Moheagan Tribe."[17] Both of these land concessions were granted by the Mohegan tribe in an attempt to further ally with, and gain protection from, the English colonies. In 1660, Major Mason transferred this land to the Connecticut colony without the permission or knowledge of the Mohegans. Legal trouble arose, however, when Connecticut incorporated the disputed Mohegan territory into its boundaries. Although Major Mason had

[16] *Laws of the colonial and state governments: relating to Indians and Indian affairs, from 1633 to 1831, inclusive: with an appendix containing the proceedings of the Congress of the Confederation: and the laws of Congress, from 1800 to 1830, on the same subject* (Washington city: Thompson and Homans), 35.
[17] *Case of the Appellants [Mohegan]* (cir. 1751), Treasury Solicitor Records, Public Record Office (Chancery Lane), London, England, 11/1006.

petitioned that the colony leave reserved lands for exclusive tribal use, which a 1681 treaty seemed to reaffirm, Connecticut began selling this land to colonists in 1687.

In 1704, the Attorney General of England formed a council of Massachusetts authorities tasked with settling the *Mohegan* case. Importantly, the council was granted full autonomy in its decision making, with no revision by the Crown necessary. A 1705 ruling in favor of the Mohegan tribe stated that "the said Indians [had been] unjustly dispossessed."[18] However, decades of appeal to various higher English courts saw the decision's reversal in 1773, with no written opinion provided. Interpretations of this decision's significance have remained mixed. On one hand, certain scholars argue that this case further bolstered the *Indian right* (4) to land use and ideas of Native sovereignty. Others reason that a significant furthering of an Indian title was not truly realized until further down the line. Either way, concerns were now raised over how well colonies were equipped to autonomously deal with tribal affairs.

In 1776, America would gain its independence from Great Britain, setting the stage for each state to form its own constitution. With issues such as the *Mohegan* case in mind, states began to almost immediately disallow the purchase or acquisition of Indian land by any private party. This was in order to achieve a more clear-cut control of tribal affairs than the states' colonial predecessors. For example, Virginia's constitution proclaims that "no purchases of lands shall be made of the Indian natives, but on behalf of the public, by the authority of the [state government]."[19] Georgia and Tennessee would follow suit in their constitutions, embedding a *preemptive right* (3) of the state to all purchases and acquisitions of ceded tribal land within its borders. Soon, the chaotic reality of each state taking Indian policy into its own hands proved that the consolidation of power on a federal level was sorely needed. However, in order to

[18] Walter, Mark D., *Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America* (Osgoode Hall Law Journal), 806.
[19] Virginia Constitution, pg. 3819.

consolidate power, the United States had to first form a federal government. Thus, in 1781, the Articles of Confederation were written, and a far more centralized approach to Indian affairs arose. Eventually, the Articles of Confederation would be largely recognized as a failure. Under this system, the government lacked the ability to tax its citizens and regulate commerce, relying on states to voluntarily provide money and troops. The US was effectively rendered bankrupt, and sought a change in government.

In 1788, the modern Constitution of the United States was ratified, fixing these inadequacies. Not only did the Constitution create both the Legislative and Executive branches, but Articles I and IV further granted the government sole authority in Indian affairs and land rights. Article 1, § 8, cl. 3 (better known as the Commerce Clause) states that Congress shall "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[20] This section is significant in two ways. First, Congress now became the only federal entity allowed to engage in commerce with Indian nations. Second, Indian tribes were now officially separate entities from both foreign nations and states, which will become of greater importance further on. Article I, § 10 additionally prohibits states from engaging in treaties with Native tribes, ensuring that Congress has exclusive jurisdiction in Indian affairs.

Article IV, on the other hand, is more significant in what it neglects to explicitly state. In many instances, the exact wording of the US Constitution leaves certain legal areas intentionally vague.[21] This allows future Congresses to apply certain aspects of the law in unpredictable or unprecedented situations, further adding to the elasticity of its powers. In this same vein, Article IV surrenders various state-held rights over to the Federal government, yet makes no mention of how any of these restrictions might apply to Indian nations themselves. While this may seem like

[20] US Constitution. art. I, §8, cl. 3.
[21] Pazzanese, Christina, "Are there holes in the Constitution?"

an oversight on Congress's end, the omission of Indian nations in the Article means that tribal members are not explicitly eligible for Article IV, § 2's entitlement. These include, "all Privileges and Immunities of Citizens in the several States."[22] Thus, the Federal government theoretically reserved more purview in how it governs a tribal nation and its citizens.

With the government's newfound powers and elasticity in mind, the Supreme Court began to hear its first land rights cases regarding Indian territorial grants. While the Constitution had explicitly stripped states of the ability to sign their own treaties, the question still remained as to whether or not states themselves could actually give away ceded tribal territory via land grants to private citizens. Two highly important cases in particular, *Fletcher v. Peck* (1810) and *Meigs v. McClung* (1815), provided early answers, using elements of discovery as direct justification. In both cases, the Court ruled that states did have a legal interest in the tribal lands within their borders. It reasoned that, upon the establishment of colonial charters from the English Crown, the states inherited "the right and *preemption* of soil from the native Indians."[23] As such, states could also transfer these land titles to private individuals even if the Indian land was being occupied, as the lands were still viewed as *terra nullius* (7) or, at the very least, underutilized. These two cases essentially blew the doors wide open in the Court's ability to hear cases involving previous state grants of tribal land, setting the stage for one of American Federal Indian law's most foundational moments.

The Marshall Trilogy

The Marshall Trilogy, named after Supreme Court Chief Justice John Marshall, is a series of three cases considered to be the primary legal foundations of American Indian law. The trilogy consists of *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v.*

[22] US Const. art. VI, §2.
[23] *Fletcher v. Peck*, 10 US 106 (emphasis added).

Georgia (1832). While each of these cases are instrumental to the story of Federal Indian law, it is of great importance to note how much the Marshall Trilogy was influenced and informed by the legal precedence set before it. The following three cases, in combination, cite almost every British colonial charter and tribal land dispute, including the same ones that this paper has previously discussed.

In *Johnson v. M'Intosh* (1823), the Court reviewed the validity of a land grant that the Piankeshaw tribe had given to a Virginia colonist named Thomas Johnson. In 1818, after Johnson had died and left this grant to his heirs, William M'Intosh purchased 11,000 acres of the grant's land from Congress. Johnson's heirs subsequently sued M'Intosh, claiming that their land grant predated M'Intosh's. The Supreme Court decided unanimously that Indians could not actually cede lands to individuals, and therefore M'Intosh's Congressional grant was legally superior to Johnson's invalid claim. Furthermore, Justice Marshall reasoned that a tribe's "power to dispose of [land] at their own will . . . [was nullified, as] *discovery gave exclusive title* to [colonial nations] . . . subject only to the *Indian right* of occupancy."[24] Additionally, Marshall wrote that, "[t]he history of America from its discovery to the present day proves, we think, the universal recognition of these principles."[25] The effects of this case were two-fold. Not only did Marshall's decision cement the idea that Native Americans only possessed a right to occupy land while holding no legal ownership of it, but he clearly drew upon the elements of discovery in his justification and ruling. Justice Marshall would dive further into these principles in the other two cases of this trilogy.

The main dispute in *Cherokee Nation v. Georgia* (1831) revolved around the validity of a set of Georgia laws, which aimed to initiate the seizure and sale of occupied Cherokee land. The

[24] *Johnson & Graham's Lessee v. McIntosh*, 21 US 5743 (emphasis added).
[25] *Id.*, 543.

Cherokee Nation sued the State of Georgia, claiming that the taking of their territory, and its sale to private individuals, would not only annihilate the tribe's ability to function as a society, but that such laws were in violation of federal treaties. The Cherokee Nation also reasoned that it had been granted both sovereignty and federal protection under the aforementioned treaties, and that its people bear no membership to any nation other than its own, therefore elevating its legal status to that of a foreign entity. This would seemingly place Georgia's actions against the tribe outside the scope of a state's jurisdictional powers.

However, the Court ruled that, while there exists no challenge to the idea that a tribal nation is a legal entity definitively separate from States, "[t]he Indian Territory is admitted to compose a part of the United States . . . [i]n all our maps, geographical treatises, histories, and laws . . . [and] in all our intercourse with foreign nations . . . "[26] Instead, the Court ruled that Indian tribes would be better categorized as "domestic dependent nations."[27] As for a definition of this new term, the Justice provided that tribes "occupy a territory to which we assert a title independent of their will . . . [t]heir relation to the United States resembles that of a ward to his guardian."[28] The Court therefore reasoned that it would be acting outside of its own jurisdictional scope, as enumerated in Article III, § 2 of the Constitution, by deciding a case between a State and any party that is not an individual or foreign nation. This left unclear as to exactly where tribes fit in the jurisdictional step-ladder of the US legal system, instead classifying tribes as a definitely legal "other." This classification harkens back to Doctrine of Discovery style reasoning found in earlier texts like the Royal Proclamation of 1762. This is most evident in the way both *Cherokee Nation* and the Royal Proclamation view tribes as subservient dependents, subject to both the protection and rule of a paternal, colonial force.

[26] *Cherokee Nation v. Georgia*, 30 US 1.
[27] *Id.*
[28] *Id.*

In *Worcester v. Georgia* (1832), the Court would more clearly define the legal status of tribes in comparison to States. This case was concerned with a Georgia bill that, under punishment of the law, exclusively regulated and controlled the ability of private citizens to reside in tribal territory within the State's borders. In 1831, Samuel Worcester, a private citizen and missionary who worked closely and amicably with the Cherokee Nation, was arrested for violating this law by entering Cherokee Territory without a state-issued permit. The Court ruled that Georgia's law was unconstitutional in its interference "with the relations established between the United States and the Cherokee Nation, the regulation of which . . . are committed exclusively to the government of the Union."[29] Additionally, the majority opinion stated that "the laws of Georgia can have no force,"[30] in Cherokee territory. This essentially established that tribes were subject only to the Federal government's jurisdiction.

In sum, the Marshall Trilogy greatly redefined the legal status of Indian tribes. In classifying tribes as domestic dependent nations, the Court acknowledged that they are definitively separate from both foreign nations and states. This means that, while tribal nations are legally sovereign in their land occupation and use, they do not own their territory and are still subject to the federal government. However, these cases only explored what this legal status meant when challenged by the action of a state, while the rights that tribes had in regard to the power of the federal government remained ambiguous. Throughout the rest of the 1800s, America's rapid push toward the West Coast would bring this ambiguity to the forefront of its Indian affairs.

[29] *Worcester v. Georgia*, 31 US 515.
[30] *Id.*

Expansion Era Legislation and Manifest Destiny

Although westward expansion had primarily started with the passage of the Northwest Land Ordinance of 1787, a significant movement into the Frontier would not take place until the early 19th Century. This would be brought on by events such as the Louisiana Purchase of 1803 and the Lewis and Clark Expedition from 1804–1806. As the US began its true westward expansion, its hunger for land seemed both insatiable and unstoppable. It acted as a wave of movement and colonization incredibly similar to, and drawing direct inspiration from, the type of conquest enabled by the Doctrine of Discovery. In the government's eyes, the entirety of the Western frontier was *terra nullius* (7), ripe for the taking in its quest for North American dominance and growth, much in the same way that Portugal and Spain had viewed the supposedly undiscovered Americas. Legislative acts from this Expansion Era would accordingly see tribes being stripped of their rights to sovereignty and land occupation.

President Andrew Jackson was an outspoken critic of the Marshall Court, and infamously did not approve of its decision in *Worcester*. Believing that tribes should be removed from American society, he oversaw the passage of the Indian Removal Act of 1830, which sanctioned the "exchange of lands with the Indians . . . [in] their removal west."[31] Over the following two decades, the Indian Removal Act displaced at least sixty thousand Native Americans, from around eighteen tribes, relocating them to Oklahoma and Kansas. This event is known as the Trail of Tears, which resulted in the deaths of thousands of native people. The State of Georgia, in light of its recent defeat in both *Cherokee Nation* and *Worcester*, saw this as an opportunity to address its long standing frustrations with the Cherokees. In 1838, despite legal challenges, the Cherokee Nation would also be removed from its territory.

[31] Superintendence by President over tribes west of Mississippi, 25 US Code § 174 (1830).

Although the relocation of tribes was intended to be permanent, American expansion efforts started to encroach on Indian territory in both Oklahoma and Kansas. By 1850, Congress recognized that there was nowhere left to relocate tribes, passing the Indian Appropriations Act of 1851 in order to find a solution. Claiming it was in the best interest of the American government to ensure the safety of Native people, the act set aside protected plots of tribal land, creating what is essentially a predecessor to the modern reservation system. The later Indian Relocation Act of 1871 further declared that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation."[32] While echoing *Johnson v. M'Intosh*'s classification of Indians as wards of the US government, this differed from the decision in its reclassification of all Native Americans as legal individuals.

This legal reclassification would be further explored by the Dawes Act, or General Allotment Act, of 1887. The Dawes Act broke up reservations into smaller allotments of land to be sold back to tribal members. Given the recognition of Indians as legal individuals, it also provided that "each head of a family [was to own] one-quarter" of an allotment, to be used for "agricultural and grazing purposes."[33] This took emphasis away from the reservation's ownership by the tribe as a whole, as the bill's intent was to promote the ownership of land by a single Indian family. In doing so, the government hoped to instill a sense of "whiteness" and *civilization* (9). If assimilation were to occur on a large enough scale, then the government would not have to be as paternalistic in its approach to Indian affairs, with each tribal member having a greater sense of individual legal responsibility.[34] As the United States ushered in the 20th Century, court cases and congressional acts would shift in scope away from the aforementioned

[32] Future Treaties With Indian Tribes, 25 US Code § 71 (1871).
[33] General Allotment Act, 25 US Code §9 (1887).
[34] *Id.*

back-and-forth efforts to both remove and re-home tribes, instead focusing on how to further regulate and exploit labor and resources on these newly created reservations.

Notable Cases of the Last Century

Over the last one hundred years of legal history, the American court system has aimed to address an increasingly different set of issues relating to Indian law. This is to be expected, as certain issues, political and otherwise, have become of greater relevance in the eyes of the Federal government. The shift away from historically dominant issues, such as the dispossession of tribal lands, can be attributed to a severe decline in US expansionist policies following the eventual settlement and development of every region of the country. More contemporary attention has been given to topics such as water rights and the use of other natural resources on tribal land.

One example of this would be *Winters v. United States* (1908), which established a more fair positioning of Native reservations in the appropriative water system. In this system, precedence in the ability to divert water from a flowing source is determined by whoever utilized the water source first. In *Winters*, members of the Fort Belknap Reservation in Montana observed that water in the nearby river was being diverted away from the reservation onto non-Indian settlements. The Court ruled that, since an 1888 treaty had secured the tribe's right to agricultural use of the river, there was no need to also separately reserve water rights. Additionally, the Court in *Winters* states that water rights are crucial "in furthering and advancing the *civilization* (9) and improvement of the Indians . . . "[35] Not only does this touch upon the idea that the only point of a reservation is to 'civilize' Native people, but it also affirms that access to water is key in this process in order to promote a more colonial agricultural way of life.

[35] *Winters v United States*, 207 US 564.

There have also been a few instances over the last fifty years in which tribes have sought to revisit old cases. In *United States v. Sioux Nation of Indians* (1980), the Court was tasked in deciding whether or not the Sioux Nation had already received just compensation after the US military forced the tribe to cede its lands in 1876. The Sioux Nation had signed the Treaty of Fort Laramie in 1868, reserving land and hunting grounds in the Black Hills of South Carolina. However, once gold was found in the Black Hills, the US Military took great effort in dispossessing the Sioux of their reservation, eventually culminating in its militaristic invasion at the Battle of Little BigHorn. While the Sioux did win this battle, the remaining tribal members were captured and forced to sign a new treaty ceding their lands under threat of starvation. Decades of legal efforts and petitioning of the forced cession proved relatively unsuccessful, but the Sioux were finally heard by the Supreme Court in 1980. The court ruled that, while Congress did have "paramount power over the property of the Indians,"[36] its power is only properly used when "mak[ing] a good faith effort to give the Indians the full value of the land."[37] Therefore, the Sioux Tribe was entitled to further compensation for the harm it had suffered.

Although *Sioux Nation* was technically a success in terms of its legal challenge, it may not necessarily be described as a true 'victory' in the more triumphant sense of the word. In certain situations, the Court's decision regarding what a tribe may have 'earned' as the result of winning its case is not wanted. For some tribes, getting land back is far more important and valuable than receiving compensation for its monetary value. As with this case, the Sioux Nation refused the compensation money, instead only asking for the return of the Black Hills. The money is still sitting in a compound interest Bureau of Indian Affairs account, and is valued at around $1 billion.

[36] *United States v. Sioux Nation of Indians*, 448 US 371.
[37] *Id.*

Repudiation and Future Impacts

In 2023, the Vatican repudiated the Doctrine of Discovery, essentially denouncing its validity. While this move was a major step in the right direction, the repudiation occurred after five centuries of irreversible damage. This was not the Vatican's first attempt to distance itself from the Doctrine of Discovery. In 1537, around eighty-five years after the issuance of Dum Diversas, Pope Paul III issued Sublimis Deus, a papal bull that stood in defiance of the ongoing massacre and enslavement of indigenous people around the globe. The decree boldly claimed that all who had perpetrated this behavior were satellites of the enemy of the human race.[38]

Sublimis Deus further stated that "the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property."[39] However, by the time the Vatican had issued this bull, several notable North American colonial advancements had already taken place. Columbus had started colonies in the Carribeans, the Aztec empire had fallen at the hands of Cortés, and Canada was being mapped and settled by the French. Sublimis Deus had no effect in either slowing down, or changing the nature of, colonization in America. This begs the question: If Sublimis Deus was not enough to deter the seizure of Indian lands in 1537, what effect could the Vatican's repudiation of the Doctrine of Discovery, almost five-hundred years later, even have? The U.S's history of forced displacement, impoverishment, and, in some cases, outright erasure of tribal nations cannot be undone. Even Justice Marshall, when discussing the treatment of Indigenous peoples at the hands of European colonists, states that "the character and religion of [Native Americans] afforded an apology for considering them as a people over whom the *superior genius of Europe* (8) might claim an ascendency."[40]

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[38] "Sublimis Deus," June 2, 1537, Pope Paul III.
[39] *Id.*
[40] *Johnson & Graham's Lessee v. McIntosh*, 21 US 543 (emphasis added).

It is evident, though, that something much greater than a mere apology is needed. However, broadly sweeping restitution efforts, as a whole, are not common in American law. The only famous example of something similar to a government restitution effort was the reparations given to Japanese-Americans after being released from WWII internment camps. Another, more recent, attempt was made by California in 2024, regarding reparations for its Black residents, but, as of yet, nothing more than an official apology was administered. It is important to note, though, that even in these rare instances of the approval of government reparations, the primary offer is monetary compensation. Reiterating the outcome of *United States v. Sioux Nation of Indians* (1980), some tribes are not interested in money. The return of land that was taken from them is the only suitable form of restitution in their minds.

While the above examples highlight ways in which the American government has tried to provide a fix or compensation for harm it previously caused, none of these cases include a dismantling of language utilizing the elements of discovery. As noted, upon the Vatican's repudiation of the Doctrine, it was rendered invalid in its entirety by the Church. With the very authority behind the elements of discovery now nullified from the source itself, what authority should these principles hold in our legal system? What would dismantling them look like? Australia has provided a great example of how this may be done.

In the 1770s, explorer James Cook declared Australia to be under the British Crown's possession, claiming that it was uninhabited or *terra nullius* (7).[41] For centuries, legal efforts to grant land back to indigenous Australians were largely unsuccessful. However, the country's High Court rendered a landmark decision in *Mabo v. Queensland* (1982) returning ancestral lands back to the indigenous Meriam people. Not only did this case affirm that the idea and application of *terra nullius* has no place in legal decisions, but it also introduced the idea of a

[41] "The Mabo Decision," Parliament of Australia.

native title into Australian law.[42] This native title operates a bit differently than the American concept of an *Indian title* (4), and would better be described by the Mabo Decisions follow up Act. The 1993 Native Title Act, essentially created by the Mabo Decision, provided an entire framework for Aboriginal people to have their native title recognized. This native title allows Aboriginal Australians to play an active role in the negotiation of certain benefits for their communities, and can also be used to advocate for compatible land use agreements between native and non-native people.[43] If the US were to enact more similar laws, it could remove many harmful remnants of the elements of discovery from the framework of its Indian affairs.

Conclusion

In closing, American Federal Indian law is an incredibly vast and historic area of legal study. The field remains extremely convoluted in nature, and, at times, painstakingly nuanced. This is often in contrast to the multitudinous fields of US law that similarly deal with civil rights, the expression of cultural identity, free practice of religion, and legal sovereignty. A large part of its complexity is the result of various court cases and Congressional acts that have attempted to use an unrealistically generalized approach in the governance of not just a singular group of homogenous peoples, but rather a historically and culturally rich mosaic of hundreds of tribal nations. I believe that Justice John Marshall wrote it best in his summation that, "the framers of our Constitution had not the Indian tribes in view when they opened the courts of the union . . ."[44] While legal reform continues to be explored, it has been the primary goal of this paper to emphasize the great importance in understanding how we, as a nation, have arrived in our present legal moment, and why restitution is both necessary and owed.

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[42] *Id.*
[43] Native Title Act, Act No. 110 of 1993.
[44] *Cherokee Nation v. Georgia*, 30 US 1.

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International Law's Constraint on State Behavior

By Jack Wang

Jack Wang is a second-year student at the University of California, Davis, studying political science. He aspires to go to law school and become an attorney after finishing his undergraduate education.

International law refers to rules and doctrines that dictate the conduct of sovereign states with each other. In theory, just like domestic law, international law ought to manage and constrain state behavior on the international stage, boosting cooperation among sovereign states. However, the effectiveness of international law, whether it is international law de facto or merely de jure, constrains state behavior and has been subject to extensive debate. The core skepticism towards the effectiveness of international law focuses on a lack of enforceability. When two or more states enter an international treaty, they are obligated to carry out the clauses in the treaty and violations would frequently result in financial, reputational, and other repercussions. International law is heavily oriented toward a consent-based system, meaning that states voluntarily opt into international treaties through deliberative national processes, such as legislation, executive mandates, or popular referendums.[1] States typically enter binding international agreements when doing so aligns with their perceived national interests. Therefore, when states opt into international treaties, these pre-approved treaties can effectively restrict state behavior.

Throughout the history of international law in the past decades, there appears to be a pattern of states abiding by international laws and treaties, as states voluntarily ratify treaties and

[1] Murphy, Sean. *Murphy's Principles of International Law*. Available from: UC Davis, (3rd Edition). West Academic Publishing, 2018.

modify their behavior accordingly, as suggested by Murphy. We will analyze this pattern in four nations—the United States, the Soviet Union (Russia), Canada, Greece, and Liberia—and two significant treaty laws: the Montreal Protocol and the regulations under the International Monetary Fund (IMF), a UN financial agency in charge of lending money to sovereign states.

The Montreal Protocol was an international treaty addressing the depletion of the Earth's ozone layer, primarily by eliminating the production of consumption of almost a hundred ozone-depleting substances (ODS). Before the ratification of the Montreal Protocol, ODS were broadly used by nations across the globe in fire extinguishers, air conditioners, aerosols, and other widely used elements.[2]

Since scientists discovered that ODS was depleting the ozone layer, the US engaged in the drafting phase of the Montreal Protocol and unanimously ratified it in the Senate.[3] By ratifying the treaty, the United States committed to the legal obligation of reducing ODS production. The United States later ratified the Kigali Amendment to the Montreal Protocol, which aimed to eliminate the use of alternatives to ODS that also pose environmental hazards.[4]

As one of the first initiators of the campaign for the treaty, Canada hosted the Montreal Protocol negotiations.[5] After ratifying the Montreal Protocol, the Canadian parliament established national compliance through legislation, by Ozone-depleting Substances and Halocarbon Alternatives Regulations (also known as ODSHAR) under the Canadian Environmental Protection Act, 1999.[6] The Canadian government internalized the Montreal treaty

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[2] US Department of State. "The Montreal Protocol on Substances That Deplete the Ozone Layer - United States Department of State." *United States Department of State*, 1988,
[3] *Id.*
[4] *Id.*
[5] Government of Canada. "Ozone Layer Depletion: Montreal Protocol - Canada.ca." *Canada.ca*, 2018.
[6] *Id.*

law through legislation. The Environment and Climate Change Data controls the import and manufacture of appliances containing ODS.[7] Canada also ratified the Kigali Amendment.[8]

The Soviet Union, despite its frigid relationship with the US and the West, ratified the Montreal Protocol and actively reduced its production of appliances containing ODS.[9] The successful collaboration between the Soviet Union and the West demonstrated the power of initial commitment and the constraint of international law on states. By opting into the Montreal Protocol, states voluntarily joined the procedures to gradually eliminate the use of ODS in their industries.[10]

Since eliminating ODS requires more reformed and advanced technology of production, some might infer that the transition period toward non-ODS production could cause short-term losses, as the cost of production rises. States did not seem deterred by such concerns: one hundred ninety-seven states signed and ratified the Montreal Protocol, making it the first international treaty to achieve universal ratification by all states across the world.[11] Evidence proves that global production of ODS significantly decreased immediately after the passage of the Montreal Protocol, demonstrating that states have effectively regulated their manufacturing after ratifying the Montreal Protocol.[12]

In the long run, it is estimated that the Montreal Protocol would help avoid global warming by zero point five degrees Celsius; the size of the ozone hole has been consistently

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[7] *Id.*
[8] *Id.*
[9] Whitesides, Greg. "Learning from Success: Lessons in Science and Diplomacy from the Montreal Protocol." *Science & Diplomacy*, 8 Oct. 2020.
[10] *Id.*
[11] U.S. Department of State. "The Montreal Protocol on Substances That Deplete the Ozone Layer - United States Department of State." *United States Department of State*, 1988.
[12] Velders, G. J. M., et al. "The Importance of the Montreal Protocol in Protecting Climate." *Proceedings of the National Academy of Sciences*, vol. 104, no. 12, 8 Mar. 2007, pp. 4814–4819.

shrinking and is expected to return to pre-1980 levels by 2045. States collectively complied with the Montreal Protocol and delivered considerable and positive changes. The Montreal Protocol, attempting to preserve the ozone layer, received universal approval from states across the ideological spectrum. As the theory of compliance from national appliances suggested, states can absorb international treaties through legislation, executive orders, or court procedures.[13]

Since eliminating ODS in household appliances requires major adjustments in a state's industrial system, the Montreal Protocol takes a step-by-step approach, with a more lenient timetable for developing countries to eliminate ODS in their manufacturing. Addressing the capacity disparity among states, the Montreal Protocol established the Multilateral Fund to provide financial and technical assistance to developing countries to prepare for the transition to non-ODS appliances.[14] For example, Liberia supported and ratified the Montreal Protocol, with its legislature passing a law requiring its Environmental Protection Agency to execute the Montreal Protocol and protect the ozone layer.[15] The Montreal Protocol contains countermeasures towards state noncompliance, primarily capacity building measures, warning, and lastly suspensions of certain privileges under the Montreal Protocol.[16]

The theory of initial commitment suggests that, in addition to the effects of independent treaties, states benefit from a stable international legal system as a whole.[17] International law imposes constraints on states and in doing so, it advances the collective interests of all states,

[13] Murphy, Sean. *Murphy's Principles of International Law*. Available from: UC Davis, (3rd Edition). West Academic Publishing, 2018.
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[15] *AN ACT CREATING the ENVIRONMENT PROTECTION AGENCY of the REPUBLIC of LIBERIA*
[16] "Indicative List of Measures That Might Be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol | Ozone Secretariat"
[17] Murphy, Sean. *Murphy's Principles of International Law*. Available from: UC Davis, (3rd Edition). West Academic Publishing, 2018.

exemplified through states across the ideological spectrum coming together to tackle ozone depletion and succeeding—they obeyed the protocol and eliminated the use of ODS in manufacturing, in contrast to the widespread use of it in the early 1980s.

In a binding international treaty, signing parties might include clauses regulating the repercussions of violations of the treaty or compromissory clauses addressing disputes. However, upon ratifying an international treaty, many developing nations may not have the capacity to fulfill their obligations laid out in the treaty.[18] This issue is different from actively disobeying treaties, as other co-signatories will help developing countries with their ability to fulfill their obligations through assisting in economic development, infrastructure, and other areas.[19] The spirit of self-constraint under international law fosters positive cooperation among states, especially to lift up developing states from their internal struggle.

Financially, the international community can provide critical assistance to states in accordance with international law, as the International Monetary Fund (IMF) frequently funds states in developing critical infrastructure to fulfill their legal obligations. In addition to funding, the IMF "provides technical assistance to the borrowing state's finance agencies and central banks of member states as a means of strengthening adherence to IMF obligations and policies".[20] The IMF routinely reviews and monitors the financial and monetary policies of its member states, ensuring fair political practice. While these measures ensure that the IMF lending will be safe and properly utilized, they impose an obligation on the member states to access the IMF's monitoring, improve fiscal responsibility, and keep currency exchange open.[21] States fulfilling

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Council on Foreign Relations. "What Is the IMF?" *Council on Foreign Relations*, 8 Dec. 2023.

the obligation can strengthen their financial stability, modernize their taxation structure, and improve quality of life. Some states (mostly developing) receive critical funding and technical assistance from the IMF to help fulfill their legal obligations under other international treaties, facilitating economic development and infrastructure reform.[22]

Liberia, which has struggled with the Ebola pandemic, political violence, and civil wars, desperately needed a more effective taxation system to support its government. The IMF collaborated with the African Development Bank, the World Bank, and the US Treasury to assist Liberia. The IMF's Revenue Mobilization Thematic Fund assisted the Liberian government not only financially, but through "off-site capacity development missions and effective use of technology".[23] These projects aimed to improve the Liberian government's capacity in auditing by designing and implementing an effective computer system. The IMF also assisted the Liberian government in establishing the legal and institutional framework for the Liberia Revenue Authority.[24] With support from IMF's Revenue Mobilization Trust Fund, the Liberian government developed its own program to implement extensive reform to underpin revenue mobilization, focusing on "establishing a robust organizational structure, strengthening core functions such as audit and taxpayer services, building capacity through training and coaching, and laying the groundwork for the transition to a revenue authority".[25]

Even though the IMF mostly lends to developing states, developed states that agreed and contributed to the initiation of the IMF followed the IMF's founding principles by liberalizing their economies. The Structural Adjustment Programs of the IMF suggest that states should

[22] *Id.*
[23] "IMF Capacity Development - What We Do." *Www.imf.org*
[24] *Id.*
[25] *Id.*

transition to a more outward-oriented economy and integrate with the global market. The IMF's power in capacity building is crucial for developing nations and nations facing daunting financial crises; however, developed countries and major global powers also follow the IMF rules by maintaining an open currency exchange system. The United States, as a key contributor to the IMF, also encouraged free trade, free currency exchange, and government size reduction measures.[26]

Canada is also a member and active voice in the IMF. Having been one of the largest contributors to the IMF's capacity-building programs, Canada has contributed to the IMF's Central America capacity-building programs in Panama, the Dominican Republic, and technical assistance programs in Africa.[27] In addition to monetary contributions, Canada also provided technical assistance to improve the efficiency of IMF programs in developing states, namely in assessing the efforts of combating the COVID-19 pandemic in Caribbean countries.

Since the collapse of the Soviet Union, the Russian Federation has joined the IMF amid its transition toward a market economy.[28] Russia followed the IMF's recommendation and imposed a series of measures aiming toward "privatization, stabilization, and liberalization."[29] The IMF has lent more than twenty billion dollars to Russia, aiming to assist Russia in bringing its economic standard closer to Western liberal democracies.[30]

The behavior of the aforementioned four states demonstrated a clear pattern of compliance with the regulations of the IMF and the spirit of an open-market economy. Despite

[26] Welch, Carol, and Jason Oringer. "Structural Adjustment Programs - FPIF." *Foreign Policy in Focus*, Apr. 1998.
[27] Global Affairs Canada - Affaires mondiales Canada. "Canada and the International Monetary Fund." *GAC*, 2019.
[28] McClintick, David. "How Harvard Lost Russia." *Institutional Investor*, 13 Jan. 2006.
[29] "BBC News | the Economy | Russia: The IMF's Biggest Failure"
[30] *Id.*

the lack of hardline enforcement mechanisms from the IMF, states chose to adhere to the IMF's regulations for their self-interest, obtaining IMF loans to rebuild or develop their economies.

Because international law is a consent-based system, the ability of a state to refuse to join an international treaty raises doubts about the real constraints of international law on state behavior. The theory of selection bias suggests that states only opt into treaties that benefit themselves; thus, despite states appearing to behave in accordance with international law, they are not constrained by it. This is true, especially for global superpowers such as the United States, as the US could utilize its dominance by manipulating international treaties in its favor. Therefore, selection bias could be prominent among powerful states. According to this theory, states might not constantly try to object to international laws. Instead, they would only obey treaties that align with their interest while ignoring those that don't.

Compliance with international treaties can be burdensome in the short run, however states enter these international treaties due to the treaties' long-term benefits by defending and participating in the international legal system.[31] The theory of selection bias argues that states should not always obey international law; instead, they would disobey international law, or at least attempt to disobey without facing serious repercussions. However, some countries, such as Greece, prove that states would comply with international law even if such compliance would not advance the state's best interest.

In addition, defection will cause a loss of credibility and will impose long-term and more severe harm, since it will be more difficult for the state to participate in and benefit from other international treaties. Government officials do not want to be labeled as "liars" or "cheaters",

[31] Murphy, Sean. *Murphy's Principles of International Law*. Available from: UC Davis, (3rd Edition). West Academic Publishing, 2018.

therefore it is more likely for a state to attempt to disobey an international treaty without openly refuting it. However, other states, international organizations, and non-government organizations can levy their power to identify non-compliances, such campaigns are sometimes referred to as a "mobilization of shame".[32] Conflicts with other states regarding the compliance of international law may reflect the incompetence of a government's leaders, which may diminish a leader's credibility among domestic constituencies.[33]

Empirical evidence proves that few states would ignore international law and disregard any consequences. Greece, one of the founding members of the IMF, fell into a severe debt crisis in the aftermath of the Great Recession.[34] Greece pledged to impose austerity measures in exchange for a loan from the IMF. However, the IMF has had varying impacts on Greece; it has successfully prevented Greece's debt crisis from spilling over into other countries in the Eurozone, but it has largely failed to recover Greece's economy as the government deficit and unemployment rates remained, while the GDP dropped by 25 percent.[35] The unprecedented amount of investment by the IMF in Greece not only failed to revitalize the economy, but it also made Greece become a "serial borrower" that could not repay its debt on time—the Greek government fell behind in repaying its debt on time in summer of 2015, but had repaid all private bondholders on time.[36] The IMF has the "preferred creditor status", meaning that states are expected to prioritize their IMF obligations over other lenders. Therefore, it seems that Greece's actions might have violated international law. Although the IMF does not possess sufficient

[32] *Id*.
[33] *Id*.
[34] The Economist. "Still in a Spin." *The Economist*, 17 Apr. 2010.
[35] Congressional Research Service. "- LESSONS from the IMF'S BAILOUT of GREECE." *www.govinfo.gov*, 18 May 2017.
[36] *Id.*

power to directly punish the Greek government for not repaying its debt, Greece will potentially face difficulties negotiating treaties with other countries if it has lost its credibility. Proponents of the IMF's loan to the Greek government believed that it had prevented a major financial disaster in the entire Eurozone, but critics argued that it failed to create a domestic economic improvement or lift the Greek government from financial shortcomings. Regardless of the positive or negative consequences of the IMF's actions in Greece, Greece eventually paid off its IMF debt in 2022, two years before the original deadline, despite the previous failures to repay on time.[37] However, Greece's relationship to the IMF shows how violating international law can impose reputational consequences on the state, causing the state to lose trust from other states in the international community, thus making it harder for the state to benefit from other international treaties.

After negotiations with the IMF and the European Bank, Greece began to raise revenue to pay for its loans through extreme austerity measures, cutting governmental expenses while raising taxes. However, the austerity policies demonstrate that the Greek government was pressured to repay its debt, to maintain trust in the international community.[38] The central argument of the selection bias theory is that states only abide by international law that advances their self-interest. However, Greece's austerity policies under its deficit crisis do not align with its short-term best interests. Greece's compliance with international law refutes the argument of selective bias, in favor of international law's constraint on state behavior.

It is undeniable that international law does not restrict parties as strictly as domestic laws, due to the lack of an authoritative body and proper enforcement mechanisms. Nevertheless, it is

[37] The Associated Press. "Greece Completes Early Repayment of Bailout Loans to IMF." *AP NEWS*, 4 Apr. 2022.
[38] *Id.*

evident that international law does restrain states through soft enforcement mechanisms and capacity building. Through the Montreal Protocol and the IMF, we can see that states behave in accordance with international law if they have ratified and participated in the initiation of the international treaty. However, as some opponents of international law's constraint on state behavior chose to argue, the IMF's regulations of the Greek economy, for example, have elicited unexpected consequences. The Greek government's austerity policies not only failed to improve the Greek national interest, but also damaged it.

In order to fulfill its international legal duty, the Greek government imposed economic policies that violated its economic interests and were widely opposed by the Greek electorate. From Greece, the United States, Canada, Russia, Liberia, and other states throughout modern history, in their compliance with a wide range of international treaty laws and the overwhelming success in these treaty laws, we can conclude that states are, to a considerable extent, constrained by international law.

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Free Speech Coalition, Inc. v. Paxton

By Gaius Ilupeju

Gaius Ilupeju is a student at the University of California, Davis.

In 2023, the Texas Legislature implemented H.B. 1181, a law that imposes a content-based restriction on adult entertainment websites with the aim of protecting minors. The author, State Representative Matt Shaheen, stated, "laws restricting similar content found in books and magazines have been upheld. H.B. 1181 is no different than other websites around the world that require age verification to protect children from harmful materials, such as alcohol or tobacco, let alone adult content."[1] The law requires websites that have one-third or more of content that is harmful to minors to verify the ages of all of their users by requesting state ID. To safeguard the identity of online users, the law prohibits attempts to retain this information.[2] Furthermore, it requires them to include a health warning that states "[p]ornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function."[3] Violators of this statute will be charged a $10,000 fine that becomes $250,000 of the violation involving a minor.[4] This paper will explore the various legal arguments that are being employed by legal advocacy groups to determine the constitutionality of H.B. 1181, proposing that the Supreme Court should adopt strict scrutiny review on the basis of established case law.

Prior to the implementation of the law, a group of plaintiffs, which includes those that could have been financially affected and legal advocacy groups, formed the Free Speech

[1] "U.S. Supreme Court to Review Texas' Age Verification Law" 2024
[2] *Id.*
[3] ACLU. 2024. "Free Speech Coalition, Inc. v. Paxton." https://www.aclu.org/cases/free-speech-coalition-inc-v-paxton.
[4] "U.S. Supreme Court to Review Texas' Age Verification Law" 2024

Coalition and filed a suit in a federal district court. They argued that the statute was burdensome on users and the health warning was an attempt to compel speech. An attempt to compel speech occurs when the government forces an individual or group to support a particular expression. In agreement with their rationale, the district court issued a preliminary injunction utilizing *Reno* v. *ACLU* (1997) and *Ashcroft v. ACLU* (2004), among other cases that affirm free speech protections, to determine that statutes should receive strict scrutiny when they restrict adult speech.[5] This injunction was vacated by the Fifth Circuit Appellate Court. The panel, in a divided ruling, decided that when a statute aims to protect children, the curtailing of the First Amendment rights of adults only has to have some rational basis and does not need to face strict scrutiny.[6]

To arrive at this decision, the Appellate Court argued that *Reno (1997)* and *Ashcroft (2004)* did not provide direction on the determination of whether H.B. 1181 "burdened adult speech." Additionally, it argued that the Texas statute was the digital version of a New York law deemed constitutional by the Supreme Court in the 1960s under *Ginsberg* v. *New York* (1968) that criminalized the sale of pornography to minors.[7] On April 12, 2024, the plaintiffs asked the case to the Supreme Court to rule on whether the Appellate Court erred "in applying rational-basis review, instead of strict scrutiny."[8] Strict scrutiny is a form of judicial review that Courts use to analyze statutes that potentially burden legal rights and require a compelling governmental interest as justification. However, when the Court adopts rational-basis review it takes a differential position to the government, forcing challengers to bear the burden of proof.

[5] Electronic Privacy Information Center. "Free Speech Coalition v. Paxton." https://epic.org/documents/free-speech-coalition-v-paxton/.
[6] ACLU. 2024. "Free Speech Coalition, Inc. v. Paxton." https://www.aclu.org/cases/free-speech-coalition-inc-v-paxton.
[7] Electronic Privacy Information Center. "Free Speech Coalition v. Paxton." https://epic.org/documents/free-speech-coalition-v-paxton/.
[8] ACLU. 2024. "Free Speech Coalition, Inc. v. Paxton." https://www.aclu.org/cases/free-speech-coalition-inc-v-paxton.

The Case definitely raises many questions pertaining to legal precedent, the extent of First Amendment Rights and the broader impacts of similar statutes on society. Texas joined several other states, such as: Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Utah, and Virginia that have implemented similar measures. Firstly, the law could upend prior precedent. In *Reno* and *Ashcroft*, the Supreme Court ruled against federal laws that included online age verification requirements because of the effects that they could have on First Amendment Rights. They could follow this precedent and rule in the favor of the plaintiffs. However, the current Court has recently ruled against cases that were once thought to be predictable due to legal precedent. The new composition of the Court has allowed some of its older members to overturn decisions that they have long been skeptical about. For example, in *Janus* v. AFSCME (2018), they overturned the precedent on compulsory union fees which they had established in *Abood*.

More notoriously, they overturned the *Roe* v. *Wade* precedent in their decision on *Dobbs* v. *Jackson*. It is likely that the same could follow in this case. The social impacts of this case are numerous and wide-ranging. If the Supreme Court upholds the legality of this statute, it could incentivize similar attempts in other states and might even prompt the new Republican majority in Congress to pass a federal law along the same lines. Furthermore, it would adversely affect the revenue streams of the businesses that operate these websites. In addition, other laws could emerge that regulate other online activities with the age-verification provision of this statute. Alternatively, the Supreme Court could also partially repeal aspects of this law which could lead to another broad set of outcomes.

Despite the legitimate health concerns that Texas legislators have about the impact of obscene material on youth mental health, their desire to protect children, the lack of guidance in *Reno* and *Ashcroft* on how to determine whether H.B. 1181 burdens adult speech, the Fifth

Circuit Court of Appeals erred "in applying rational-basis review, instead of strict scrutiny."[9] This advisory brief will explore various elements of this case, drawing from the arguments found in the amicus briefs filed by the Manhattan Institute and the Center for Democracy & Technology to paint a better picture about the arguments utilized by legal groups on both sides of this issue to provide an advisory opinion on how the Supreme Court should rule on the question before it. In their ruling, the Appellate Court incorrectly likened the law to the statute explored by the Supreme Court in *Ginsberg* (1968). This fails because the enforcement mechanisms of such statutes impede on individual privacy in ways that they do not in the real world. Ultimately, the broad range of age-verification methods that can be used by websites, their potential effect on adult speech, and the established precedent (*Reno* and *Ashcroft*) on the matter should discourage the Court from accepting the primary argument of the Appellate Court.[9] Due to the burdens it places on adult speech, a determination has to be made about whether the statute is narrowly tailored.

In *Reno* and *Ashcroft*, the Court held that legislative attempts to protect minors from obscene content must be designed specifically to serve those interests and should be determined through a strict scrutiny review. When it reviewed *Reno*, the Court established that obstructions to the speech of adults were unacceptable when "less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[10] This suggests that it believes that courts should presume statutes that interfere with the ability of adults to access obscene content are invalid because of their "constant potential to be a repressive force in the lives and thoughts of a free people."[11] These prior determinations do not

[9] ACLU. 2024. "Free Speech Coalition, Inc. v. Paxton." https://www.aclu.org/cases/free-speech-coalition-inc-v-paxton.
[10] Reason Foundation. 2024. "Free Speech Coalition, Inc. v. Paxton: Texas law burdens adult access to protected online speech." https://reason.org/amicus-brief/free-speech-coalition-inc-v-paxton-texas-law-burdens-adult-access-to-protected-online-speech/.
[11] *Id.*

align with the Appellate Court's use of *Ginsberg* to justify a revocation of the District Court's injunction and do not support its holding that the case should be rational-basis review.

In *Ginsberg*, the petitioner challenged a New York law after being convicted of selling obscene material to children and attempted to overturn the convictions by arguing that the statute limited the speech of children. The Court "found that rational basis scrutiny applied because kids do not have a constitutionally protected interest in accessing the regulated obscenity."[12] Although the Appellate Court argues that the issues are settled case law because the statute examined in *Ginsberg* had the potential to chill adult speech, this comparison is incongruent with the fact of this case because the Supreme Court did not determine, in *Ginsberg*, what threshold had to met before an age-verification requirement chills "adult' access" and *Ginsberg* focused on the burden of the statute on "kids' speech" which limits the scope of its application to adult speech.[13] This decision greatly differs from the present case where the statute being examined explicitly constrains adult access by requiring all individuals in Texas to verify their age when visiting websites under the jurisdiction of this statute. Furthermore, the Supreme Court established in *Reno* that the Communications Decency Act's attempt to place a burden on adult speech could not be justified by prior holdings such as *Ginsberg* due to the unique restrictions that regulation of online speech entails.[14]

In an amicus brief filed by the Manhattan Institute and several technology scholars written in favor of Texas' age verification requirements, the authors argue that modern age-verification technologies at our disposal can protect minors while preventing the imposition of immense burdens on adult access to adult websites which was a key concern in *Ashcroft*.[15]

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[12] Brief of Electronic Privacy Information Center (EPIC) as Amicus Curiae in Support of Neither Party, Free Speech Coalition v. Paxton, No. 23-1122 (U.S. filed Sept. 23, 2024).
[13] *Id.,* 8.
[14] Brief of Foundation for Individual Rights and Expression as Amicus Curiae in Support of Petitioners at 21, Free Speech Coalition v. Paxton, No. 23-1122 (U.S. filed Sept. 26, 2024).
[15] Brief of Manhattan Institute for Policy Research as Amicus Curiae in Support of Respondents at 5-15, Free Speech Coalition v. Paxton, No. 23-1122 (U.S. filed Nov. 22, 2024).

They note that Zero-knowledge proofs (ZKPs) allow websites to conduct age-verification without exposing personal data and that biometric systems can estimate age without storing sensitive information. According to them, Louisiana's LA Wallet is a third-party vendor that can provide secure verification services to websites. Additionally, the implementation costs that come with the utilization of these modern platforms are minimal compared to much older versions.[16] They also argue that age-verification is already widely used for a vast array of online services used by adults such as banking, sports betting, and alcohol delivery. In Europe, many countries have already taken the step of mandating some of the provisions of the statute at issue such as online age-verification.[17] Lastly, they criticize claims about privacy concerns by issuing a reminder that internet use already requires wrought with extensive data tracking, and age-verification although potentially invasive, is not as bad as parental controls which result in data collection that is susceptible to third-party acquisition and vulnerable to security breaches.[18] Conversely, the Free Speech Coalition position is supported by an amici curiae filed by the Center for Democracy & Technology. This brief indirectly addresses the arguments made by the Manhattan Institute about the efficacy of age-verification technologies in protecting minors and minimizing burdens on adult access. The CDT argues that systems that require government ID upload are weak because they can be circumvented by minors using fake or borrowed IDs.[19] Additionally, those that comply with them could face security breaches, and credit card verification methods are ineffective primarily because minors have access to credit/debit cards. This reduces the effectiveness of this method when it comes to determining the adult-status of a user, and increases the risk of financial data exposure.[20]

[16] *Id.,* 13-15.
[17] *Id.,* 15-17.
[18] *Id.,* 17-19.
[19] Brief of Center for Democracy & Technology et al. as Amici Curiae in Support of Petitioners at 7-13, Free Speech Coalition v. Paxton, No. 23-1122 (U.S. filed Sept. 20, 2024).
[20] *Id.,* 15-19.

Although biometric scanning systems seem impervious to these same failures they are imprecise, susceptible to racial/gender bias, disproportionately exclude young adults, and can be deceived by deep fakes. These methods are all inherently associated with security risks because the data collection requirement will draw hackers to these websites which link user identities to sensitive browsing history.[21] Lastly, not only is the statute's non retention provision broad allowing for varying misuses but these risks have also been demonstrated. For example, a company that offered to provide age-verification services under the statute was already breached "left login credentials exposed online for over a year, 'potentially compromis[ing] the personal information of millions of users, including facial images and driver's licenses.'"[22] Other vendors such as Equifax and Experian have experienced breaches.[23]

Some may argue that although the technologies used to implement the statute may be circumvented by minors, they still reduce access to many kids. This argument aligns with some of the points found in the Manhattan Institute amicus briefs. The authors of the amicus brief argue that although minors could evade age-verification systems through the use of VPNs, this loophole is wide enough for most kids to employ it because "minors are generally prohibited from having a credit card or bank account (in their own names)" and digital ID systems are "resistant to forgery." However, this argument ignores the significant adult populations that would be burdened by such methods such as the minorities and low-income people without IDs, the 5.9 million U.S. households with banking access, disabled people, and undocumented immigrants. In Texas alone, there are 1.6 million undocumented immigrants, many of whom would struggle to get past some of these verification systems.[24]

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[21] *Id.*, 26-27.
[22] *Id.*, 32.
[23] *Id.*
[24] CDT Amicus Brief at 17, Free Speech Coalition.

Conclusion

Fundamentally, age-verification systems burden adult access to the internet. This is evident even without an in depth analysis on the imperfections of these mechanisms. In *Reno*, the Court ruled that laws that impose such burdens "are subject to strict scrutiny" and this case should follow that precedent. Regardless of what age-verification system a website employs, substantial segments of the adult population will experience reduced digital autonomy, and unlike the statute at issue in *Ginsberg*, will face greater security and privacy risks. H.B. 1181 inherently necessitates these possibilities by stipulating that websites only need to use "reasonable age-verification methods" without identifying a method that is impervious to immense security risks or capable of causing mass exclusivity. *Free Speech Coalition* v. *Paxton* must be subjected to strict scrutiny review due to its similarity to other cases within the same legal domain.

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“U.S. Supreme Court to Review Texas’ Age Verification Law.” 2024. TPR Staff

Reimagining Immigration Reform: Why the US Must Rework Its Enforcement Approach

By: Deyab Syed

Deyab Syed is a second-year senior at the University of California, Davis. He is studying International Relations and Economics as a double major. On campus, he leads the New York Times Media Representation Project as part of the Dr. Suad Joseph Lab. He is currently a Human Rights Scholar and researching genocide for the Aggie Scholar Initiative. Deyab aspires to become a human rights attorney focusing on international refugee law.

The United States faces a pressing challenge with undocumented migration and must enact immigration reforms that uphold its values of liberty and justice while balancing economic and security concerns. Current federal policies—particularly Sections 1325 and 1326 of the US Code—disproportionately criminalize undocumented immigrants, exacerbating family separations, economic inefficiencies, and human suffering. Findings from the Department of Justice highlight that undocumented immigrants exhibit lower crime rates than US citizens, challenging misconceptions about their contributions and risks to society. To address these challenges comprehensively, this paper proposes a singular framework that merges state-level accommodations with federal adjustments—such as the New Way Forward Act—to decriminalize unauthorized entry, enhance judicial discretion, and address moral turpitude standards. Under this framework, policies expanding access to driver's licenses, higher education, and health coverage while strengthening labor law enforcement can promote economic mobility and societal inclusion. Recognizing the perspectives of migrants, law enforcement, and the public, this framework fosters humane and sustainable solutions. By balancing compassion with pragmatism, these reforms aim to uphold the nation's immigrant legacy, mitigate the root causes of undocumented migration, and enrich American society.

Introduction

The United States, built on the contributions of immigrants, faces the challenge of undocumented migration. This issue requires policies that reflect the nation's core values of liberty and justice while accounting for both economic and security concerns. The complexity grows when policymakers and officials consider the differing circumstances of undocumented immigrants with and without criminal records, as each group may require distinct legal approaches. Crafting effective immigration policies thus demands a clear understanding of the various stakeholders involved: federal agencies overseeing national security and immigration enforcement, state and local governments responsible for community-level programs, employers concerned with labor and economic implications, advocacy groups championing immigrant rights, and undocumented individuals whose livelihoods are directly affected by legislation. Each of these parties holds a tangible stake in how laws are shaped, ranging from economic costs and societal safety to human rights and community well-being.

Notably, strong evidence from the DOJ indicates that undocumented people, on average, exhibit three times lower levels of criminality than citizens and authorized foreigners, challenging assumptions that stricter enforcement is always warranted.[1] By expanding state-level accommodations, such as granting driver's licenses, offering in-state tuition, or creating localized protections, the US can advance more equitable and compassionate treatment, better integrate undocumented populations, and strengthen communities overall. In the following sections, we will explore how these state-level strategies can be further developed and integrated with federal

[1] Jason P. Robey, Michael T. Light, and Jingying He, "Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas," U.S. Department of Justice, December 2020, https://www.ojp.gov/library/publications/comparing-crime-rates-between-undocumented-immigrants-legal-immigrants-and.

reforms to address undocumented migration in a manner that truly upholds American values while promoting prosperity and security for all.

Policies from the United States' Perspective

The United States has a responsibility to its citizens to ensure safety and security in the land. However, the laws and practices of law enforcement agencies cause undue harm to undocumented migrants and their families. The United States' federal immigration law criminalizes immigrants in several ways, including the 1996 Illegal Immigration Reform and Immigration Responsibility Act, which creates a double punishment for immigrants with criminal records.[2] Sections 1325 and 1326 of the US Code make it a federal crime to enter or reenter the United States without authorization.[3] Specifically, Section 1325 imposes a potential fine as delineated in Title 18 of the U.S. Code and/or a prison sentence of up to six months for an individual's first unlawful entry into the United States. For the second offense, the individual is subject to a potential fine and/or imprisonment for up to two years.[4] Section 1326 criminalizes the act or attempt of reentry into the United States after being denied admission or deported, prescribing harsh penalties for undocumented individuals who were removed for certain criminal convictions under vaguely defined "crimes of moral turpitude."[5] Crimes of moral turpitude include: "any act contrary to justice, honesty, or good morals as well as fraud, vileness, or depravity in the private and social duties that a person owes to his or her fellow citizens or to

[2] "Illegal Immigration Reform and Immigration Responsibility Act," Legal Information Institute, accessed March 25, 2025, https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act.
[3] "Decriminalize Immigration," National Immigrant Justice Center, accessed December 24, 2024, https://immigrantjustice.org/issues/decriminalize-immigration.
[4] "8 U.S. Code § 1325 - Improper Entry by Alien," Legal Information Institute, accessed December 24, 2024, https://www.law.cornell.edu/uscode/text/8/1325.
[5] "8 U.S. Code § 1326 - Reentry of Removed Aliens," Legal Information Institute, accessed December 24, 2024, https://www.law.cornell.edu/uscode/text/8/1326.

society in general, regardless of whether it is a crime."[67] Given the breadth and severity of these measures, it is critical to examine whether existing immigration enforcement practices align with constitutional principles and broader humanitarian values—an analysis that will guide potential reforms aimed at protecting both national interests and the well-being of immigrant communities.

Many undocumented immigrants are unjustly criminalized, especially for nonviolent convictions, and removed to countries with dangerous conditions. A 2009 Human Rights Watch report revealed that 69.7 percent of individuals with undocumented status were deported for nonviolent offenses.[8] More recently, the Cato Institute found that 88.9 percent of convictions of undocumented migrants by ICE were for crimes that had no victims, like DUIs.[9] The National Immigrant Justice Center cites the example of an unnamed client who came to the United States with his parents as a child and lived in the country for twenty years. After a traffic stop, "he was turned over to ICE who then coerced him into signing a voluntary return to Mexico, where he became a victim of cartel violence." This led to deep emotional trauma for his family.[10] He tried to return to safety in the U.S. but was subsequently charged with unlawful entry under 8 U.S.C. § 1325.[11] This pattern of criminalizing undocumented immigrants for nonviolent actions not only exposes them to serious harm but also lays the groundwork for overly punitive legal responses that strain public resources and tear apart families.

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[6] "8 U.S. Code § 1326 - Reentry of Removed Aliens," Legal Information Institute, accessed December 24, 2024, https://www.law.cornell.edu/uscode/text/8/1326.
[7] "Decriminalize Immigration," National Immigrant Justice Center, accessed December 24, 2024, https://immigrantjustice.org/issues/decriminalize-immigration.
[8] Alison Parker and Brian Root, "Forced Apart (By the Numbers)," Human Rights Watch, April 15, 2009, https://www.hrw.org/report/2009/04/15/forced-apart-numbers/non-citizens-deported-mostly-nonviolent-offenses.
[9] Bier, David. "'Criminal Aliens' Commit Mostly Victimless Crimes, Few Violent Crimes." Cato Institute, March 20, 2018. https://www.cato.org/blog/criminal-aliens-commit-mostly-victimless-crimes-few-violent-crimes.
[10] "Decriminalize Immigration," National Immigrant Justice Center, accessed December 24, 2024, https://immigrantjustice.org/issues/decriminalize-immigration.
[11] "Decriminalize Immigration," National Immigrant Justice Center, accessed December 24, 2024, https://immigrantjustice.org/issues/decriminalize-immigration.

Sections 1325 and 1326 of the U.S. Code are harmful and costly to both immigrant communities and US taxpayers. Migration-related offenses are the most prosecuted federal crimes in the country, with the Justice Department claiming that it prosecuted more people for immigration offenses in FY 2019 than in the last twenty-five years.[12] The government also wastes vast resources on federal criminal prosecution of immigration-related offenses. Incarceration costs for improper entry prosecutions alone cost taxpayers more than $7 billion over the last decade, with most of the funds going to private prison companies.[13] Moreover, these harsh penalties increase family separation and exacerbate long-term detention and deportation of individuals who have long-standing familial, economic, and social ties to the United States, many of whom contribute meaningfully to the country through their labor, business, and cultural participation.[14]

To address these serious issues, the National Immigrant Justice Center proposes the "New Way Forward Act" (NFWA) to seriously revise the immigration system within the federal government's control. This law limits the criminal-legal-system-to-deportation pipeline, ends mandatory detention, clarifies the requirements of crimes involving moral turpitude, and restores judicial discretion for all immigration-related cases.[15] Specifically, this law removes the prison sentences that are strictly associated with unauthorized entry into the United States.[16] This allows border security to detain unauthorized persons for processing and still subject them to civil fines,

[12] "Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019," Office of Public Affairs | Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 | United States Department of Justice, October 19, 2019, https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year.
[13] "Decriminalize Immigration," National Immigrant Justice Center, accessed December 24, 2024, https://immigrantjustice.org/issues/decriminalize-immigration.
[14] *Id.*
[15] *Id.*
[16] "8 U.S. Code § 1325 - Improper Entry by Alien," Legal Information Institute, accessed December 24, 2024, https://www.law.cornell.edu/uscode/text/8/1325.

but protects individuals whose only violation of U.S. law is illegal entry. Additionally, this policy amendment removes the overly broad and ill-defined "crime involving moral turpitude" category of removability in order to protect individuals who have not committed aggravated felonies or other similarly serious crimes.[17]

Furthermore, the NWFA restores discretion to immigration judges in all cases to maximize the chance an undocumented individual will be granted relief on the basis of humanitarian purposes.[18] This discretion empowers judges to consider the full context of an individual's life and circumstances—such as the presence of U.S. citizen family members, long-term residency, community ties, economic contributions, or credible fear of persecution in their home country—when deciding whether to issue a removal order. Without this flexibility, judges are often bound by rigid statutory requirements that mandate deportation regardless of a person's rehabilitation, potential for hardship, or lack of serious criminal history. By reinstating judicial discretion, the NWFA ensures that cases can be evaluated holistically and fairly, rather than treated as one-size-fits-all. This policy amendment has no bearing on individuals who have committed serious and violent aggravated felonies, as these individuals should be removed from the country for security concerns.[19] This policy can help create a sustainable and humanitarian immigration prosecution process by removing criminal convictions strictly for unlawful entry—a purely civil violation—that is both fair to the country and the undocumented immigrants.

Policies from the Migrants' Perspective

From the perspective of migrants themselves, the United States must tackle criminal versus non-criminal undocumented migration with a comprehensive approach that prioritizes accommodation rather than antagonization. Sociologists specializing in undocumented

[17] *Id*.
[18] *Id*.
[19] *Id*.

immigrants empirically assert that such individuals with greater access to mainstream social, educational, and economic opportunities are much less likely to engage in criminal behavior or be associated with criminal persons.[20] In fact, a study by the Department of Justice found that undocumented immigrants have "substantially lower crime rates than native-born citizens and legal immigrants across a range of felony offenses," especially in communities in which undocumented immigrants are seen as more acceptable by the native population, based on an analysis of Texas and California crime dynamics.[21]

The first step toward addressing the issue of undocumented status is to promote inclusion and social harmony in order to mitigate criminality within the undocumented population. In fact, many states are already moving ahead with the initiative to adopt more inclusive policies for immigrants. Arizona passed a measure in 2021 that allows undocumented students to pay in-state tuition rates at public universities and community colleges.[22] Virginia enacted a law in 2021 to protect drivers' private information from being used in immigration enforcement cases. Virginia has also extended access to state-issued identification cards with no immigration status criteria.[23] Connecticut extended state-funded Medicaid coverage to pregnant women and children from households with low incomes irrespective of immigration status.[24] Arkansas, Colorado, and New

[20] Jason P. Robey, Michael T. Light, and Jingying He, "Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas," U.S. Department of Justice, December 2020, https://www.ojp.gov/library/publications/comparing-crime-rates-between-undocumented-immigrants-legal-immigrants-and.
[21] Jason P. Robey, Michael T. Light, and Jingying He, "Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas," U.S. Department of Justice, December 2020, https://www.ojp.gov/library/publications/comparing-crime-rates-between-undocumented-immigrants-legal-immigrants-and.
[22] Eric Figueroa and Iris Hinh, "More States Adopting Inclusive Policies for Immigrants | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, April 12, 2022, https://www.cbpp.org/blog/more-states-adopting-inclusive-policies-for-immigrants.
[23] *Id*.
[24] *Id*.

Mexico passed laws to remove immigration-related barriers when trying to get professional licenses.[25]

If such measures (particularly those that give undocumented migrants more economic and social mobility as a result of naturalization reform) were introduced nationwide, not only would undocumented people feel more included in the United States but also their increased workforce participation would further stimulate the economy, increasing prosperity for all Americans. Contrary to anti-immigration rhetoric that portrays undocumented immigrants as tax burdens, job stealers, or social program exploiters, the nation's estimated 11 million immigrants who are undocumented pay nearly $12 billion annually in state and local taxes. This number could grow to nearly $14 billion (close to $100 billion when including federal taxes) if undocumented people can attain a steady path to citizenship.[26] [27] Currently, many undocumented immigrants can only function at the margins of the mainstream economy because of the lack of broader federal immigration reform. The Center on Budget and Policy Priorities makes several state and local policy recommendations to include rather than exclude undocumented immigrants to benefit the states.

Expanding access to driver's licenses for undocumented immigrants is a practical and effective state-level reform that offers both public safety and economic benefits. Allowing all residents—regardless of immigration status—to obtain a driver's license ensures that more people on the road are properly trained, tested, and insured, which can reduce traffic fatalities

[25] *Id*.
[26] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, December 19, 2019, https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help.
[27] Casey Quinlan, "Study Says Undocumented Immigrants Paid Almost $100 Billion in Taxes," Oregon Capital Chronicle, August 1, 2024, https://oregoncapitalchronicle.com/2024/08/01/study-says-undocumented-immigrants-paid-almost-100-billion-in-taxes/.

and hit-and-run accidents.[28] Undocumented people obtaining driver's licenses can also "help immigrant workers contribute as much as possible to state economies and tax systems."[29, 30] If driver's licenses give unauthorized laborers access to more jobs, they can better avoid exploitative employers and find skill-optimized jobs, boosting their wages and allowing them to maximize their talents and, of course, better serve the state economies and tax systems.[31, 32] In fact, states that have implemented such reforms demonstrate the real-world benefits. California's AB 60, passed in 2015, resulted in a nearly 10 percent drop in hit-and-run rates, improving overall traffic safety.[33] This example clearly shows that inclusive driver's license policies strengthen communities, enhance safety, and support the economic health of the states that adopt them.

Another state policy change includes providing undocumented students with in-state college tuition and financial assistance. The American Constitution guarantees all children, regardless of their immigration status, a place in public K-12 schools in order to better prepare the children of today to become efficient members of tomorrow's economy. Similarly, states

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[28] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities."
[29] Mary C. King and John Corbett, "Assessment of the Socio-Economic Impacts of SB 1080 on Immigrant Groups," Oregon Department of Transportation Research Section, June 2011, https://www.oregon.gov/ODOT/Programs/ResearchDocuments/SB1080.pdf.
[30] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, December 19, 2019, https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help
[31] Mary C. King and John Corbett, "Assessment of the Socio-Economic Impacts of SB 1080 on Immigrant Groups," Oregon Department of Transportation Research Section, June 2011, https://www.oregon.gov/ODOT/Programs/ResearchDocuments/SB1080.pdf.
[32] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, December 19, 2019, https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help
[33] Hans Lueders, Jens Hainmueller, and Duncan Lawrence, "Providing Driver's Licenses to Unauthorized Immigrants in California Improves Traffic Safety," *Proceedings of the National Academy of Sciences* 114, no. 16 (April 3, 2017): 4111–16, https://doi.org/10.1073/pnas.1618991114.

should provide all their college-bound inhabitants access to higher education systems at in-state tuition rates. After all, nearly 100,000 undocumented students graduate every year from high school, and most cannot afford out-of-state tuition rates.[34] [35] Increasing access to in-state tuition for students regardless of immigration status makes it more likely that they will attend a state's higher education institutions. It also encourages more low-income immigrant students to graduate from high school by giving them a compelling reason to stay in school. According to a study by Stephanie Potochnick at Princeton University, the high school dropout rate for foreign-born, non-citizen Mexican students fell by seven percentage points in states that adopted an in-state resident tuition policy.[36] Twenty-one states and D.C. have already implemented policies of similar effect for people who meet certain criteria.[37] Moreover, college graduates earn approximately $24,000 more a year than their peers with only a GED.[38] These increased earnings do not just benefit individuals—they help fuel local consumer markets, boost state tax revenues, and generate long-term economic growth. Such policies, enacted at the state level, create a more productive, educated, and economically resilient population for the state as a whole.

A third potential policy to address challenges related to unauthorized immigration is to strengthen labor law enforcement. Although undocumented workers possess the same protections as documented workers, their fear of law enforcement and the threat of detention keeps them from advocating for themselves in the workplace when wage violations occur.

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[34] Jeanne Batalova and Jie Zong, "How Many Unauthorized Immigrants Graduate from U.S. ...," Migration Policy Institute, April 2019, https://www.migrationpolicy.org/sites/default/files/publications/UnauthorizedImmigrant-HS-Graduates-FactSheet-Final.pdf.

[35] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, December 19, 2019, https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help

[36] *Id*.

[37] *Id*.

[38] Elka Torpey, "Education Pays," U.S. Bureau of Labor Statistics, February 2019, https://www.bls.gov/careeroutlook/2019/data-on-display/education_pays.htm.

Pay-based labor law violations cost low-wage workers in Chicago, Los Angeles, and New York City 15 percent of their earnings, generating a total wage loss for workers in the three cities of $56 million per week, a 2009 study found.[3940] Specifically, 37 percent of unauthorized foreign-born workers in low-wage industries in these cities were paid less than the minimum wage, compared to 21 percent of the authorized foreign-born workers and 16 percent of US-born workers.[41] These lost wages hurt workers and their families and negatively affect the economy since lower-wage workers must spend most of their income on necessities. Wage violations also "increase poverty and thus the need for public assistance, while reducing income tax revenues that could pay for various public services."[42] Labor laws also help promote a freer and fairer business and employment market. Businesses that hire undocumented workers have a competitive advantage over those who do not because they are not obliged to pay proper wages. Much of the anti-immigrant sentiment stems from this issue, as blue-collar white Americans often complain that their employment opportunities are undercut by the second labor market.[43] States can stiffen penalties and impose higher wage-law enforcement agents for wage theft violations as measures to secure labor rights for undocumented people.

Finally, another policy that can help increase the standard of living for undocumented immigrants and stimulate long-term economic output is to extend health coverage to all children,

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[39] Annette, Ruth Milkman, and Nik Theodore, "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," National Employment Law Project, September 21, 2009, https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.
[40] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, December 19, 2019, https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help
[41] *Id*.
[42] "The Social and Economic Effects of Wage Violations," Eastern Research Group, Inc. for the U.S. Department of Labor, December 2014, http://www.dol.gov/asp/evaluation/completedstudies/WageViolationsReportDecember2014.pdf.
[43] David Kallick, "Three Ways Immigration Reform Would Make the Economy More Productive," Fiscal Policy Institute, June 2013, http://fiscalpolicy.org/wp-content/uploads/2014/11/3-Ways-Reform-improves-productivity.pdf.

regardless of immigration status. Access to health care contributes to better long-term health and economic outcomes and can especially provide a critical service that most undocumented children do not have access to because of their likely low-income background. According to the National Bureau of Economic Research, over the long term, children with health insurance are more likely to compete in high school and college and tend to have higher incomes throughout adulthood.[44] Unfortunately, nearly a third of the nation's estimated one million undocumented children lack health coverage because of fear of reprisal and ineligibility, yet California's recent policies show what a state can accomplish by extending health coverage to all children.[45] In 2016, Medi-Cal covered 86 percent of eligible undocumented children. In 2019, Medi-Cal covered 97 percent of Californian children.[46] Undocumented people in California enjoy a considerably better life than undocumented people in other, less sympathetic states, allowing them to coexist with citizens and LPRs and be seen as acceptable members of society.

An Important Stakeholder: The American Public

Though these policy recommendations prove to be far more humane and just for undocumented immigrants and have the strong potential to lead to serious positive immigration reform, it is critical to acknowledge how American citizens may react to such reforms. As of 2018, a study by Veera Korhonen of University College London indicated that 69 percent of Americans believed that undocumented immigrants are not more likely to commit crimes than

[44] Sarah Cohodes et al., "The Effect of Child Health Insurance Access on Schooling: Evidence from Public Insurance Expansions," National Bureau of Economic Research, May 29, 2014, https://www.nber.org/papers/w20178.
[45] Erica Williams, Eric Figueroa, and Wesley Tharpe, "Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper | Center on Budget and Policy Priorities," Center on Budget and Policy Priorities, December 19, 2019, https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help
[46] *Id*.

American citizens.[47] Despite this finding, it is clear to anyone even remotely tuned into the national political discourse that immigration, especially illegal immigration, is a highly controversial issue. Eight in ten Republican/conservative voters want increased border security and increased deportations for illegal immigrants, a Pew Research poll shows.[48] Only 37 percent of Republicans believe that support for an easier pathway to legal status for immigrants illegally residing in the US is an important issue.[49] This data clearly suggests that Republican voters (and politicians, for that matter) would be strongly opposed to the reforms outlined above.

In fact, they may have reason to, considering potential unintended consequences. If these policy recommendations are implemented, it is possible, though currently unsubstantiated, that there might be an increase in petty and non-violent crimes, especially given that the recommendations allow for more leniency in defining crimes involving moral turpitude. Some conservatives may point to policies in cities like San Francisco or New York—where undocumented immigrants have broader access to public benefits and sanctuary protections—as examples where perceived leniency correlates, in their view, with increases in crime or strained public services. While these claims are debated and often lack clear causality, they nevertheless contribute to political resistance. Additionally, limiting access through official ports of entry is unlikely to reduce the overall number of people seeking to enter the United States, especially as factors like violence, poverty, and persecution continue to drive high levels of migration and asylum claims. As a result, when legal pathways are restricted or overwhelmed, more individuals

[47] Veera Korhonen, "U.S. Public Opinion on Criminality among Undocumented Immigrants, 2018," Statista, February 2, 2024, https://www.statista.com/statistics/878225/voter-opinion-on-the-prevalence-of-criminality-among-undocumented-immigrants/.
[48] Baxter J. Oliphant and Andy Cerda, "Republicans and Democrats Have Different Top Priorities for U.S. Immigration Policy," Pew Research Center, September 8, 2022, https://www.pewresearch.org/short-reads/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy/.
[49] *Id*.

may feel they have no choice but to attempt entry through unauthorized routes. This increases the likelihood of dangerous crossings and makes it harder for border enforcement to effectively manage and process incoming migrants, further complicating border security and undermining the results these Republicans want to see. With regard to the state and local social programs to increase the standard of living for the undocumented migrant, Republican voters might object to allowing unauthorized persons to access social benefits and provisions that they might not necessarily contribute to.

To convince opponents of these proposed measures to agree, it is essential that they are educated on the empirical realities of undocumented criminality before they make broad and potentially harmful claims about the issue of undocumented migration. Evidence regarding undocumented criminality points to the conclusion that most undocumented migrants do not nearly fit the dangerous image people on the right create for them. In fact, the Cato Institute, a Libertarian think tank, found that undocumented migrant incarceration rates were 26-41 percent lower than native-born Americans.[50] Furthermore, while opponents often link undocumented immigration to drug trafficking, available data challenge this assumption. According to the U.S. Sentencing Commission, 86 percent of people caught smuggling drugs into America from 2017 to 2021 were American citizens, not undocumented individuals.[51] This suggests that increasing deportations is unlikely to significantly disrupt the major pipelines of drug trafficking. Concerning possible objections to state and local social programs, the Migration Policy Institute finds that when undocumented immigrants are granted access to mainstream economic, social,

[50] Alex Nowrasteh and Michelangelo Landgrave, "Illegal Immigrant Incarceration Rates, 2010-2018: Demographics and Policy Implications," The CATO Institute, April 21, 2010, https://www.cato.org/publications/policy-analysis/illegal-immigrant-incarceration-rates-2010-2018-demographics-policy.

[51] Laura Guzman, Carlos Martinez, and Jorge Zepeda, "No, Deporting Undocumented Immigrants Won't Solve the Fentanyl Crisis," San Francisco Chronicle, March 30, 2023, https://www.sfchronicle.com/opinion/openforum/article/immigration-fentanyl-drugs-deportation-17850457.php.

and health-related resources, they are more likely to engage with their local communities, participate in civic life, and form stronger ties with neighbors and institutions—outcomes that foster a greater sense of belonging not just for immigrants but for the broader community as well.[52] Finally, many concerns should be allayed by the important fact that the NWFA and CPBB policy proposals do not apply to individuals who have committed serious and violent aggravated felonies, as these individuals should be removed from the country for security concerns.[53]

Education and advocacy campaigns, along with more research on the complex dynamics of undocumented criminality, are necessary to counter misinformation. These efforts can help show Republicans and other potential opponents that undocumented immigrants who do not commit serious offenses are no more of a threat than US citizens. In fact, their increased participation in American society brings benefits to all people, regardless of legal status.

Other important stakeholders to consider are law enforcement agencies (such as Border Patrol and ICE), immigration courts, and sectors of the business and economic community.[54] Law enforcement agencies and immigration courts will likely object to these reforms because they might increase the legal and bureaucratic burden for immigration-related matters on these institutions.[55] For example, restoring judicial discretion in deportation cases and providing broader access to legal counsel would require more time, personnel, and case-by-case evaluations. This would place additional strain on already overburdened immigration courts. Similarly, law enforcement agencies may fear that shifting the system from one focused on

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[52] Tomás R. Jiménez et al., "Growing State and Local Role in U.S. Immigration Policy Affects Sense of Belonging for Newcomers and Natives Alike," Migration Policy Institute, June 17, 2022, https://www.migrationpolicy.org/article/immigration-policy-sense-belonging.
[53] "Decriminalize Immigration," National Immigrant Justice Center, accessed December 24, 2024, https://immigrantjustice.org/issues/decriminalize-immigration.
[54] Elizabeth Wieling, "1.1 Immigration Policy," University of Minnesota Libraries Publishing, November 20, 2019, https://open.lib.umn.edu/immigrantfamilies/chapter/1-1-immigration-policy/#:~:text=These%20groups%20are%20called%20%E2%80%9Cstakeholders,the%20nation%20as%20a%20whole.
[55] *Id*.

mandatory detention to one centered around individualized assessments would reduce their authority or create logistical challenges in detainment and supervision protocols. However, these reforms are intended to provide justice and due process to all undocumented migrants, even at the expense of the legal system's efficiency.

Businesses will likely support these reforms, especially if they are reliant on immigrant labor or employ people whose family members may be negatively affected by the current immigration prosecution system.[56] Many sectors, particularly agriculture, food service, and healthcare, advocate for immigration reforms that provide legal pathways for undocumented workers. These industries heavily depend on immigrant labor to meet workforce demands. For instance, U.S. farm groups have expressed concerns that mass deportations could disrupt the food supply chain and lead to higher consumer prices, emphasizing the critical role of immigrant workers in agriculture.[57] Organizations like the American Business Immigration Coalition (ABIC), representing 1,700 employers nationwide, have launched campaigns such as "Secure Our Borders and Secure Our Workforce." This initiative highlights the potential economic impact of deporting undocumented labor, which could reduce the GDP by 4.2 percent. Business leaders stress that many positions filled by immigrant workers lack sufficient American applicants, underscoring the necessity of a stable immigrant workforce.[58]

That said, not all businesses would welcome these changes. Employers who knowingly hire undocumented workers to bypass wage laws or workplace safety regulations might resist reforms that empower workers to report abuses without fear of deportation. In 2017, a

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[56] *Id.*
[57] Leah Douglas and Ted Hesson, "US Farm Groups Want Trump to Spare Their Workers from Deportation," Reuters, November 25, 2024, https://www.reuters.com/world/us/us-farm-groups-want-trump-spare-their-workers-deportation-2024-11-25/.
[58] Monica Eng, "Business Leaders Ask Trump for Immigration Reform for Undocumented Workers," Axios, January 27, 2025, https://www.axios.com/local/chicago/2025/01/27/business-leaders-urge-immigration-reform-trump-administration.

Pennsylvania-based tree trimming and vegetation management company called Asplundh Tree Expert Co. pleaded guilty to unlawfully employing undocumented workers. The company was ordered to pay a historic $95 million fine—the largest ever in an immigration case—after a six-year investigation that revealed a deliberate pattern of hiring unauthorized employees to maximize productivity and profit.[59] In another example, a Korean grocery store in San Diego called Zion Market and its former general manager pleaded guilty in 2020 to knowingly hiring undocumented workers over a span of 16 years. The court imposed a $500,000 fine on the business, acknowledging that nearly half of its 100-person workforce were not authorized to work in the United States.[60] Enhanced legal protections for undocumented workers could disrupt exploitative labor arrangements that currently go unchecked. These changes would ultimately promote a fairer and more competitive labor market, but not without resistance from businesses that benefit from the status quo.[61]

Conclusion

Although these recommendations may not directly address the issue of criminal undocumented immigrants, they prove to be long-term adjustments to diminish criminality and make the undocumented population appear more favorable to Americans who currently dislike undocumented people.[62] Access to mainstream resources and institutions—such as in-state tuition for undocumented students, equal access to driver's licenses, stronger labor protections,

[59] "Asplundh Tree Expert Co. Charged with Recruiting, Hiring, and Employing Unauthorized Aliens," United States Attorney's Office District of Eastern Pennsylvania, September 19, 2017, https://www.justice.gov/usao-edpa/pr/asplundh-tree-expert-co-charged-recruiting-hiring-and-employing-unauthorized-aliens.
[60] "Grocery Store and Manager Plead Guilty to Hiring Undocumented Workers; Court Imposes $500,000 in Fines and Penalties," *United States Attorney's Office in the Southern District of California* (United States Department of Justice, December 21, 2020), United States Attorney's Office in the Southern District of California, https://www.justice.gov/usao-sdca/pr/grocery-store-and-manager-plead-guilty-hiring-undocumented-workers-court-imposes-500000.
[61] Elizabeth Wieling, "1.1 Immigration Policy," University of Minnesota Libraries Publishing, November 20, 2019.
[62] Tomás R. Jiménez et al., "Growing State and Local Role in U.S. Immigration Policy Affects Sense of Belonging for Newcomers and Natives Alike," Migration Policy Institute, June 17, 2022, https://www.migrationpolicy.org/article/immigration-policy-sense-belonging.

and fairer immigration court procedures—allow undocumented migrants to pursue education and attain success rather than fall into criminal activity.[63] By adopting policies that address the complex drivers of harsh federal immigration prosecution, the U.S. can affirm its legacy as a nation of immigrants while safeguarding its security and prosperity. However, immigration prosecution reform is not enough. Because states hold much power over the daily lives of undocumented migrants, long-term facilitation should be the responsibility of the states. These accommodating policies will help put undocumented immigrants in a more favorable light, as they will be able to operate in the mainstream and be less likely to engage in criminal activities. More favorable sentiment can lead to more pro-immigrant political pressure, which can lead to broad citizenship access reform, thus solving the issue of undocumented migration at its very root. Such policies require a delicate balance, but with careful consideration and commitment to the nation's foundational principles, the U.S. can navigate this challenge in a manner that is both pragmatic and principled, ultimately enriching American society.

[63] Tomás R. Jiménez et al., "Growing State and Local Role in U.S. Immigration Policy Affects Sense of Belonging for Newcomers and Natives Alike."

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The Human Right to Water Act

By Madison Sass

Madison Sass is a first year student at University of California, Davis. She is studying Hydrology. On campus she focuses on increasing student interest in Hydrology and works as a Hockey Referee and figure skating coach. She aspires to become a water lawyer, eventually becoming a law professor.

In 2012, Governor Brown signed Assembly Bill 685, which codified the Human Right to Water Act into section 106.3 of the California Water Code. The Human Right to Water Act is unique, a right recognized only in California. AB 685 established that state policy is " . . . every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes".[1] The Act tasks all relevant state agencies with considering this policy when " . . . revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent . . . [to those described in the policy]".[2] Although this right is revolutionary, there are concerns regarding the efficacy of the Human Right to Water Act. More than 250 water systems servicing 900,000 people are failing to meet the clean drinking water standard[3] and 507 more water systems are at risk of failure.[4] Beyond this, water prices are increasing, and nearly one million Californians lack access to clean water.[5, 6] As the fifteenth anniversary of the passage of the Human Rights to Water Act encroaches, it is clear California has far to go. Throughout this essay, we will explore the history of water law in California, including water regulation in California and comparing two

[1] Eng, Mike, 2012. *State Water Policy*. Assembly Bill 685
[2] *Id*.
[3] Chapelle, Caitrin, and Ellen Hanak. 2021. "Water Affordability in California." https://www.ppic.org/wp-content/uploads/water-affordability.pdf: PPIC.
[4] "SAFER Drinking Water | California State Water Resources Control Board." 2021. Ca.gov. 2021. https://www.waterboards.ca.gov/safer/.
[5] Chapelle, Caitrin, and Ellen Hanak. 2021. "Water Affordability in California." https://www.ppic.org/wp-content/uploads/water-affordability.pdf: PPIC.
[6] Tilden, Michael. 2022. "State Water Resources Control Board-It Lacks the Urgency Necessary to Ensure That Failing Water Systems Receive Needed Assistance in a Timely Manner."

revolutionary sister laws, then systematically diving into the failures of the Human Right to Water Act, afterwards we will discuss the roots of the failures and potential steps forward. Before diving further into the failures of the Human Right to Water Act, we must delve into California's water law history.

History of Water Law in California

In California, water is owned by the people and put into the trust of the state. People can obtain a riparian water right by buying or owning land situated upon a river. Additionally, a person can become an appropriator by applying for a permit with the State Water Resources Control Board. California has multiple water rights, with the Human Right to Water Act becoming state policy in 2012. Yet, despite California's dependence on groundwater, there was historic neglect of groundwater rights and their regulation until 2014. Near the tail end of the 2012-2016 drought, California became the last state to regulate groundwater.

Two years after the passage of the Human Right to Water Act, the Sustainable Groundwater Management Act (SGMA) was passed. Considered a revolutionary act, the Sustainable Groundwater Management Act became the first law to set the framework for managing groundwater statewide. One would be remiss to neglect the multiple attempts taken in the past to regulate groundwater, or the slow steps towards regulation taken by the State Water Resources Control Board. However, it would also be neglectful to not fully explore the disastrous conditions California was facing, due to the lack of regulation before the SGMA.

Water Regulation

Groundwater overdraft conditions in California were observed as early as 1950 while the consequences of overdraft were in full effect.[7] Overdraft occurs when people take more water

[7] Ciriacy-Wantrup, S, and Patricia Mcbride Bartz. 1950. “Ground Water in California Economic and Social Causes and Effects of Overdraft on State’s Water Resources Subjects of Current Studies.”

from a groundwater basin than what is returned, or recharged, into the basin. Overdraft impacts the environment, human health, and infrastructure. For example, overdrafting often leads to land subsidence, a process where the rocks comprising aquifers collapse, leading to a loss of land elevation. From 1925 to 1977, land subsidence in the San Joaquin Valley exceeded nine meters, during a period referred to as the "Historic Period" by Lee & Knight in their paper quantifying subsidence in the San Joaquin Valley.[8,9] The United States Geological Survey considered this severe subsidence " . . . one of the single largest alterations of the land surface attributed to humankind", in their 1999 report *Land Subsidence in the United State*s. Imports from aqueducts and canals from the 1950s and 1960s temporarily alleviated the "Historic Period" of severe drought conditions[10]. However, despite water imports as early as the 1950s, the period of subsidence continued until 1977. California repeatedly suffered from several droughts from 2007-2009, 2012-2016, and 2020-2022, during which areas experienced more subsidence. The historic drought during 2014 was one of the driving factors behind the passage of the Sustainable Groundwater Management Act, with multiple residents complaining of dry wells.

The Sustainable Groundwater Management Act was set forth to tackle unsustainable extraction throughout the state. The act tasks stakeholders, known as Groundwater Sustainability Agencies, with creating groundwater sustainability plans. Groundwater Sustainability plans must lay the foundations for ongoing sustainable groundwater extraction and must be approved by the Department of Water Resources. If the plan is deemed unsatisfactory, the basin itself will be put

[8] "Land Subsidence | U.S. Geological Survey." n.d. Www.usgs.gov. https://www.usgs.gov/mission-areas/water-resources/science/land-subsidence#overview.
[9] Lees, M, and R Knight. 2024. "Quantification of Record Breaking Subsidence in California's San Joaquin Valley." *Communications Earth & Environment* 5 (1): 677. https://doi.org/10.1038/s4324702401778w.
[10] R. L, Ireland, Poland J.F, and Riley F.S. 1980. "Land Subsidence in the San Joaquin Valley, California, as of 1980." US Geological Survey Professional Paper 437-1. https://pubs.usgs.gov/pp/0437i/report.pdf.

on a probationary period.[11] If the probationary period passes and the agency still fails to provide a proper groundwater sustainability plan, the basin could fall under the State Water Resources Control Board's authority. This regulatory power given to state agencies draws a stark contrast to the Human Right to Water Act.

Comparisons between Legislation

Despite complaints surrounding the Sustainable Groundwater Management Act, one cannot ignore the revolutionary steps it is making towards attaining sustainable groundwater extraction. However, the arguably more revolutionary Human Right to Water Act, has raised questions as to whether California is truly providing this right. Many Californians are experiencing rising water prices, while various schools are served by failing water systems, and disadvantaged communities face water insecurity.[12] Further comparisons between the Sustainable Groundwater Management Act and the Human Right to Water Act bring to light weaknesses in the Human Right to Water Act.

The main difference between the two water bills is that the Human Right to Water Act has virtually no consequences or guidelines for implementation. With the Sustainable Groundwater Management Act, groundwater sustainability agencies must create plans to achieve sustainability, lest they face probationary periods or a State Water Resources Control Board takeover. Beyond this, the Sustainable Groundwater Management Act is tangible; one can observe the differences between sustainable and unsustainable overdraft. In comparison, the Human Right to Water Act does not expand the responsibilities of the state to provide clean water or to increase spending to ensure access to water. Instead, the Human Right to Water Act

[11] California Department of Water Resources. 2014. “Sustainable Groundwater Management Act Groundwater Management.” Ca.gov. 2014. https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management.
[12] McCloud, Jacqueline. 2024. “At the Confluence of Water and Human Insecurity: Drinking Water Standards in California’s Underserved Communities - Homeland Security Affairs.” Homeland Security Affairs. September 2, 2024. https://web.archive.org/web/20250212075828/https://www.hsaj.org/articles/23372.

only asks state agencies to consider the human right when revising, adopting, establishing policies, or developing grant criteria. This both inhibits the power of governmental agencies in providing this right and frees California from the burden of funding infrastructure to provide these rights. The vague nature of the Human Right to Water Act, the lack of authority to protect the right, and finally, a failure to create a roadmap to achieve this right are all major pitfalls that lead the Human Right to Water Act to fail to provide safe, clean, affordable, and accessible water to Californians. In the following sections, we will delve into the failure to provide the right to water in California, first focusing on how multiple communities lack safe or clean water.

Safe and Clean

Eleven years after the passage of the Human Right to Water Act, students at Lakeside Elementary in Bakersfield rely on bottled water because most of their taps are barren[13]. The school has been almost entirely reliant on bottled water for over a decade, and Lakeside is not alone. Nearly sixty schools across California have failing water systems, and seventy-six more are teetering on the edge of failure[14]. Despite state policy, there has been a failure to ensure these students' right to clean water. Multiple vulnerable groups face water insecurity and desperately need funding or regulation to secure safe and clean water. In the following few paragraphs, we will discuss the disparities disadvantaged communities face regarding safe and clean water, why these disparities exist, and the slow progress toward improving water quality. Ultimately, we will see that the Human Right to Water Act does not, and can not, provide safe and clean water for all Californians without proper reform.

[13] Pineda, Dorany , Hayley Smith, Ian James, Gabrielle LaMarr LeMee, and Katie Licari. 2023. "'A Ticking Time Bomb': Why California Can't Provide Safe Drinking Water to All Its Residents." Los Angeles Times. September 27, 2023. https://www.latimes.com/environment/story/2023-09-27/californias-struggle-for-clean-water-is-getting-harder.
[14] *Id.*

In 2021, a research paper was published focusing on the extreme disparities for disadvantaged unincorporated communities compared to the general public when accessing their human right to water in California. According to the paper, London et al., around 14% of these disadvantaged unincorporated communities receive water from out-of-compliance community water systems. Persons served by out-of-compliance community water systems are disproportionately persons of color.[15] However, many of these persons served by out-of-compliance wells are relying on domestic wells. This further complicates access to clean water as these wells are not regulated by the State and therefore are neglected by the Human Right to Water Act.

A year before the passage of the Human Right to Water Act, Balzas et al. published a research paper on the concerning levels of nitrates in San Joaquin Valley domestic wells. According to their study of the San Joaquin area alone, over 5,000 people were potentially exposed to water with nitrate levels exceeding the regulatory maximum.[16] In another study, authors claim that nearly 14% of the study's population was potentially exposed to dangerous arsenic levels above the revised standard.[17] Furthermore, it is known that Domestic and Household wells are more likely to experience higher levels of contamination, due to their unregulated nature.[18]

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[15] London, Jonathan, Amanda Fencl, Sara Watterson, Yasmina Choueiri, Phoebe Seaton, Jennifer Jarin, Mia Dawson, et al. 2021. "Disadvantaged Unincorporated Communities and the Struggle for Water Justice in California." www.water-alternatives.org: water_alternatives.

[16] Balazs, Carolina, Rachel Morello-Frosch, Alan Hubbard, and Isha Ray. 2011. "Social Disparities in Nitrate-Contaminated Drinking Water in California's San Joaquin Valley." *Environmental Health Perspectives* 119: 1272–78. https://doi.org/10.1289/ehp.1002878.

[17] Balazs, Carolina L, Rachel Morello-Frosch, Alan E Hubbard, and Isha Ray. 2012. "Environmental Justice Implications of Arsenic Contamination in California's San Joaquin Valley: A Cross-Sectional, Cluster-Design Examining Exposure and Compliance in Community Drinking Water Systems." *Environmental Health* 11 (1). https://doi.org/10.1186/1476-069x-11-84.

[18] Pace, Clare, Carolina Balazs, Komal Bangia, Nicholas Depsky, Adriana Renteria, Rachel Morello-Frosch, and Lara Cushing. 2022. "Inequities in Drinking Water Quality among Domestic Well Communities and Community Water Systems, California, 2011–2019." *National Library of Medicine*. PubMed Central: National Library of Medicine. https://pmc.ncbi.nlm.nih.gov/articles/PMC8713636/.

Domestic or household wells are permitted by the counties and are unregulated by the state. This resulted in a large data gap, as the State Water Resources Control Board lacked data on water quality or even the location of the wells. Five years after the passage of the Human Right to Water Act, the SAFER program was launched, allowing the State Water Resources Control Board to collect data on these wells. However, the monitoring itself is unregulated, leading to unequal access to safe drinking water for predominantly rural communities.[19]

The launch of the SAFER program has allowed the water board to begin regulating these impacted domestic wells, but it wasn't passed until 2019, seven years after the passage of the Human Right to Water Act. California is routinely slow in passing regulations, as in the 2022 audit, auditors found that the State Water Resources Control Board was too slow to fix contaminated water resources. Auditors claimed that the length of the application process had doubled, due to the complicated process and lack of communication from the State Water Resources Control Board.[20] Overall, auditors pointed to a lack of urgency, stating " . . . [it] has funding available to help these failing systems improve the quality of their drinking water. Nonetheless, the board has generally demonstrated a lack of urgency in providing this critical assistance."[21] The audit and experiences of disadvantaged communities demonstrate the struggle to achieve clean water in California. However, for some communities, the struggle lies in accessing this clean water. In the next section, we will discuss the issues California residents face in obtaining clean and affordable water.

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[19] *Id.*
[20] Tilden, Michael. 2022. "State Water Resources Control Board-It Lacks the Urgency Necessary to Ensure That Failing Water Systems Receive Needed Assistance in a Timely Manner." *Https://Information.auditor.ca.gov/Pdfs/Reports/2021-118.Pdf*. Sacramento: California State Auditor
[21] *Id.*

Accessible and Affordable

California residents face struggles when accessing affordable water. For example, the San Francisco Chronicle spoke to Lerner, who was among the 8,000 San Francisco residents who didn't receive a bill for months or years, due to technical problems with the Public Utilities Commission billing system. Customers were not notified of this glitch until September of 2024, despite the glitch becoming widespread nearly a year beforehand. Due to this glitch, residents received bills reaching into the thousands. For example, Lerner claimed that when he finally received his water bill after a year of confusion, it was $7,732.93.[22]

Affordable and accessible clean water is the policy of California state agencies. However, many communities, especially disadvantaged communities, face increasing water rates and overall water insecurity. In the following paragraphs, we will discuss the rising cost of water in California, the infrastructure crisis, and the accessibility of failing water systems. First, we will dive into the cost of water in California.

The cost of water is rising in California.[23] The State Water Board estimated that 21 percent of the state's water systems have water rates that are unaffordable for the basic needs outlined in the Human Right to Water Act.[24] Additionally, the state identified that 34% of all households earning less than 200 percent of the federal poverty level are flagged as potentially in need of assistance.[25] These percentages could be even higher according to a recent Stanford study criticizing the "affordability ratio" commonly used by water utilities, non-governmental

[22] Hoeven, Emily. 2024. "SF Says Retiree Owes Nearly $8,000 for Water. Questions Abound." San Francisco Chronicle. December 23, 2024. https://www.sfchronicle.com/opinion/emilyhoeven/article/sfpuc-water-bills-delayed-19974420.php.
[23] Chapelle, Caitrin, and Ellen Hanak. 2021. "Water Affordability in California." https://www.ppic.org/wp-content/uploads/water-affordability.pdf: PPIC.
[24] *Id.*
[25] *Id.*

organizations, and regulators.[26] The Stanford Report claims that 14% of households surveyed across the country report that a twelve-dollar increase in monthly water bills would lead to a cutback on other essential goods.[27] A twelve-dollar increase could become a reality for San Diego residents, as in July 2024, San Diego's Water Board approved an increase of up to 14 percent for wholesale water rates.[28] The Public Policy Institute of California warns that these prices will only increase as the cost to replace aging infrastructure and meet new treatment standards continues to rise.[29] On a nationwide scale, California has the most expensive average water bill in the entire U.S. at 77 dollars per month.[30]

The Human Right to Water Act acknowledges the importance of affordability in achieving one's water rights. However, the rising price of water highlights a disconnect between policy and action when providing this right. Without funding to improve infrastructure and regulatory oversight to restrict or cushion price hikes, even if Californians have clean water, they will not be able to afford to access it.

Root of the Failures within the Human Right to Water Act

The vague writing of the Human Right to Water Act is one of the driving forces behind the failures of the Human Right to Water Act. The name itself would lead people to believe that they indeed have a codified human right to water, similar to the protection of free speech or voting rights. However, the Human Right to Water Act has placed no legal obligation on state

[26] Hadhazy, Adam. 2024. "A New Approach to the Growing Problem of Water Affordability." News.stanford.edu. July 2024. https://news.stanford.edu/stories/2024/07/new-tools-are-needed-to-make-water-affordable.
[27] Hadhazy, Adam. 2024. "A New Approach to the Growing Problem of Water Affordability." News.stanford.edu. July 2024. https://news.stanford.edu/stories/2024/07/new-tools-are-needed-to-make-water-affordable.
[28] Zychowicz, Kathryn. 2024. "New Revenues, Budget Cuts Trim Wholesale Rate Increase for 2025 - San Diego County Water Authority." San Diego County Water Authority. SDCWA. July 25, 2024. https://www.sdcwa.org/revenues-and-cuts-trim-rate-increase-for-2025/.
[29] Chapelle, Caitrin, and Ellen Hanak. 2021. "Water Affordability in California." https://www.ppic.org/wp-content/uploads/water-affordability.pdf: PPIC.
[30] Durrani, Ana. 2024. "Monthly Utility Costs in the U.S. By State." Edited by Samantha Allen. Forbes Home. July 26, 2024. https://www.forbes.com/home-improvement/living/monthly-utility-costs-by-state/.

agencies beyond considering a person's water rights. The Human Right to Water is the policy of state agencies, but it places no burden upon the state to guarantee this right. While this frees up the obligations of the state, it also curtails the power of agencies if they wish to protect this right.

Section B of the Human Right to Water Act asks the relevant state agencies to consider the right when " . . . revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent . . . [to those described in the policy]".[31] Noted immediately afterward, is "[t]his section does not expand any obligation of the state to provide water or …expenditure of additional resources to develop water infrastructure beyond the obligations that may exist according to section B." By refusing to expand the obligations of the state, it prevents these agencies from protecting this right. If they can only consider this right when creating policies or grant criteria, they cannot protect it by improving failing infrastructure or creating guidelines to improve access to this right. Additionally, the Human Right to Water Act rests almost entirely upon the already stressed water agencies in California.

The State Water Resources Control Board is in charge of regulating both the Human Right to Water Act and the Sustainable Groundwater Management Act. These two revolutionary measures are placed on top of the already inefficient and stressed permitting systems. By placing the obligations and pressure solely on state agencies, the Human Right to Water Act neglects violations by other parties. If the state adopted the Human Right to Water Act as a true right, similar to free speech or voting, persons and companies could be prosecuted for violating it.

The most glaring problem with the Human Rights to Water Act is the lack of goals or a timeline for when the policy should be implemented. The lack of a framework for adopting or

[31] Eng, Mike. 2012. *State Water Policy*. Assembly Bill 685

reaching goals was criticized by auditors in 2022 as one of the glaring problems in achieving clean water for all Californians. Another law, also arguably passed to maintain water access for Californians, the Sustainable Groundwater Management Act, illustrates the benefit of timelines.

In comparison to the Human Right to Water Act, the Sustainable Groundwater Management creates new governance, through agencies, to create plans for achieving the goal of sustainable groundwater extraction. Additionally, these agencies are given guidance and strict expectations through the six undesirable results as outlined in the act. Finally, unlike the Human Right to Water Act, agencies are held responsible if they fail, or are failing, to achieve the goals laid out in their plans. The framework surrounding the Sustainable Groundwater Management Act has led to greater visible improvements and adherence to the law. Additionally, it flushes out areas that fail to adhere to the Sustainable Groundwater Management Act. The Human Right to Water Act lacks this framework or timeline, despite attempts from outside agencies to provide help.

A year after the passage of the Human Right to Water Act, the International Water Clinic at UC Berkeley School of Law tried to remedy the lack of framework in their report, *The Human Right to Water Act in California: An Implementation Framework for State Agencies*.[32] This report details possible areas for improvement, as well as areas that lack proper regulation or data that could impede water rights. In the report, the International Water Clinic extends beyond the Human Right to Water and attempts to tackle historical racism and boundaries that impede a person's right to water. This is to highlight that establishing the Human Right to Water in California is possible and supported, however, many more steps need to be taken.

[32] International Human Rights Law Clinic. 2013. "The Human Right to Water Bill in California: An Implementation Framework for State Agencies," May, 19. https://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL.pdf.

Conclusion

Throughout this essay, we have discussed multiple failures and weaknesses of the Human Right to Water Act. We saw how multiple vulnerable communities rely on unsafe, contaminated, inaccessible, or unaffordable water resources. By comparing the Human Right to Water Act and the Sustainable Groundwater Management Act, we fleshed out the differences that define them. Ultimately, we saw that a lack of regulation and consequences has led to multiple groups losing their right to safe, clean, affordable, and accessible water. However, this essay is not meant to discount the importance of the Human Right to Water Act, as it is revolutionary and a step in the right direction. Ultimately, this essay is to show that California must expand its water laws to achieve the goals it proclaims to have. If the state's policy is safe and clean drinking water for all, then further regulations and expansions must go into effect. However, these improvements must widen the area of accountability beyond state agencies, extending it to companies and Californians as well. When everyone is tasked with protecting the Human Right to Water, clean water for all can be achieved.

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Dalit Rights in Nepal: The Legal Struggle Against Caste Discrimination and the Path to Inclusion

By Prasumi Chand

Prasumi Chand is a fourth-year at the University of California, Santa Cruz. She is studying Legal Studies and minoring in Technology and Information Management. On campus, she is the president of a pre-law co-ed fraternity, Phi Alpha Delta. Along with that, she is currently working as a Writing Assistant for the Writing Department on campus and as an Outreach and Education Coordinator for the Contra Costa Senior Legal Services. Prasumi aspires to be involved in technology and law, focusing on cyber security.

Nepal's legal and societal evolution has profoundly shaped the Dalit community's socio-political realities, from the codification of caste hierarchies in the *Muluki Ain* of 1854 to the progressive provisions of the 2015 Constitution. This paper examines the interplay between legal frameworks, systemic discrimination, and the enduring societal resistance to Dalit inclusion. Beginning with the institutionalization of caste hierarchies during Nepal's unification and the *Muluki Ain*'s enforcement, this analysis traces the historical roots of caste-based marginalization. Subsequent reforms, including the 1963 Civil Code and the Caste-Based Discrimination and Untouchability Offense and Punishment Act of 2011, sought to dismantle entrenched inequalities but have been hindered by weak enforcement and systemic inertia. This paper traces significant milestones, including the Maoist insurgency (1996–2006), which brought national attention to Dalit issues, and the adoption of the 2015 Constitution, which formally recognized Dalit rights through affirmative action and proportional inclusion. However, these legal reforms have often failed to achieve equitable outcomes due to biases in implementation, regional disparities, and the structural limitations of Nepal's hourglass federalism model. This

paper underscores the persistent challenges faced by Dalits, including ineffective quota systems and a lack of alignment between legal provisions and societal change.

Through a critical analysis of legal history, affirmative action policies, and governance structures, this paper argues that meaningful progress for Dalits requires robust enforcement mechanisms, coordinated governance, and transformative societal reforms. The findings showcase the necessity of bridging the gap between legal frameworks and societal realities to dismantle caste hierarchies and foster true inclusivity and equality in Nepal.

Introduction

Nepal's history of legal and societal frameworks has profoundly shaped the status and struggles of the Dalit community. Beginning with the codification of caste hierarchies in the *Muluki Ain* of 1854, the state institutionalized systemic discrimination that relegated Dalits to the margins of society. Subsequent reforms, including the 1963 Civil Code, the 2015 Constitution, and the Caste-Based Discrimination and Untouchability Offense and Punishment Act of 2011, have attempted to address these entrenched inequities. However, the gap between legal provisions and their practical implementation remains stark. By tracing Nepal's legal history and affirmative action policies, this paper considers their influence on the Dalit community's socio-political realities, drawing attention to persistent systemic flaws and deep-rooted societal resistance to change. Through an analysis of legal reforms, this paper explores the relationship between historical oppression and contemporary legislative efforts, emphasizing the importance of better aligning legal measures with broader societal change.

Historical Background

Unification of Nepal

The modern nation of Nepal began to take shape under the ambitious leadership of King Prithvi Narayan Shah, who unified the region in the late 18th century. Beginning with his conquest of the Kathmandu Valley in 1769, which included the defeat of independent states like Kirtipur, Prithvi Narayan Shah established the Shah dynasty and moved the capital to Kathmandu. This marked the creation of a unified Nepal, ruled by the Shah dynasty until 2008. The Gorkha state, where Prithvi Narayan originated, had been expanding since 1559, when Dravya Shah established it in a Magar-majority region. Over the following centuries, Gorkha's steady expansion through conquests and alliances set the stage for the eventual unification. Prithvi Narayan's vision for Nepal extended beyond territorial unity; he envisioned a nation unified by a single religion and language. In his *Divya Updesh*, he described Nepal as "Asali Hindustan" (*Real India*) and a "garden of four castes and thirty-six varnas," underscoring his desire for cultural and social consolidation.[1]

A critical tool in this unification was the implementation of a state-enforced caste system grounded in Hindu scriptures. The Nepalese penal code institutionalized Hindu law, with caste-based demotions functioning as severe state-imposed punishments. While similar practices were seen in India during the early 18th century, Nepal's codification uniquely linked caste enforcement with the consolidation of state power.[2] This process, referred to as Sanskritization, advanced a Hindu ideal that unified Nepal legally and socially while accommodating ethnic and local diversity. This foundation of Hindu law, pivotal to Nepal's

[1] Suditya Sapcotta, "The History of Caste in Nepal," *Quest Journals: Journal of Research in Humanities and Social Science* 10, no. 11 (2022): 337, https://www.questjournals.org.
[2] *Id., 338.*

early legal system, set the stage for subsequent legal codifications that shaped Nepalese society. By the mid-19th century, the Shah monarchy had been relegated to ceremonial roles under the hereditary rule of the Rana Prime Ministers, a political shift that further influenced the trajectory of Nepal's legal and social systems.

Muluki Ain of 1854

Nepal's caste-based social hierarchies were institutionally codified in the *Muluki Ain* of 1854, marking a pivotal moment in the legal formalization of social stratification. Drafted under the direction of Prime Minister Jung Bahadur Rana, the *Ain* entrenched caste divisions within a centralized legal framework, enforcing a strict hierarchy that classified Nepal's diverse ethnic groups into gradations of purity and impurity.[3] At the apex of this system were the Brahmins and Chhetris, who enjoyed significant privileges and authority, while groups like the Dalits were relegated to the lowest tiers, perpetuating their marginalization and untouchable status.[4]

The *Muluki Ain* assigned caste-specific duties, rights, and restrictions, reflecting Hindu principles of purity and pollution, which dictated social interactions, marriage, and occupational roles. Drawing on texts like the *Manusmriti*, the legal code embedded the cosmology of karma and rebirth, justifying caste hierarchies as divinely ordained.[5] Dalits, deemed ritually impure, were consigned to occupations such as leatherwork and sanitation, their lives circumscribed by structural exclusion. This legal framework institutionalized

[3] Rajan Khatiwoda, Axel Michaels, Astrid Zotter, and Manik Bajracharya, *Mulukī Ain of 1854: Nepal's First Legal Code* (Heidelberg: Heidelberg University Publishing [heiUP], 2021), 2.
[4] *Id*., 4.
[5] Subhash Nepali, *The Role of Dalit Civil Society in Combatting Caste-Based Discrimination* (Georgetown University, School of Foreign Service, Asian Studies Program, 2019), 23, https://hdl.handle.net/10822/1055365.
[6] Rajan Khatiwoda, Axel Michaels, Astrid Zotter, and Manik Bajracharya, *Mulukī Ain of 1854: Nepal's First Legal Code* (Heidelberg: Heidelberg University Publishing [heiUP], 2021), 34.

disparities not only in social status but also in criminal justice, as penalties for offenses varied depending on the caste status of the victim and the perpetrator.[6] For instance, crimes against higher-caste individuals attracted harsher punishments, further entrenching caste-based inequities.

The *Muluki Ain* was not merely a codification of social norms but also a tool for state-building. Nepal, unlike its colonized neighbors, developed a unique form of social coherence that rejected colonial governance models. Instead, the *Muluki Ain* sought to consolidate Rana rule by unifying Nepal's fragmented ethno-cultural landscape under a single legal and administrative system. Jung Bahadur Rana's legal reforms mirrored British codification projects in India, such as the establishment of the *divānī adālat* (civil court) in Bengal. Both initiatives replaced more fluid legal pluralism with centralized judicial systems that prioritized state-sanctioned norms over local customs.[6]

In its preamble, the Ain articulated its intent to standardize punishments and ensure uniformity in legal proceedings, addressing inconsistencies in earlier practices. However, its ambitions extended far beyond procedural reform[7]. By establishing a national caste hierarchy and reinforcing Hindu law, the *Muluki Ain* aimed to strengthen the autocratic Rana regime while positioning Nepal as a uniquely Hindu kingdom resistant to British colonial influence.[8] The code symbolized Nepal's aspiration to join the ranks of advanced nations that adopted codified laws, marking a watershed moment in the country's legal and political history.

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[6] *Id*.
[7] *Id*., 1-2.
[8] Rajan Khatiwoda, Axel Michaels, Astrid Zotter, and Manik Bajracharya, *Mulukī Ain of 1854: Nepal's First Legal Code* (Heidelberg: Heidelberg University Publishing [heiUP], 2021), 3.

1963 Civil Code

The *Muluki Ain* of 1854 institutionalized a rigid caste hierarchy, embedding social stratification within Nepal's legal system. This codification aligned with the Rana regime's strategy to consolidate power by reinforcing traditional social structures. However, the mid-20th century ushered in a wave of political changes that set the stage for legal reforms aimed at dismantling caste-based discrimination.

In the early 1950s, a pro-democracy movement, supported by King Tribhuvan, culminated in overthrowing the Rana oligarchy. King Tribhuvan was reinstated as the head of state, and in 1959, his successor, King Mahendra, introduced a new constitution, leading to Nepal's first democratic elections. The Nepali Congress Party emerged victorious, and Bishweshwar Prasad Koirala assumed the role of prime minister. However, in 1960, King Mahendra dissolved parliament, suspended the constitution, and dismissed the democratic government, establishing a partyless Panchayat system in 1962.[9]

Amid these political shifts, King Mahendra promulgated the 1963 Civil Code, which sought to abolish the legal foundations of untouchability and caste-based discrimination.[10] This legal reform aimed to establish equal legal status for all citizens, irrespective of caste, thereby nullifying the discriminatory provisions of the *Muluki Ain*.

Despite the progressive intent of the 1963 Civil Code, deeply entrenched social norms and attitudes toward caste hierarchy persisted.[11] The abolition of legal discrimination did not

[9] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.
[10] Rajan Khatiwoda, Axel Michaels, Astrid Zotter, and Manik Bajracharya, *Mulukī Ain of 1854: Nepal's First Legal Code* (Heidelberg: Heidelberg University Publishing (heiUP), 2021),
[11] Subhash Nepali, *The Role of Dalit Civil Society in Combatting Caste-Based Discrimination* (Georgetown University, School of Foreign Service, Asian Studies Program, 2019), 24, https://hdl.handle.net/10822/1055365.

immediately translate into social acceptance of caste equality. Discriminatory practices, particularly against Dalits, continued, underscoring the complex interplay between legal reforms and societal change. The persistence of untouchability and caste-based discrimination points to the limitations of legal measures in transforming societal behaviors and the necessity for comprehensive social reforms.[12]

The journey from the *Muluki Ain* to the 1963 Civil Code illustrates the intricate relationship between law and society in Nepal. The *Muluki Ain*'s codification of caste hierarchies legally sanctioned social stratification, embedding discrimination within the state's legal apparatus. Conversely, the 1963 Civil Code represented an effort to legally dismantle these hierarchies. However, the enduring prevalence of caste-based discrimination post-1963 reveals the challenges inherent in using legal instruments to effect social change. This period in Nepal's history underscores that while legal reforms are crucial, they must be part of a broader strategy encompassing social, economic, and educational initiatives to effectively eradicate deep-seated discriminatory practices.

Political and Governmental Context Leading to the Maoist Insurgency in Nepal

Nepal's journey from an autocratic monarchy to a more inclusive political system was marked by turbulence, reform, and unmet promises of equality. These developments, coupled with persistent systemic discrimination, laid the groundwork for the Maoist insurgency in 1996.

The Dalit liberation movement in Nepal, which began in the 1940s with organizations like the Vishwa Sarvajan Sangh, faced significant challenges in achieving its objectives. Despite gaining renewed momentum following Nepal's democratic transition in 1990, the movement

[12] Sreeya Sharma, "The History and Impact of Casteism in Nepal," The Borgen Project, last modified 2024, https://borgenproject.org/casteism-in-nepal/.

struggled to address caste-based inequalities effectively. Fragmentation within the movement and a lack of sustained political support hindered meaningful progress. The 1990s were characterized by persistent caste-based discrimination, both publicly and privately, as Dalit leaders often found their efforts thwarted by political corruption and bureaucratic inefficiency.[13] This left Dalit communities marginalized and disillusioned with the political system, fostering a sense of exclusion that would later play a role in fueling social unrest.

The Multiparty Politics of the 1990s

The pro-democracy movement of 1990 was a pivotal moment in Nepal's history. After decades of political parties being banned, activists coordinated mass protests, often led by the Nepali Congress Party and leftist groups. The agitation, which included widespread street protests, was met with severe suppression by the security forces, resulting in deaths and mass arrests. Eventually, King Birendra conceded to pressure, leading to the promulgation of a new democratic constitution that established a multiparty parliamentary system. The king retained his role as Head of State, while an executive Prime Minister governed the country. The first democratic elections were held in 1991, with the Nepali Congress Party winning and Girija Prasad Koirala assuming the role of Prime Minister.[14]

Despite the initial optimism surrounding the transition to democracy, Nepal's political environment quickly descended into instability once again. In 1994, the Koirala government fell due to a no-confidence motion, resulting in new elections and the formation of a Communist government. However, this government was dissolved by 1995, leaving the country in a state of

[13] S. K. Panthee, "Effects of Maoist's War on Dalits' Movement," *Contemporary Voice of Dalit* 13, no. 1 (2021): 20, https://doi.org/10.1177/2455328X20922442.
[14] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.

political disarray. The instability weakened Nepal's ability to address systemic social inequalities, including those faced by Dalit communities, and fostered a growing dissatisfaction with the government among marginalized groups.[15]

Rising Tensions and the Prelude to Insurgency

The political volatility of the 1990s was exacerbated by economic challenges, including a trade and transit dispute with India that led to a crippling blockade and worsened economic conditions. The 1990 constitution and later democratic reforms sought to improve governance and representation. However, they failed to bring meaningful social and economic progress to many Nepalese, especially marginalized groups such as the Dalits. The disillusionment with the slow pace of reform, combined with ongoing caste-based discrimination, contributed to a growing sense of frustration among various segments of society.[16]

By 1996, the Maoist parties declared a "People's War" against the monarchy and the elected government, signaling the start of a decade-long insurgency. The Maoists sought to abolish the monarchy and address deep-seated issues of inequality, including those tied to caste. The roots of this conflict lay in the unmet aspirations of Nepal's democratic transition, political instability, and the persistent marginalization of groups like the Dalits.[17]

Maoist Insurgency (1996-2006)

The Maoist insurgency, a decade-long armed conflict in Nepal, marked a transformative yet tumultuous period in the country's history. Emerging in February 1996, the Communist Party of Nepal (Maoist) launched a "People's War" aimed at overthrowing the monarchy and

[15] BBC News, "Nepal Profile," April 28, 2021, https://www.bbc.com/news/world-south-asia-12499391.
[16] *Id.*
[17] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.

addressing systemic inequalities, including caste-based discrimination.[18]Initially rooted in Marxist-Leninist ideology, the Maoist movement embraced the struggles of marginalized groups like the Dalits, weaving their grievances into a broader revolutionary vision centered on equality and social justice.[19] This alignment with Dalit struggles resonated deeply within the community, which had long been excluded from political and economic power structures.[20]

The Dalit Agenda and Revolutionary Symbolism

The Maoists' 40-point action plan demanded the abolition of untouchability, the establishment of caste equality, and the dismantling of systemic discrimination. Nine points addressed nationalism, 17 related to public welfare, and 14 outlined the Maoists' living conditions.[21] Symbolically, the Maoists actively recruited Dalits into the People's Liberation Army, promoting inter-caste marriages and collective social events in areas under their control.[22] These measures temporarily reduced caste-based discrimination in Maoist-controlled regions and brought caste issues into the national dialogue.

However, the scope of these efforts was limited. While symbolic acts like inter-caste marriages were encouraged, they often lacked deep societal support. A broader campaign of social re-education and a commitment to dismantling entrenched caste biases would have been necessary to ensure lasting change. The challenge of fostering meaningful inter-caste

[18] S. K. Panthee, "Effects of Maoist's War on Dalits' Movement," *Contemporary Voice of Dalit* 13, no. 1 (2021): 21, https://doi.org/10.1177/2455328X20922442.
[19] *Id.,* 27.
[20] Yash Ghai, "Ethnic Identity, Participation and Social Justice: A Constitution for New Nepal?" *International Journal on Minority and Group Rights* 18, no. 3 (2011): 319, https://doi.org/10.1163/157181111X583305.
[21] S. K. Panthee, "Effects of Maoist's War on Dalits' Movement," *Contemporary Voice of Dalit* 13, no. 1 (2021): 23, https://doi.org/10.1177/2455328X20922442.
[22] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.

relationships in the face of centuries of entrenched discrimination reflects the intricate and often contradictory nature of the Maoist social revolution.

Political Unrest and Escalating Violence

During the insurgency, Nepal underwent significant political turmoil. In 2001, the tragic royal massacre resulted in the death of King Birendra and most of the royal family, thrusting Birendra's brother Gyanendra onto the throne.[23] Gyanendra initially cooperated with the elected government but later dissolved parliament in 2002 and assumed absolute power in 2005. The monarchy's actions further destabilized the country, intensifying public dissatisfaction and strengthening the Maoist cause. By 2006, the insurgency had claimed thousands of lives and exacerbated Nepal's political and economic instability.[24]

The insurgency's escalation was marked by violent confrontations between Maoist rebels and government forces. In November 2001, a state of emergency was declared following coordinated Maoist attacks on army and police posts. King Gyanendra ordered the military to crush the rebellion, leading to widespread violence and civilian casualties.[25] Despite several ceasefires and peace talks, including a brief truce in 2003, hostilities resumed, culminating in intensified clashes and political upheavals.[26]

The Comprehensive Peace Agreement and Lingering Challenges

The Maoist insurgency officially ended in November 2006 with the signing of the Comprehensive Peace Agreement (CPA) between Prime Minister Girija Prasad Koirala and

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[23] BBC News, "Nepal Profile," April 28, 2021, https://www.bbc.com/news/world-south-asia-12499391.
[24] *Id.*
[25] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.
[26] BBC News, "Nepal Profile," April 28, 2021, https://www.bbc.com/news/world-south-asia-12499391.

Maoist leader Prachanda.[27] This accord was the culmination of a series of events and negotiations influenced by both internal dynamics and external pressures. Following the death of King Birendra, King Gyanendra assumed power and imposed direct rule, prompting the formation of the Seven Party Alliance (SPA) in opposition to the monarchy.[28] With mediation from the Indian government, the SPA and the Maoists negotiated the Twelve-Point Agreement in New Delhi, a pivotal accord that established a united front against monarchical rule and laid the groundwork for a future democratic framework in Nepal[29].

The agreement committed both parties to democracy, peace, and the dismantling of systemic inequalities, including caste-based discrimination.[30] However, while the insurgency brought Dalit issues to the forefront of national discourse, many Dalits felt disillusioned with the Maoist movement[31]. Critics argued that the Maoist leadership, predominantly composed of upper-caste individuals, had strategically co-opted Dalit support without genuinely addressing their struggles.[32]

The Maoist insurgency underscored the intersection of political instability, systemic inequality, and grassroots activism in shaping Nepal's modern history. For Dalits, the insurgency represented both an opportunity to challenge centuries of oppression and a reminder of the limitations of revolutionary rhetoric in achieving transformative social change. The movement

[27] BBC News, "Nepal Profile," April 28, 2021, https://www.bbc.com/news/world-south-asia-12499391.
[28] Khadka, Navin Singh. "Not Quite There Yet." Nepali Times, 1 Dec. 2005.
[29] "Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) | Peacemaker." , Nov. 23, 2006, https://peacemaker.un.org/en/node/9215.
[30] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.
[31]Pradhan, Gyan Ph.D. (2013) "Mahendra Lawoti and Anup K. Pahari (Eds.) The Maoist Insurgency in Nepal: Revolution in the Twenty-First Century. New York: Routledge, 2010.," Journal of International and Global Studies: Vol. 4: No. 2, Article 16.
[32] Richard A. Bownas, "Dalits and Maoists in Nepal's Civil War: Between Synergy and Co-optation," *Contemporary South Asia* 23, no. 4 (2015): 422, https://doi.org/10.1080/09584935.2015.1090952.

revealed the complexity of dismantling entrenched hierarchies, emphasizing that symbolic gestures must be accompanied by sustained structural reforms to create lasting equality.

Post-Civil War Society

The Comprehensive Peace Accord (CPA) of 2006, which formally ended the Maoist insurgency, created a foundation for critical constitutional and legislative reforms aimed at addressing systemic caste discrimination.[33] The post-civil war era ushered in a renewed focus on Dalit rights and representation. One of the first major milestones was the 2007 Constituent Assembly elections, which for the first time brought Dalit issues into mainstream political discourse. This was followed by the historic declaration on May 28, 2008, when the newly elected Constituent Assembly abolished the 240-year-old monarchy and declared Nepal a Federal Democratic Republic, replacing the King with a President as Head of State and establishing a Prime Minister-led government.[34]

These political shifts paved the way for the drafting of the 2015 Nepali Constitution, which explicitly recognized the rights of Dalits and included provisions aimed at combating caste-based discrimination.[35] These developments were significant in affirming the state's commitment to equality and social justice. However, the enactment of laws and constitutional provisions alone proved insufficient to dismantle deeply entrenched social hierarchies. Critics pointed out that legal reforms, though groundbreaking on paper, faced resistance in implementation due to persistent societal prejudices and systemic inertia. Dalit activists often

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[33] Richard A. Bownas, "Dalits and Maoists in Nepal's Civil War: Between Synergy and Co-optation," *Contemporary South Asia* 23, no. 4 (2015): 410, https://doi.org/10.1080/09584935.2015.1090952.
[34] Ministry of Foreign Affairs Nepal, *History of Nepal*, Government of Nepal, Ministry of Foreign Affairs, https://www.mofa.gov.np/about-nepal/history-of-nepal/.
[35] Constitute. *Nepal 2015 Constitution*. Translated by Nepal Law Society et al., 2015, https://www.constituteproject.org/constitution/Nepal_2015.

found their efforts diluted by their alliances with major political parties, which frequently prioritized broader political agendas over specific caste-based concerns.[36]

Traditional elites—typically high-caste individuals, as well as those from upper or intermediate castes who gained power during the civil war but historically held privileged positions—retained significant influence within Nepal's socio-political framework and often resisted efforts to redistribute power and resources.[37] The constitutionally enshrined principles of social justice and inclusion faced entrenched opposition, limiting their impact on the ground. A key example of this resistance was the opposition to restructuring Nepal into a federal state with provisions for ethnic representation. Traditional elites feared that such reforms would weaken their long-standing dominance. During the constitution-building process, debates emerged over whether federalism should be based on ethnicity or a common identity. The ruling parties, largely influenced by upper-caste Brahmins and Chhetris, rejected ethnicity-based federalism, arguing it would incite division.[38] However, this stance was widely viewed as a tactic to preserve the status quo and restrict the political empowerment of marginalized communities. As a result, despite constitutional promises of equality and inclusion, systemic barriers continued to marginalize Dalit voices in decision-making processes. The disconnect between legislative reforms and tangible societal change left many Dalits disillusioned, highlighting the ongoing struggle to translate formal legal provisions into lived realities.

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[36] S. K. Panthee, "Effects of Maoist's War on Dalits' Movement," *Contemporary Voice of Dalit* 13, no. 1 (2021): 23, https://doi.org/10.1177/2455328X20922442.
[37] Yash Ghai, "Ethnic Identity, Participation and Social Justice: A Constitution for New Nepal?" *International Journal on Minority and Group Rights* 18, no. 3 (2011): 324, https://doi.org/10.1163/157181111X583305.
[38] Narayan Silwal, "Federalism in Nepal: Divergent Perception and Convergent requirement for Democratic Consolidation", *Naval Postgraduate School,* March 2013, https://apps.dtic.mil/sti/tr/pdf/ADA579895.pdf

Caste-Based Discrimination and Untouchability Offense and Punishment Act

The adoption of the Caste-Based Discrimination and Untouchability Offense and Punishment Act of 2011 (CBDU Act) was a landmark moment in Nepal's legislative history, representing a critical step toward addressing systemic caste-based discrimination. The Act emerged as part of a broader wave of reforms undertaken by the Nepalese state over the past two decades, including constitutional changes aimed at building a more inclusive and equitable society. These efforts were particularly significant following the abolition of the monarchy and the declaration of Nepal as a federal democratic republic in 2008, which created momentum for legal and institutional measures to combat deep-rooted social injustices. In this context, the CBDU Act was introduced to criminalize caste-based discrimination and untouchability in both public and private spheres. It included penalties for such acts, aiming to dismantle entrenched hierarchies and provide Dalits with legal recourse to protect their rights.[39] The Act also symbolized the state's formal acknowledgment of caste-based inequalities and its commitment to social justice.

For Dalit communities, the CBDU Act was a beacon of hope, offering a legal foundation to challenge pervasive discrimination in everyday life. It aimed to ensure Dalits' right to equality, dignity, and freedom from untouchability. By prohibiting caste-based discrimination in areas like education, employment, and access to public spaces, the Act intended to dismantle centuries-old practices that marginalized Dalits and perpetuated social exclusion.[40]

[39] Amnesty International, *Nepal: "No-One Cares": Descent-Based Discrimination against Dalits in Nepal* (Amnesty International, May 10, 2024), 29, https://www.amnesty.org/en/documents/asa31/7980/2024/en/.
[40] *Id.*

Implementation Challenges and Systemic Shortcomings

Despite its transformative potential, the CBDU Act has faced significant implementation challenges that have limited its impact. Reports showcase that law enforcement often fails to take complaints of caste-based discrimination seriously, and police frequently push for informal mediation instead of pursuing criminal investigations.[41] This practice not only undermines the Act's authority but also perpetuates a culture of impunity, sending a message that caste-based offenses are tolerable within the justice system.

The Act's shortcomings are further evident in the limited number of cases registered annually. Only 30 to 43 cases are typically reported, a figure that grossly underrepresents the scale of caste-based discrimination in Nepal. Dalit communities often experience "legal cynicism," a distrust of law enforcement stemming from institutional bias and negligence. For example, the reluctance of police to register caste-based offenses, coupled with delays in legal proceedings, discourages Dalits from seeking justice through formal channels.[42]

Case Studies of Systemic Failures

Two high-profile cases exemplify the barriers Dalits face in accessing justice under the CBDU Act. In 2020, Angira Pasi, a 12-year-old Dalit girl, was raped and coerced into an informal settlement with her assailant, a dominant-caste man. When she was later found dead, police initially refused to register a complaint, acting only after significant civil society intervention. The accused was eventually convicted, but the systemic failures in the handling of her case illustrate the entrenched caste and gender biases in Nepal's justice system.[43]

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[41] *Id.*
[42] *Id.*
[43] *Id.*

Similarly, the case of Ajit Dhakal Mizar, an 18-year-old Dalit man found dead under suspicious circumstances in 2016, underscores the inadequacies of the justice system. His death, initially recorded as a suicide, was not properly investigated, and his family has faced years of legal hurdles in their quest for justice. Allegations of police negligence and bias have highlighted the systemic barriers that prevent Dalits from achieving accountability.[44]

Analyzing the Act

The CBDU Act's lack of procedural clarity and enforcement mechanisms has significantly undermined its efficacy. Although the Act was designed to hold individuals accountable for caste-based discrimination, its poor implementation renders it largely symbolic. Many Dalits view the law as lacking transformative power, as it fails to confront the deeper structural inequities that sustain caste-based oppression. To move beyond surface-level commitments, the Nepali government must think more creatively and proactively about enforcement strategies. A historical example can be drawn from the U.S. desegregation era: although Brown v. Board of Education legally ended school segregation, meaningful change only occurred when the federal government threatened to withhold funding from noncompliant schools. Similarly, Nepal must adopt a holistic approach—one that includes not only robust enforcement of the CBDU Act, but also comprehensive police reforms and targeted efforts to challenge entrenched social norms. Without such measures, Dalits will continue to face barriers in accessing justice, and the promise of equality enshrined in Nepal's legal framework will remain unfulfilled.

[44] Amnesty International, "Descent-Based Discrimination against Dalits in Nepal," Amnesty International, May 10, 2024, 33, https://www.amnesty.org/en/latest/news/2024/05/descent-based-discrimination-against-dalits-in-nepal/.

2015 Nepali Constitution

The 2015 Constitution of Nepal was drafted and finalized under extraordinary circumstances, shaped by the aftermath of a devastating earthquake that struck the country in April 2015. The 7.8 magnitude earthquake, followed by powerful aftershocks, caused catastrophic loss of life, infrastructure, and property, particularly in the Kathmandu Valley and mid-hill districts. This national tragedy created a sense of urgency among political parties, compelling them to expedite the constitution-writing process to bring political stability and focus on post-disaster reconstruction. After weeks of intense negotiation and resolution of contentious issues, the constitution was promulgated on September 20, 2015, through an overwhelming majority vote in the Constituent Assembly. This historic achievement marked the fulfillment of the Nepali people's long-standing aspiration for a constitution crafted by an elected representative body, paving the way for the election of key state positions under the new constitutional framework.

The "Rights of Dalits" Provision and the Evolution of Reservation Laws in Nepal

The 2015 Constitution of Nepal marked a significant milestone for the Dalit community, providing legal recognition and specific guarantees under Article 40, titled "Right of Dalits." This provision enshrines several fundamental rights for Dalits, such as proportional representation in all state agencies, free education with scholarships from primary to higher education levels, and special provisions for health care, land, housing, and traditional occupations. The state is further mandated to ensure equitable distribution of these facilities among all Dalit communities, including Dalit women, emphasizing inclusivity and equality.[45]

[45] Constitute. *Nepal 2015 Constitution*. Translated by Nepal Law Society et al., 2015, https://www.constituteproject.org/constitution/Nepal_2015.

While Article 40 outlines the state's commitment to structural change and long-term empowerment of Dalits, it is complemented by the Caste-Based Discrimination and Untouchability (Offense and Punishment) Act, 2011 (CBDU Act). These two legal instruments differ in scope, legal function, and implementation mechanisms. The constitution sets the broader vision for Dalit inclusion and equity, whereas the CBDU Act provides the legal tools to criminalize caste-based discrimination, ensure accountability, and protect Dalits' dignity in everyday life.

In line with the constitutional directive for proportional inclusion, the Civil Service Act 1993 (2049 B.S.) evolved to accommodate affirmative action policies for Dalits. The Act's amendments, including the landmark provisions in 2007 and subsequent revisions in 2016, introduced a reservation system in civil service positions. Currently, Dalits are entitled to a 9% quota within the 45% reservation allocated for marginalized groups, which also includes women, indigenous peoples, Madhesis, and others. This quota applies to open competition posts and reflects Nepal's commitment to inclusive governance.[46]

Impact and Shortcomings

Nepal's affirmative action policies, including the reservation system under the Civil Service Act, have played a pivotal role in promoting inclusion. However, these measures have also exposed systemic shortcomings, which hinder their transformative potential. A significant concern with the reservation system is the disproportionate representation of Hill Dalits compared to Dalits from other regions, particularly Madhesi Dalits. Hill Dalits have often benefited more from reserved civil service positions due to greater access to education,

[46] Civil Service Act, 2049 (1993), 43.

employment opportunities, and state resources—advantages stemming from the relatively better infrastructure in the hill regions. In contrast, Madhesi Dalits, who primarily reside in the southern plains of Nepal where agriculture dominates and development remains limited, continue to face systematic marginalization. Additionally, a social hierarchy established by the *Muluki Ain* still exists within Dalit communities themselves, with Hill Dalits typically ranked higher than Madhesi Dalits, further compounding disparities in representation and opportunity. This overrepresentation of Hill Dalits undermines the principle of proportional inclusion and fails to address the intersectionality of caste and regional inequities.[47]

Studies show that Hill Dalits constitute the majority of Dalit appointees in civil services, sidelining Madhesi Dalits, who often face compounded discrimination due to their caste and regional identity. This imbalance suggests that affirmative action policies have not fully accounted for the socio-economic diversity within the Dalit community, leading to uneven benefits.[48]

The overlap between the categories of Dalits, Madhesis, and Backward Regions creates additional challenges in implementing affirmative action policies effectively. Dalits are classified based on caste, while Madhesis are defined by regional and ethnic identities. Backward regions are undeveloped geographical areas, often without specified race or ethnicity. This lack of clear demarcation results in conflicts where individuals may fall into multiple categories or be excluded altogether.[49] For instance, some Madhesis are also Dalits, but policies often fail to

[47] Prithvi Man Shrestha, "Despite Law, Hill Brahmins Continue to Be Disproportionately Recruited in Civil Service," *The Kathmandu Post*, January 6, 2021, https://kathmandupost.com/national/2021/01/06/despite-law-hill-bramhins-continue-to-be-disproportionately-recruited-in-civil-service.
[48] *Id.*
[49] Lynn Bennett, Dilli Ram Dahal, and Pav Govindasamy, Caste, Ethnic, and Regional Identity in Nepal: Further Analysis of the 2006 Nepal Demographic and Health Survey (Calverton, MD: Macro International Inc., 2008).

distinguish their dual marginalization, leaving these individuals vulnerable to being overlooked in either category. Similarly, Dalits from Backward Regions may find themselves competing with other marginalized groups, diluting the intended focus of affirmative action and perpetuating systemic inequalities.

The implementation of affirmative action faces numerous institutional barriers, including bias within the bureaucracy and weak enforcement mechanisms. Reports indicate that reserved posts are often filled by relatively privileged individuals within marginalized groups, sidelining the most disadvantaged. Moreover, the criteria for identifying beneficiaries lack transparency and consistency, leading to skepticism about the fairness of the system.

The shortcomings of Nepal's reservation policies highlight the complexities of addressing systemic inequalities through affirmative action alone. The overrepresentation of Hill Dalits and the overlap in marginalized group definitions reflect the need for more nuanced and intersectional approaches. To truly empower the Dalit community, policies must prioritize equitable resource allocation, enhance access to education and training, and ensure rigorous oversight to prevent elite capture within marginalized groups.

Hourglass Federalism

The shortcomings of Nepal's affirmative action and quota system are intricately tied to the structural constraints of its federal system, particularly the hourglass federalism model established by the 2015 Constitution. This system, characterized by strong central and local governments and weaker provincial governments, was designed to decentralize power and foster localized governance, including addressing caste-based discrimination.[50] Theoretically, this

[50] Michael G. Breen and Iain Payne, "Hourglass Federalism in Nepal: The Role of Local Government in Post-Conflict Constitutions," *Indian Law Review* 7, no. 2 (2022): 200, https://doi.org/10.1080/24730580.2022.2162281.

model aims to ensure that marginalized groups, including Dalits, benefit from proximity to local decision-making processes while maintaining central oversight to prevent fragmentation.

One of the most significant issues with hourglass federalism is the lack of robust provincial authority to address systemic inequalities. Provinces are often unable to ensure greater political representation for marginalized ethnic and caste groups due to their limited scope of power. For instance, Madhesh Province, which is home to many Madhesi Dalits, theoretically provides greater representation. However, it lacks the institutional capacity and resources to implement transformative policies. This limited provincial function has restricted the effectiveness of affirmative action policies and quota systems, leaving Dalit communities without adequate representation or support to overcome entrenched discrimination.[51]

Furthermore, the absence of clear coordination between local and provincial governments has exacerbated gaps in accountability, particularly in addressing caste-based discrimination. For example, while local governments are tasked with implementing affirmative action measures, their efforts are often fragmented and lack the backing of cohesive provincial frameworks. This has allowed regional disparities in the implementation of quota systems to persist, with Hill Dalits continuing to dominate reserved positions while Madhesi Dalits and those from Backward Regions remain sidelined.[52] The overlapping definitions of marginalized groups, such as Dalits, Madhesis, and those from Backward Regions, further complicate policy implementation, with beneficiaries often falling through the cracks of poorly coordinated governance structures.[53]

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[51] *Id., 186*.
[52] Prithvi Man Shrestha, "Despite Law, Hill Brahmins Continue to Be Disproportionately Recruited in Civil Service," *The Kathmandu Post*, January 6, 2021, https://kathmandupost.com/national/2021/01/06/despite-law-hill-bramhins-continue-to-be-disproportionately-recruited-in-civil-service.
[53] Lynn Bennett, Dilli Ram Dahal, and Pav Govindasamy, *Caste, Ethnic, and Regional Identity in Nepal: Further Analysis of the 2006 Nepal Demographic and Health Survey* (Calverton, MD: Macro International Inc., 2008).

The structural limitations of hourglass federalism also reflect broader systemic challenges in Nepal's approach to inclusion. While the intent of decentralization was to empower marginalized groups through local governance, the weak linkage between governance tiers has undermined the transformative potential of these policies. As a result, affirmative action measures, including quotas in civil service, have struggled to produce equitable outcomes. Without addressing the structural inefficiencies inherent in Nepal's federal system, Dalits and other marginalized communities will continue to face barriers to meaningful inclusion and representation.

Conclusion

The legal trajectory of Nepal, from the *Muluki Ain* to the 2015 Constitution, reveals a complex interplay between law and society in shaping the status of Dalits. While legislative reforms have expanded legal protections and increased visibility for Dalit rights, their impact has often been undermined by weak enforcement, systemic biases, and structural inefficiencies within Nepal's governance frameworks. Affirmative action policies, including quotas, have failed to equitably uplift all Dalit communities, with Hill Dalits disproportionately benefiting at the expense of Madhesi Dalits and those from backward regions. Similarly, the hourglass federalism model has further complicated efforts to address caste-based discrimination, as fragmented governance structures limit the transformative potential of these policies. Ultimately, the promise of equality and justice remains out of reach for many Dalits. This reality calls for more than just strong legal frameworks, it demands comprehensive societal reforms aimed at dismantling entrenched caste hierarchies and addressing the deep-rooted social foundations of caste discrimination, ensuring that legal progress is accompanied by genuine social change.

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An Analysis of the 2016 Court of Arbitration Ruling on the South China Sea

By Robi Castaneda

Robi Castaneda is a third-year political science and music double major. He currently serves as the journal's Director of External Affairs, managing the journal's relationship with outside organizations. Aside from DJLS, Robi also works with the ASUCD External Affairs Commission, helping to expand access to legal resources among UC Davis Students. He plans to continue his passion for immigration law and international arbitration as the next International Student Representative for ASUCD.

Introduction

This analysis will examine the relation of international legal standards to the 2016 International Court of Arbitration ruling against China's territorial claims in the South China Sea. I will be referencing the United Nations Convention on the Law of the Sea (UNCLOS), the relevance of *opinio juris* in China's reaction to the ICA's ruling, the issue of overlapping jurisdictional sovereignties, as well as structural issues of enforcement inherent to UNCLOS' treaty. Among the weaknesses of the UNCLOS treaty, the following issues will be addressed: (1) the conflicts between the sources of international maritime law, and (2) the unequal standards of enforcement based on power imbalances.

Historical Background

2016 International Court of Arbitration Ruling

The International Court of Arbitration ruling made on July 12, 2016, found China's territorial claims in the South China Sea, outlined as the nine-dash line, insufficient in their proofs to be labeled acceptable as part of China's territory, as defined by the United Nations Convention on the Law of the Sea. This nine-dash line, extending from the southern coasts of the

Guangxi, Guangdong, and Hainan provinces, extends down towards the Paracel and Spratly Islands, intersecting with the Philippines' Exclusive Economic Zone.[1] The tribunal found that China had overstepped its prescribed EEZ, ruling in favor of the Philippines, the litigant of the case. The process began with the Philippines' invocation of Annex VII of UNCLOS, triggering the procedures for entering into territorial claim disputes with China. The Philippines' argument rested on the premise that China had overextended the boundaries of its exclusive economic zone and territorial sea. As a response to the Philippines, China tried to justify its own claims through the use of historical precedent, quoting China's past economic, cultural, and military involvements in the region as evidence.[2]

Despite the Court of Arbitration ruling against China, China rendered the decision null and void. It has since constructed numerous islands along the Spratly, Paracel, and Scarborough regions of the South China Sea.[3] This has since upended the order of international law, questioning both the relevancy and structural integrity of UNCLOS when challenged by militarily powerful, non-compliant nations.

To contextualize this ruling's relevance within international law, it is important to explain UNCLOS's origins within 18th-century customary standards of maritime territorial claims. The first instances of maritime claims originated with the 18th century "cannon shot rule", which ruled that countries' territorial waters extended to how far their cannons could shoot. In this case, generally three miles from a country's shoreline. Insofar as the recognition of these territorial

[1] Hoogeland, Martijn. "Case Note: The South China Sea Dispute and the Role of UNCLOS in the Settlement of the Dispute." *Revue Québécoise de Droit International* Hors-série (December 2019): 93. https://canlii.ca/t/spsh.
[2] Hoogeland, Martijn. "Case Note: The South China Sea Dispute and the Role of UNCLOS in the Settlement of the Dispute." *Revue Québécoise de Droit International* Hors-série (December 2019): 93. https://canlii.ca/t/spsh.
[3] Beech, Hannah, and Jason Gutierrez. "Blasting Bullhorns and Water Cannons, Chinese Ships Wall off the Sea." *The New York Times*, September 23, 2023. https://doi.org/10.3389/fmars.2023.1266802.

waters was concerned, control over such maritime areas could only go as far as the extent of a country's ability to exert a "monopoly on violence" over its territorial waters. In short, the recognition of a country's territorial waters rested not on countries' observance of perceived legal norms, but on the more politically realist possibility of brute force as a consequence of belligerence. This conflict between the "logic of appropriateness" vs the "logic of consequence" ties into China's refusal to observe the ruling by the ICA. As such, when put into China's perspective, it need not observe the ICA ruling when it can resort to its modern version of the "cannon shot rule". As such, should a vessel with the interest of exacting harm upon a nation enter within firing range of such nation's cannons, it should expect the possibility of a nation to act in its interest and sink the vessel. Nowadays, norms of brute force, such as the "cannon shot rule," are not commonplace in 21st-century international legal standards. Still, they exist as a possible conflict with the perceived obligation to international treaties. While the cannon shot rule is now defunct, it still holds a degree of influence today. It is grounded in realist explanations of state behavior and interest, wherein nations enforce their territorial waters by exacting a monopoly of violence over the seas.

Sources of International Maritime Law

UNCLOS as a Formal Source of International Law

UNCLOS outlines boundaries that extend from countries' baselines up to 200 miles off their coast. These boundaries are thus: territorial waters (12 miles), continental shelf (200 miles), and the Exclusive Economic Zone (200 miles). Each area prescribed by UNCLOS grants nations varying degrees of sovereignty, and in turn, varying reasons for defending such territories.

Territorial Waters

The first level of maritime control is defined as a country's "territorial waters." As described in Article 3 of UNCLOS, the territorial waters, extending out twelve miles from a country's baseline, establish the areas of water in which countries exert full sovereign control.[4] These territorial waters are essentially the extent of a country's borders into the ocean. If a ship or vessel were to cross within twelve miles of a nation's baseline, it would be crossing the border into that country. All vessels with "innocent passage", passage which is neither prejudicial to the peace nor the good order or security of the state,[5] would be allowed to cross into this zone.

Continental Shelf and Exclusive Economic Zone

The second and third levels of maritime sovereignty outlined by the UNCLOS are the "continental shelf" and "exclusive zone," both extending within 200 miles of a country's baseline. The Exclusive Economic Zone (EEZ) and Continental Shelf Areas present the greatest areas of contention between nations precisely because of their extensive material and strategic benefits. These areas grant countries the right to extract critical resources from the territorial waters. Within the continental shelf, a nation may have full access to all sedentary resources–gold, minerals, seaweed, oysters, and most notably, oil. The exclusive economic zone, similar to the continental shelf, grants a nation exclusive access to both sedentary and non-sedentary resources. This means nations may have exclusive access to fishing operations in their EEZ, giving them the right to limit fishing access to foreign vessels that wish to fish in their waters.

[4] United Nations Convention on the Law of the Sea. December 10, 1982. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[5] *Id.*

UNCLOS: Degrees of Legality

One of the great strengths of UNCLOS is the specificity with which it delimits the areas of maritime territory. Through the strict definitions of territorial waters, continental shelves, and EEZs, UNCLOS extends beyond just the customary definitions of "cannon shot" waters. In this respect, UNCLOS functions as "hard" law—that is, law which legally binds nations to the provisions of a treaty through specific provisions.

Article 57, UNCLOS writes the following delimitations for exclusive economic zones: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." [6] From a technical standpoint, it is good practice to note that the language outlined by UNCLOS emphasizes the importance of "shall" over "should". While the difference between these words may amount to a minor linguistic difference in grammatical tenses, the extent to which it legally obligates nations to abide by a treaty is far from minor. Whereas "should" connotes a suggestion or recommendation of best practice to a treaty, "shall" connotes a degree of obligation that mandates countries' observance of an agreement. In the case of UNCLOS, countries "shall" observe its codification of waters and relegation of enforcement capabilities to individual nations, bolstered by maritime law.

Past Precedent as a Customary Source of International Law

The difficulty of resolving the disputes within the South China Sea is the sheer amount of claims to the region. Vietnam, Brunei, and Malaysia have exercised some claims to the islands,

[6] *Id.*

all with varying precedents to back up their cases.[7] Past precedent has shown that territorial claims may be made using historical instances of settlement and colonization. Although past historical control has not been officially enshrined into UNCLOS, it remains a customary matter wherein countries that demonstrate continuous, effective control over a region may have the greater prerogative to exercise their sovereignty over a region. Miyoshi (2012) writes about this in his reference to a U.N. Secretariat Study on the Juridical Regime on Territorial Waters, noting that the recognition of historical claims is contingent on three main factors, "(1) the exercise of authority over the area by the State claiming the historic title; (2) the continuity of this exercise of authority; and (3) the attitude of foreign States."[8]

China's historical precedent, a largely prescriptive matter, is contingent upon the first instance of the nine-dash line appearing in modern records. The nine-dash line has its origins in 1935 when the Republic of China outlined a map of its claims to territorial waters in the South China Sea.[9] China has also attempted to provide evidence for continuous control over the South China Sea, citing vague instances of its settlements in the region during the dynastic period of China's history. [10] However, these historical claims cited by Miyoshi, both modern and ancient, lack the legal basis of written documents and evidence of past Chinese settlement to back up China's claims. What China provided, as proof of its claims, was not based on solid evidence of past settlements and written legal agreements. Instead, they provided highly politicized works built off early 20th-century nationalistic sentiment observed through China's regime changes

[7] Wu, Shicun. Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective. 1st ed. Elsevier Science, 2013. https://doi.org/10.1533/9781780633558.
[8] Miyoshi, Masahiro. "China's 'U-Shaped Line' Claim in the South China Sea: Any Validity Under International Law?" Ocean Development & International Law 43, no. 1 (2012): 1–17. https://doi.org/10.1080/00908320.2011.619374.
[9] *Id.*
[10] *Id.*

during the civil war—that is, concessions of the islands to Japan in WWI. [11] Furthermore, haphazard precedent did not help with China's claims to "consistent, uninterrupted" control over the islands. The tenuous nature of these claims is well described by Hayton, citing, "They were not works of historical scholarship but partisan assertions of claim with minimal referencing."[12]

Other parties, such as Vietnam, were not necessarily part of the 2016 ICA ruling but otherwise offered greater examples of solidified legal documents to back up their claims. This was seen through the February 1975 white paper claim on the Paracel (Hoang Sa) and Spratly (Truong Sa) Islands.[13] According to Wu (2013), this was based on the land restitution of the islands that the South Vietnamese government had acquired from France. The Cairo Agreement (1943), Yalta Agreement (1945), and the Potsdam Declaration (1945) mandated that occupied lands be granted back to their legal title.[14] Essentially, South Vietnam had acquired the former French claims to the Spratly and Paracel islands upon its independence from France.

When compared to the requirements of continuous, effective control, China had a historical claim that, at best, was a few lines written onto a map. Had China truly exercised effective control, it would have had past sustained attempts to create infrastructure, settlements, and a permanent population in the islands within the South China Sea. It is for this same reason that China currently constructs bases on the Spratly Islands–an attempt to make up for its past inability to exercise effective control. By exercising its authority in the region through military

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[11] Zhang, Feng. "Assessing China's Response to the South China Sea Arbitration Ruling." Australian Journal of International Affairs 71, no. 4 (2017): 440–459. https://doi.org/10.1080/10357718.2017.1287876.
[12] Hayton, Bill. "When Good Lawyers Write Bad History: Unreliable Evidence and the South China Sea Territorial Dispute." Ocean Development & International Law 48, no. 1 (2017): 17–34. https://doi.org/10.1080/00908320.2017.1265362.
[13] Wu, Shicun. Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective. 1st ed. Elsevier Science, 2013. https://doi.org/10.1533/9781780633558.
[14] *Id.*

and commercial means, China cements its legal claims with the physicality of Chinese settlements in the South China Sea islands.

The Philippines' claims, compared to Vietnam and China's, were relatively more recent. The Philippines quotes their 'discovery' of the islands to a Philippine fisherman in 1951.[15] After the fisherman hoisted the Philippine flag, he held his claim to the land until 1971, after which he transferred authority to the Marcos administration.[16] The 'discovery' of the islands, to the hoisting of the Philippine flag over the islands, has been the Philippines' key to demonstrating effective control over the respective territories.

The Role of the International Court of Arbitration

Per Annex VII, the International Court of Arbitration acts as a third party that resolves territorial disputes between nations. As a 'law identifying source,' the ICA seeks not to create laws, but instead to clarify existing laws. In terms of the Philippines-China dispute, the court ruled in favor of the Philippines. However, it must be clarified that the court's ruling did not verify or delineate the Philippines' territorial claims in the South China Sea. It instead invalidated China's exclusive claim to the region.[17]

The Court of Arbitration cannot, however, do anything to enforce its ruling–that is a duty relegated to the parties at hand. With military exercises, harassment of foreign fishing vessels with its navy's water cannons, and the construction of artificial islands, China has clearly shown that it will not comply. This proves that a ruling by an international court can do little when faced with raw military capability. China's actions have shown that the ICA and UNCLOS remain at

[15] *Id.*
[16] *Id.*
[17] Tanaka, Yoshifumi. "Reflections on the Philippines/China Arbitration." The Law and Practice of International Courts and Tribunals 15, no. 2 (2016): 305–325. https://doi.org/10.1163/15718034-12341324.

the courtesy of countries' wills to abide by its rulings, questioning the relevance of *opinio juris* on the international stage.

Compliance

Enforcement Mechanisms

While UNCLOS formally adopts dispute mechanisms as a redress for international border disputes, I argue that these formal enforcement mechanisms are only as strong as the military capabilities of the parties at hand. In this vein, the official procedures for territorial disputes are tenuous at best. Article 296, UNCLOS writes: "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute,".[18]A court or tribunal can deliver a ruling, but it cannot deliver compliance, as the case "South China Sea Arbitration 'Philippines v. China, PRC'" has demonstrated. The International Court of Arbitration delivered a legally binding ruling, but the ruling was ignored, and China perpetuated its construction of military bases on the islands. In an ideal world of mutual respect and cooperation, the parties would comply with this decision, but the real world of power politics puts the transaction to the sale of the highest bidder—the nation with the greater military capacity. Between the Philippines and China, China's military prowess makes it the de facto winner in this transaction.

In reality, UNCLOS's current enforcement mechanisms rely on two main factors: individual countries' enforcement capabilities and the goodwill of countries to recognize the maritime borders. Part XII of UNCLOS relegates sole enforcement capabilities to countries, particularly in cases of maritime protection of ecosystems. It states the following: "The

[18] United Nations Convention on the Law of the Sea. December 10, 1982. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

enforcement of the Convention is assigned to State Parties. According to those provisions, States shall enforce laws and regulations adopted under the Convention and with international rules and standards."[19]

As per Part XII of UNCLOS, Articles 213 and 218, which outline the rights of states to protect the maritime ecosystems within their exclusive economic zones, were applied by the Philippines. The stated articles also align accordingly with the Philippines' grievances outlined in parts B and C listed in the ICA rulings. Both grievances concern the ecological impact of China's dredging activities, as well as the threat that Chinese fishing poses to marine UNCLOS, while existing as hard law in that it strictly defines the maritime borders of nations, exists simultaneously as soft law. Thus, it is unable to enforce itself on countries whose national interests supersede the interests of respecting UNCLOS' legal obligations.

Countries recognize regional claims in most cases where the interests of national security, economic benefit, and an upper hand in regional competition do not outweigh the will to act as a benevolent follower of UNCLOS. Thus, it becomes questionable as to whether UNCLOS is truly a product of *opinio juris* (the perceived legal obligation to follow established state norms) or if it simply coincides with state interests. Indeed, state interest is a confounding factor that plays into rights over extended continental shelves.[20] State interest, in the case of China, is evident through China's desire to extract the rich bed of resources found in the region, in addition to the region's geopolitical and strategic value. While China has argued for historical precedent in its claim to the South China Sea, it is clear that the reason for the Chinese' claims rests more than just

[19] United Nations Convention on the Law of the Sea. December 10, 1982. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[20] Mao, Zhong, Xiang Li, Haijuan Liu, and Zhixiong Zhang. "Binding Force of Extended Continental Shelf Limits: Investigating Whether Article 76(8) of UNCLOS Constitutes Customary International Law." Frontiers in Marine Science (2023). https://doi.org/10.3389/fmars.2023.1266802.

consistency with past precedent, it seeks to capitalize on the vast resources of more than one trillion to a hundred trillion cubic meters of natural gas.[21]

Jurisdictional Conflicts

Despite lacking official methods of enforcement, the International Court of Arbitration, and by extension, UNCLOS, exercises the applicability of its rulings not directly from itself, but through the actions of state actors. Many of the prescribed territorial waters granted to nations by UNCLOS are subject to enforcement by Maritime Law Enforcement authorities (MLEs). These authorities are the Philippine Coast Guard, the Chinese Coast Guard, and the United States Navy (under cooperation with the Philippines). When territorial conflicts occur, such as the overlap of China's nine-dash line with the Philippines' exclusive economic zone, these territorial conflicts run the risk of encountering jurisdictional issues between these state actors. As such, one encounters the unique phenomenon of an MLE acting against an MLE, one coast guard defending itself against another. Part V, Article 74 of UNCLOS states that the "delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement based on international law." [22]

However, when diplomacy fails, brute force and military capability act as the next delimiters of maritime sovereignty. Each maritime legal authority retains eight types of actions: (1) patrolling, (2) blocking and restricting another vessel from moving through means of force

[21] Su, Peng, Lichuan Lin, Yanyan Lv, Jiaoyan Liang, Yuewen Sun, Wei Zhang, and Mingsheng Cai. "Potential and Distribution of Natural Gas Hydrate Resources in the South China Sea." Journal of Marine Science and Engineering 10, no. 10 (2022): 1364. https://doi.org/10.3390/jmse10101364.
[22] United Nations Convention on the Law of the Sea. December 10, 1982. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

(water cannons), (3) searching a vessel, (4) detaining the parties of a vessel.[23] Perhaps there is no better example to illustrate this than the recent incident between the Chinese Coast Guard and the Philippine Coast Guard on Dec. 9, 2023, in which the Chinese Coast Guard targeted Philippine Coast Guard vessels with water cannon blasts and rammed another supply boat.[24] Other incidents in the past included the use of lasers to blind Philippine sailors and auditory devices to impair hearing.[25] The actions of the Chinese Coast Guard are enabled by China's superior military capability compared to that of its neighboring rivals.

By relegating enforcement mechanisms to coast guards, the efficacy of enforcement of territorial waters and EEZs goes hand in hand with a country's military capabilities. In short, a country's claims to a region can only go as far as its ability to enforce them. Should a greater military power, such as China, lay claim to the South China Sea as an EEZ, weaker military powers, such as the Philippines, are unable to counter it. This highlights a weakness within UNCLOS's treaty design–by relegating enforcement mechanisms to individual countries, UNCLOS adopts the inevitability of an unequal level of enforcement.

In a perfect, equal ecosystem of military power dynamics, restraint becomes the product of the threat of reciprocity.[26] For example, Country A assumes the same military capabilities as Country B. As such, each country assumes a similar level of military retaliation from the other should one try to encroach on the other's maritime territory. Both countries are in a state of

[23] Nguyen, H. K. T. "Law and (Dis)order in the South China Sea: Analyzing Maritime Law-Enforcement Activities in 2010–22." Asia Policy 18, no. 2 (2023): 127–64. https://www.proquest.com/scholarly-journals/law-dis-order-south-china-sea-analyzing-maritime/docview/2807414231/se-2.
[24] Beech, Hannah, and Jason Gutierrez. "Blasting Bullhorns and Water Cannons, Chinese Ships Wall off the Sea." The New York Times, September 23, 2023. https://doi.org/10.3389/fmars.2023.1266802.
[25] *Id.*
[26] Kinne, Brandon. The Nuclear Proliferation Treaty. POL 122 Lecture, UC Davis, March 14, 2024.

equilibrium where neither country has an incentive to encroach due to power disparities. However, the world is not equal, and this is most certainly not the case for China and the Philippines. China, ultimately, being a dominant military power in the Asia-Pacific, possessed the full capabilities to exert its sovereignty over the islands.

Conclusion

China's refusal to abide by the ICA ruling ultimately highlights a key weakness within the UNCLOS treaty–the relegation of enforcement capabilities to individual countries. The language of UNCLOS assumes higher degrees of legality, obligating nations to recognize its delimited territories. However, UNCLOS's obligations do little to make written words into reality. Without any proper enforcement mechanisms, nations vulnerable to power imbalances, such as the Philippines, cannot compete with greater powers like China. The ICA's award to the Philippines may suffice in guaranteeing a momentary legal victory, but it cannot assure that the actions of an aggressor will be as judicious in the geopolitical arena. Whether it is through the conflicts between sources of law, overlapping sovereignties, and an uncooperative military aggressor, the authority of UNCLOS in the South China Sea has become a mere suggestion.

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Nguyen, H. K. T. "Law and (Dis)order in the South China Sea: Analyzing Maritime Law-Enforcement Activities in 2010–22." Asia Policy 18, no. 2 (2023): 127–64. https://www.proquest.com/scholarly-journals/law-dis-order-south-china-sea-analyzing-maritime/docview/2807414231/se-2.

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Tanaka, Yoshifumi. "Reflections on the Philippines/China Arbitration." The Law and Practice of International Courts and Tribunals 15, no. 2 (2016): 305–325. https://doi.org/10.1163/15718034-12341324.

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Wu, Shicun. Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective. 1st ed. Elsevier Science, 2013. https://doi.org/10.1533/9781780633558.

Zhang, Feng. "Assessing China's Response to the South China Sea Arbitration Ruling." Australian Journal of International Affairs 71, no. 4 (2017): 440–459. https://doi.org/10.1080/10357718.2017.1287876.

1, 2, 3 — You're Out: How Three Strikes Laws Affect Recidivism Nationwide

By Michael Hayden

Michael Hayden is a fourth-year student at the University of California, Davis, double majoring in Cognitive Science and Philosophy. He is particularly interested in compliance and regulatory law, and how American jurisprudence can account for emerging technologies while upholding legal precedents. In addition to being the Vice President for Mock Trial, he has also interned with the Yolo County Public Defender's Office and California Fair Political Practices Commission. The following research was conducted as part of UC Center Sacramento.

The United States currently has the highest incarceration rate in the world, at 541 people per 100,000.[1] After reaching its peak in 1992, crime sharply dropped nationwide in the mid-to-late 1990s. This drop is thought to have been caused by increased incarceration and police presence; however, two murders would usher in a new age of nationwide punitive sentencing reforms. The highly publicized murders of two California women by habitual offenders became a catalyst for California voters in 1994 to approve Proposition 184, known as the Three Strikes Law (TSL), by 72 percent of the vote.[2] The TSL assigned a "strike" for each felony someone was convicted of, with a third strike carrying a possible life sentence. It was originally introduced to reduce recidivism of habitual offenders, which is the act of being released from prison and reoffending by committing another crime.[3]

This research investigates whether longer prison sentences deter crime, specifically

[1] "States of Incarceration: The Global Context 2024." Prison Policy Initiative, www.prisonpolicy.org/global/2024.html.
[2] "California Proposition 184, Three Strikes Sentencing Initiative (1994)." *Ballotpedia*, ballotpedia.org/California_Proposition_184,_Three_Strikes_Sentencing_Initiative_(1994).
[3] Legislative Analyst's Office. "A Primer: Three Strikes - the Impact after More than a Decade." A Primer: Three Strikes: The Impact After More Than a Decade, Oct. 2005, www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm#:~:text=of%20Three%20Strikes-,Introduction,the%20electorate%20in%20Proposition%20184.

focusing on whether states with more severe TSLs experienced lower three-year recidivism rates from 2010 to 2019 compared to states with less severe TSLs. To answer this question, I collected recidivism data from forty states between 2010 and 2019 and found the mean recidivism rate for each state. I then categorized the severity of each state's TSL based on its penal code. My findings revealed there was no relationship between TSL severity and recidivism rates, and I conclude by discussing the current standing of California's TSL in light of recent criminal justice reforms.

Context and Significance

Commonly referred to as "Three Strikes and You're Out," California's first-of-its-kind TSL aimed to limit the types of penalties habitual felons may receive to only prison sentences, while simultaneously increasing the length of prison sentences for these offenders.[4]

Under California's 1994 TSL, each subsequent offense counts as a "strike" that carries an increased penalty. First strikes follow statutory sentencing guidelines, while second strikes are double those guidelines. Third strikes carry the harshest penalty: a minimum sentence of twenty-five years and a maximum sentence of life in prison. For example, if someone committed a violent felony, they would receive their first strike, and sentencing would follow normal statutory guidelines. If they committed a second violent felony, their sentence would be doubled. Committing a third felony, such as stealing more than $950 in retail merchandise, would lead to a mandatory sentence of at least twenty-five years. Simply put, Proposition 184 required that people with three strikes, regardless of whether their third strike was a violent/serious felony, face a prison sentence ranging from twenty-five years to life..

[4] "The Three Strikes and You're Out Law." *California Legislative Analyst's Of ice*, 22 Feb. 1995, lao.ca.gov/analysis_1995/3strikes.html#:~:text=California's%20Three%20Strikes%20Law,other%20than%20a%20prison%20sentence.

The significance of California's TSL cannot be understated: it fundamentally changed how the carceral system dealt with habitual offenders and made life sentences the norm for them. Since 1994, forty-four states have followed California in passing their own TSLs. Consequently, by the end of the 1990s, TSLs transformed the criminal justice system in America to prioritize punitive measures over rehabilitation, resulting in a dramatic increase in incarceration rates, state budgets, and disproportionately severe sentences for minority communities. Prison populations across the nation skyrocketed, with 87,500 second and third strikers held in California prisons alone.[5] Due to unsafe living conditions and prisons surpassing capacity, federal class action lawsuits forced California to lower its prison population. This led to Proposition 36 being passed in 2012 by 69 percent of voters.[6] Prop 36 mandated that only serious or violent felonies could count for a third strike, and since then, California prison populations have decreased to their lowest point in thirty years.[7] Two years later, in 2014, California voters continued their momentum of criminal justice reform by passing Proposition 47 with 59 percent of the vote, reclassifying some non-violent felonies, including marijuana possession, to misdemeanors.[8] Despite these reforms, California's TSL still remains one of the strictest in the nation and continues to spark debate concerning the effectiveness of such harsh penalties in reducing crime.[9]

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[5] Legislative Analyst's Office. "A Primer: Three Strikes - the Impact after More than a Decade." A Primer: Three Strikes: The Impact After More Than a Decade, Oct. 2005, www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm#:~:text=of%20Three%20Strikes-,Introduction,the%20electo r ate%20in%20Proposition%20184.

[6] "California Proposition 36, Changes to Three Strikes Sentencing Initiative (2012)." *Ballotpedia*, ballotpedia.org/California_Proposition_36,_Changes_to_Three_Strikes_Sentencing_Initiative_(2012).

[7] Person, et al. "California's Prison Population." *Public Policy Institute of California*, Public Policy Institute of California, 12 Sept. 2024, www.ppic.org/publication/californias-prison-population/.

[8] "California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)." *Ballotpedia*, ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014).

[9] Nalchadjian, Chris. "California Three Strikes Law: Understanding the Impact." KN Law Firm, 15 Sept. 2024, kntrialattorneys.com/california-criminal-defense/three-strikes-law/#:~:text=California's%20Three%20Strikes%20La w%20is%20one%20of,the%20state%2C%20designed%20to%20target%20repeat%20offenders.

California's history with criminal justice reform is marked by a pattern of oscillation. While the early 2010s introduced criminal justice reform to California following the rigid 1994 TSL, the pendulum has swung back once again. In 2024, California voters passed Proposition 36 (different from Prop 36 in 2012) with 68 percent approval, reclassifying some theft/property crimes as felonies for repeat offenders and repealing many of Proposition 47's reduced sentencing measures for drug-related offenses.[10] Therefore, California's future with criminal justice stands at a crossroads, where voters may support progressive reforms or continue their trend of supporting more punitive measures.

Literature Review

In the same way that California has gone back and forth on criminal justice reform, scholarly perspectives surrounding the effectiveness of TSLs have varied over the years. This review will examine past and recent research on the TSL, with a focus on the roles that deterrent theory and the incapacitation effect play in shaping the TSLs' actual impact.

Policy analysts initially regarded California's TSL as a success in the mid-1990s. California's then-Secretary of State Bill Jones, writing in *Stanford Law & Policy Review,* explained how opponents of TSLs favor "government dollars being directed at experimental programs" rather than going towards incarceration of repeat offenders, which he viewed as "the only sure method to keep our citizens safe."[11] In 2005, the California Legislative Analyst's Office estimated that the TSL would cost $6 billion annually by 2026 in addition to $20 billion in one-time prison construction costs.[12] The California State Auditor now estimates the TSL

[10] "California Proposition 36, Changes to Three Strikes Sentencing Initiative (2012)." *Ballotpedia*, ballotpedia.org/California_Proposition_36,_Changes_to_Three_Strikes_Sentencing_Initiative_(2012).
[11] Jones, Bill. "Why the Three Strikes Law Is Working in California." *Stanford Law & Policy Review,* vol. 11, no. 1, Winter 1999, pp. 23-28. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/stanlp11&i=27.
[12] Legislative Analyst's Office. "A Primer: Three Strikes - the Impact after More than a Decade." A Primer: Three Strikes: The Impact After More Than a Decade, Oct. 2005, www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm#:~:text=of%20Three%20Strikes-,Introduction,the%20electo

costs $19 billion annually.[13]

This budget problem is just one of the many ways that California's Three Strikes Law has become disillusioned amongst scholars. However, modern progressive scholars have challenged the "tough on crime" rhetoric that Jones presented. Despite Jones claiming that he would be "unwilling to amend the TSL" to account for only serious/violent felonies, California voters approved Proposition 36 thirteen years later in 2012. Research at this time was skeptical of labeling the TSL as a problematic policy, with John Sutton choosing the middle ground in his 2013 research.[14] Sutton conducted a longitudinal study of the micro- and macro-effects of the TSL from both before and after it was introduced. Sutton claims the TSL neither supported the "dystopian predictions" from critics nor the "rosy predictions" from proponents. These sentiments are based on his findings that the TSL caused Black defendants to receive significantly longer sentences than their White counterparts, along with prison sentences only becoming 6 percent longer. However, Sutton theorized that there was otherwise no evidence of "a deep institutional transformation" from the TSL's introduction.

Research into the effects of TSLs continued to draw mixed results. Research from the California Policy Lab (CPL) in 2022 supported Sutton's finding of Black defendants receiving longer sentences, specifically for third strike sentencing enhancements.[15] The CPL goes a step further than Sutton, though, in claiming that the TSL "does not account for the declines" in California crime rates in the 1990s—namely, the decrease in crime that Secretary Jones celebrated as a result of the original 1994 TSL. Similarly, the Committee on Revision of the

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r ate%20in%20Proposition%20184.

[13] "Three Strikes Project." *Stanford Law School*, law.stanford.edu/three-strikes-project/.

[14] Sutton, John R. "Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing." *Law & Society Review* 47.1 (2013): 37–71.

[15] "Three Strikes in California." California Policy Lab, Aug. 2022, www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf.

Penal Code took a significantly more progressive stance in 2021: the unanimous recommendation to repeal the Three Strikes Law.[1616] Again echoing Sutton's and the CPL's findings, the Committee found that 80 percent of people sentenced under the TSL are people of color, highlighting how prosecutorial discretion in pursuing harsher sentences disproportionately targets minority communities. Therefore, research regarding the TSL's effect on general crime trends has become increasingly opposed, with initial support giving way to cautious hesitancy, and eventually to uncovering the systemic and institutional problems of the Law.

While research regarding the relationship between Three Strikes Laws and crime has changed, theories about its interaction with the deterrent effect have remained mixed. The deterrent effect refers to the idea that harsher penalties will disincentivize people from committing a crime due to the threat of punishment, including incarceration. Since 1994, scholars have released findings that either do or do not support the deterrent effect, with some research finding that harsher sentences not only fail to deter crime, but encourage it. One such study is from Cassia Spohn's 2007 research into the deterrent effect, where she compared recidivism rates for drug offenders who were either placed on probation or sentenced to prison. She found that the incarcerated people were 30 percent more likely to reoffend, perhaps because the withholding of potential connections with society turned them "into low-stakes offenders with little to lose as a result of a new arrest."[17] In contrast to Spohn's research, Helland and Tabarrok found that second strikers (people who have been convicted of two strikes) are 20 percent less likely to be rearrested than first strikers. They relied on trial outcomes of inmates released in 1994 to estimate the probability they would not be arrested again. While Spohn's and

[16] "2021 Annual Report and Recommendations." *Committee on Revision of the Penal Code*, Dec. 2021, www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf.
[17] Spohn, Cassia. (2007). The Deterrent Effect of Imprisonment and Offenders' Stakes in Conformity. *Criminal Justice Policy Review*, 18(1), 31-50. https://doi.org/10.1177/0887403406294945

Helland et al.'s research was released in the same year, their findings are contradictory, claiming that there is both no support for the deterrent effect of imprisonment and simultaneously a quantifiable measure of the deterrent effect. To add to these mixed findings, the CPL found that the TSL's deterrent effect "is likely to be minimal," though there may be a "modest deterrent effect on less serious crime."[18]

Given the full spectrum of empirical research on the deterrent effect, Alex Raskolnikov relies on a theoretical framework to assess its impact.[19] Instead of only focusing on the deterrent effect, Raskolnikov recognizes that it "is often challenging [...] to separate the deterrent effect of prison from its incapacitation effect." The incapacitation effect refers to the reduction in crime caused by the removal of offenders from society, physically barring them from committing another crime. Therefore, Raskolnikov discusses two possible causal mechanisms that could explain lower crime rates from the TSL: longer sentences deterring offenders from recidivating, or longer sentences incapacitating offenders from even the possibility of recidivating. Raskolnikov labels this entanglement of causality "the first-order issue." Furthermore, Heller and Tabarrok also highlight this issue's importance by stating "the same reduction in crime is cheaper if produced by deterrence than if produced by incapacitation," especially since it is cheaper to deter someone than incarcerate them for decades. There is still much debate surrounding which effect is more responsible for changes in crime rates or the extent to which both are responsible.

While side-stepping this debate, the CPL provides more nuance to the incapacitation effect, explaining that strike enhancements "also incarcerate people into their advanced ages

[18] "Three Strikes in California." California Policy Lab, Aug. 2022, www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf.
[19] Raskolnikov, Alex. "Criminal Deterrence: A Review of the Missing Literature." *Supreme Court Economic Review*, vol. 28, 1 Oct. 2020, pp. 1–59, https://doi.org/10.1086/710158.

when they would be less likely to commit crime."[20] Based on the CPL's research, then, while the deterrence and incapacitation effects can be viewed as the two primary causal mechanisms for affecting crime rates, there are still underlying factors influencing these effects that require more research. Perhaps once these factors are further explored, the causation debate between deterrence and incapacitation can be better understood.

Scholars continue to debate the effects of the Three Strikes Law and its causal mechanisms. While they have generally supported more progressive perspectives relating to how, if at all, the TSL has influenced crime rates, more recent and farther-reaching research is needed to fully understand its effects on the carceral system. Much of the literature focuses specifically on California's TSL and uses data sets from the 1990s and early 2000s. Therefore, my research provides a new geographical scope, namely comparing the majority of US states' TSLs, and a more recent temporal scope ranging from 2010 to 2019. These improvements could raise questions about the purpose of longer prison sentences nationwide, and could further support ongoing criminal justice reforms that prioritize rehabilitation over punishment.

Theory, Hypotheses, and Causal Mechanism

This research focuses on the punitive relationship between the state and its citizens.[21] The United States' era of mass incarceration reflects its difficulty with maintaining peace, relying on stopgaps to deal with a broken and outdated criminal justice system. Despite the surge in prison populations, the United States employs powerful punitive measures to keep offenders incarcerated, without confronting the underlying problems that lead to this mass incarceration.

[20] "Three Strikes in California." California Policy Lab, Aug. 2022, www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf.
[21] Johnson, Theodore R., et al. "The Era of Punitive Excess." *Brennan Center for Justice*, 13 Apr. 2021, www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess.

Three Strikes Laws embody the state's hyperfixation with incarceration over rehabilitation and the criminal justice system's difficulty with equipping offenders with the necessary skills for success when they are reintroduced into society. This research challenges the criminal justice system by asking: Do longer prison sentences actually lead to less crime? Specifically, between 2010 and 2019, did states with more severe Three Strikes Laws experience lower three-year recidivism rates compared to states with less severe Three Strikes Laws?

Conceptually, I hypothesize that states with more severe TSLs will have lower recidivism rates compared to states with less severe TSLs. States that classify both violent and non violent/serious felonies as third strikes will see reduced three-year recidivism rates from 2010 to 2019 compared to states that limit third strikes to violent/serious felonies, since the possibility of a life sentence will increasingly disincentivize people from reoffending due to fear of never being released from prison upon conviction. In these states, *any* felony can count as a third strike and carry a life sentence. Consequently, the increased perceived risk of committing a third strike felony—namely, spending the rest of their lives in prison—would act as a deterrent by making people less likely to reoffend, therefore leading to lower recidivism rates for these states.

Research Design and Methodology

The independent variable is the severity of the Three Strikes Law in each state. To determine severity, I looked at general trends in the second and third strikes sentencing guidelines between all states in the data set. I then coded for each state's second and third strikes with a 0 or 1, representing "not severe" or "severe," respectively. There was much variation in sentencing guidelines for second strikes; for example, there were fourteen states that had no specified increase in sentencing for second strike enhancements. However, states typically followed one of two trends: (1) doubling the maximum possible sentence, or (2) elevating the

second felony to a higher class felony. Both of these constitute being "severe," while states with no specified guidelines are classified as "not severe."

Coding for second-strike guidelines mirrors the coding for third-strike guidelines. Again, states were assigned a 0 or 1 for "not severe" or "severe," respectively, for third strike enhancements. A state received a 0 if it did not count non-violent/non-serious felonies as a third strike, and a state received a 1 if it counted all types of felonies as a third strike. Based on these codes, a severity score was assigned ranging from 1 to 4, where 1 represents the lowest level of severity; 2 represents a severe second strike; 3 represents a severe third strike; and a 4 represents both severe second and third strikes. First strikes are not included since this depends on each state's criminal code, rather than its TSL legislation.

This coding system creates four possible categories, as evidenced in Figure 1. This operationalization was chosen for two reasons: state accuracy and data simplicity. While this research primarily looks at the effects of third strike severity, second strike guidelines are necessary to include since their severity (or lack thereof) can also affect an offender's perceived risk of committing a felony. Most states followed the basic formula of a minimum 25-year sentence and maximum sentence of life in prison for a third strike. However, some states did not specify which kind of felonies counted as third strikes, while others varied in the possibility or impossibility of parole. Any state's second and/or third strike guidelines that did not follow general trends were coded on a case-by-case basis.

Data was collected in two ways: (1) looking at a state's TSL legislation, which is available on a state's legislative office website and locating the guidelines for second and third strikes, or (2) looking at a summary of a state's TSL, which can be found on websites of criminal

justice organizations, such as the Three Strikes Project from Stanford Law School.[22] Although a broader coding system could be employed to account for more variation in TSL severity, the goals of this project could still be accomplished with four categories.

Second Strike:	Third Strike:	Code:	Severity:
Not severe	Not severe	0, 0	1
Severe	Not severe	1, 0	2
Not severe	Severe	0, 1	3
Severe	Severe	1, 1	4

Figure 1. Three Strikes Law Severity Coding
(Data Source: State Penal Codes, 2010-2019)

The dependent variable is the recidivism rate, defined by the rate at which people return to criminal activity over a three-year period after being released for previously committing a crime.[23] While all states have slightly different definitions of recidivism, they each measure recidivism in a three-year period, except for Kentucky, which measures in 2-year cycles. I gathered recidivism data from 2010 to 2019 using a database of links to states' recidivism reports. This database came from The Council of State Governments Justice Center, which is a national and non-partisan nonprofit that provides policy advice based on trends in recidivism.[24]

Generally, I looked at data from the respective state's department of corrections/rehabilitation annual recidivism report (or equivalent thereof) on their websites. Recidivism rates are measured as percentages, representing the percentage of people in a yearly

[22] "Three Strikes Project." *Stanford Law School*, law.stanford.edu/three-strikes-project/.
[23] "Statewide Criminal and Juvenile Justice Recidivism and Revocation Rates." *The State of Texas Legislative Budget Board*, Feb. 2023, www.lbb.texas.gov/Documents/Publications/Policy_Report/7689_Recidivism-Revocation_Feb2023.pdf.
[24] Clement, Marshall, et al. "50 States, 1 Goal: Examining State-Level Recidivism Trends in the Second Chance Act Era." Edited by Alice Oh et al., *CSG Justice Center*, 6 June 2024, csgjusticecenter.org/publications/50-states-1-goal/.

cohort of released inmates who then reoffend. This operationalization was chosen since it is the most widespread measurement of recidivism and aligns with how data was collected in every state's annual recidivism report (except Kentucky). Recidivism data from 2010 to 2019 was then averaged to produce a mean recidivism rate for each state. While I planned to include recidivism rates from all states, some states do not have TSLs, such as Hawaii, and other states did not have publicly available recidivism data, such as Missouri.

There are two control variables I have identified: the average poverty rate and the presence of ban-the-box laws in a state. Poverty rate was chosen as one control since it is closely tied to recidivism. When an offender is released from prison, the community and environment they enter strongly determine the likelihood they will re-offend.[25] Their ability to access safe housing, available healthcare, and stable employment all directly depend on the socio-economic prosperity of their surroundings, and states with higher poverty rates will likely have fewer of these resources. Mean poverty rate was collected for each state in the dataset in 2010, 2013, 2015, 2017, and 2019 from the US Census Bureau American Community Survey Briefs' poverty reports, which are available online. Poverty rates in percentages were chosen since they are already normalized across states' varying populations.

The second control is whether a state has a ban-the-box law. This control was chosen since it, unlike the poverty rate, is legislation that directly affects offenders and reoffenders, similar to TSLs. Both ban-the-box laws and TSLs affect a reoffender outside of the carceral system, although they aim to reduce recidivism in very different ways. These ban-the-box laws protect against employment discrimination by restricting an employer's ability to ask about an applicant's criminal history. Offenders with stable employment were shown to have a 58 percent

[25] Hayes, Tara O'Neill, et al. "Incarceration and Poverty in the United States." *AAF*, 2 July 2020, www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/.

lower chance of recidivating compared to their unemployed counterparts.[26] Therefore, an offender's ability to secure employment can directly lead to either higher or lower recidivism, depending on whether they are barred from being hired based on their recent criminal history. States with ban-the-box laws would likely have lower recidivism rates since the offenders in those states are more likely to be hired, and by extension, less likely to recidivate. Data was collected from the National Employment Law Project, which is a nonprofit advocating for workers' rights. A list of states that have ban-the-box laws was available on their website.[27]

The unit of analysis for this project is states, specifically 40 states except the following: Hawaii, Kentucky, Maine, Mississippi, Missouri, Nebraska, New Hampshire, Oklahoma, Rhode Island, and Wyoming. This is due to a lack of data availability and departures in measuring recidivism. Since my temporal scope is 2010-2019, I looked at multiple cases of recidivism (based on each state) over time (based on each year). Some recidivism data was not available in certain states for certain years, so n=371.

A logit regression was run to determine any statistical relationships between second/third strike severity and recidivism rates, while also controlling for poverty rates and the presence of ban-the-box laws. Second and third strike severity were tested separately; the combined relationship of "severe" or "not severe" second and third strikes can be found by adding together the two separate regression coefficients.

[26] Kolbeck, S., Lopez, S., & Bellair, P. (2023). Does stable employment after prison reduce recidivism irrespective of prior employment and offending? *Justice Quarterly*. https://doi.org/10.1080/07418825.2023.2201330
[27] Avery, Beth, et. al. "Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies." *National Employment Law Project*, 27 Apr. 2024, www.nelp.org/insights-research/ban-the-box-fair-chance-hiring-state-and-local-guide/.

Results

There are three primary findings of this research: TSL severity, average recidivism rates, and the relationship between these two variables. After coding 40 states, four states received a 1 (lowest severity), six states received a 2, ten states received a 3, and twenty states received a 4. The severity assignments are evidenced in Figure 2.

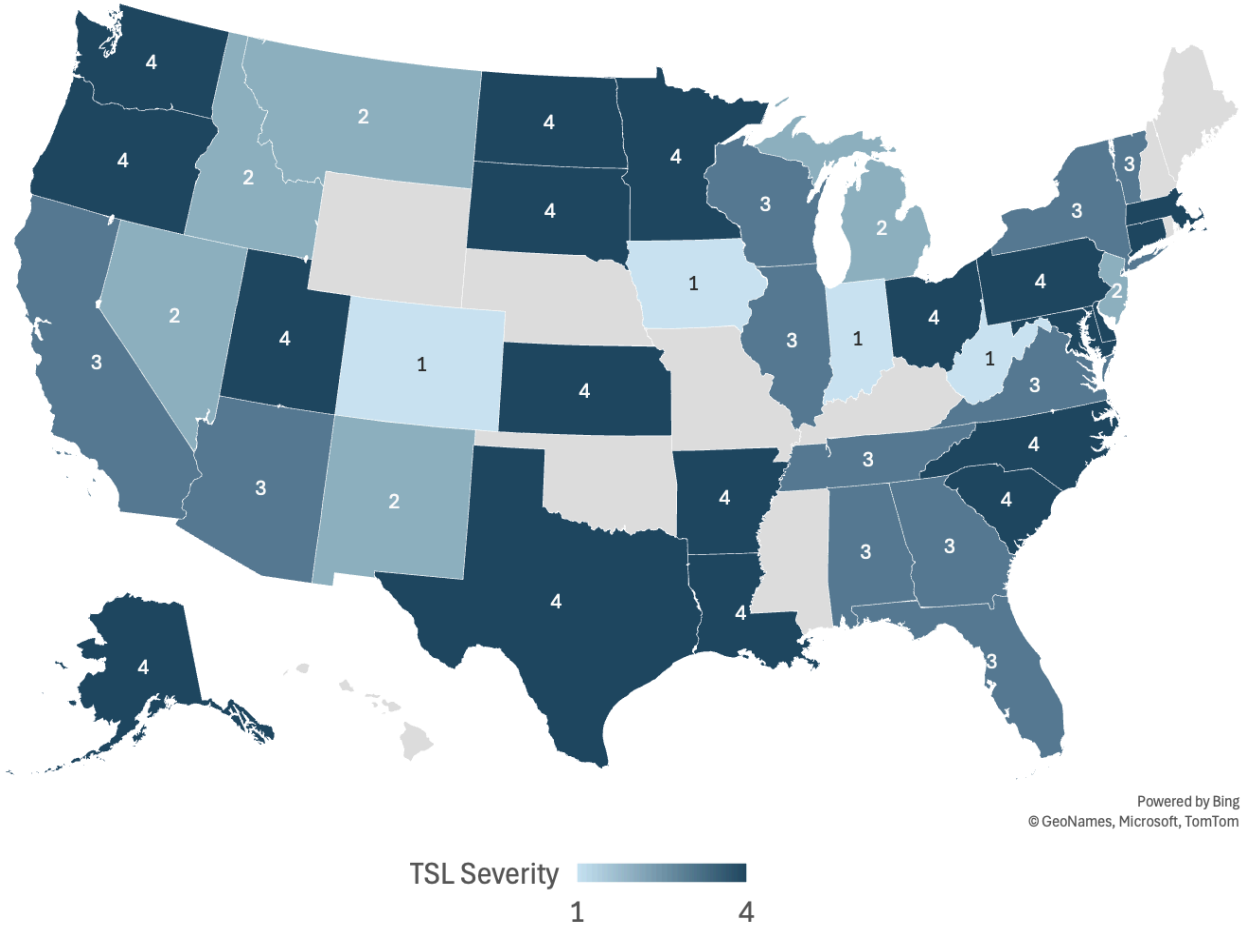

Figure 2. TSL Severity by State
(Data Source: State Penal Codes, 1994-2012)

Notable states with the most severe TSLs included Alaska and Connecticut. Alaska's TSL includes the same second strike enhancements as California's TSL, but third strikers

convicted of a violent felony receive a mandatory 99-year sentence. Connecticut's TSL has a 25-year maximum sentence for second strikers, which is the minimum sentence for third strikers in California, and also a mandatory life sentence for violent third strikers. The difference between Connecticut and California, though, lies in how they define a felony. California generally defines felonies as crimes that commit gross physical harm against an individual or property, but Connecticut also includes bigotry and larceny within this context. Therefore, should bigotry motivate someone to commit a felony in Connecticut, both the motivating belief and the act itself would be subject to the state's Three Strikes Law.

States that received a total severity code of 3 include New York, which had no explicit enhancements for second strikers and a minimum 25-year-to-life in prison without the possibility of parole for third strikers. Michigan operates its TSL differently from most states, receiving a 3 since it increases second strike sentences by 25 percent and third strikes by 50 percent. Without a possible life sentence, it therefore received a "0" for third strike severity. Iowa had the least severe TSL out of all 40 states, with no enhancements for second strikers, and a minimum 3-year sentence without the possibility of parole for third strikers. A life sentence was not included in the TSL itself and instead defaults to other sentencing guidelines in the state's criminal code. After calculating the average recidivism rates, as seen in Figure 3, there were also a few noteworthy findings from particular states. Alaska had the highest recidivism rate in the nation, at 64.9 percent. Pennsylvania followed closely behind at 62.7 percent, and California had 46.3 percent. The lowest recidivism was in Utah, at 21.7 percent. Figure 4 shows the distribution of recidivism rates, with the majority of states' recidivism ranging from 25-50 percent. Only 4 states had recidivism rates of about 50 percent, ranging from 50-65 percent, and 4 states had recidivism between 20- 25 percent.

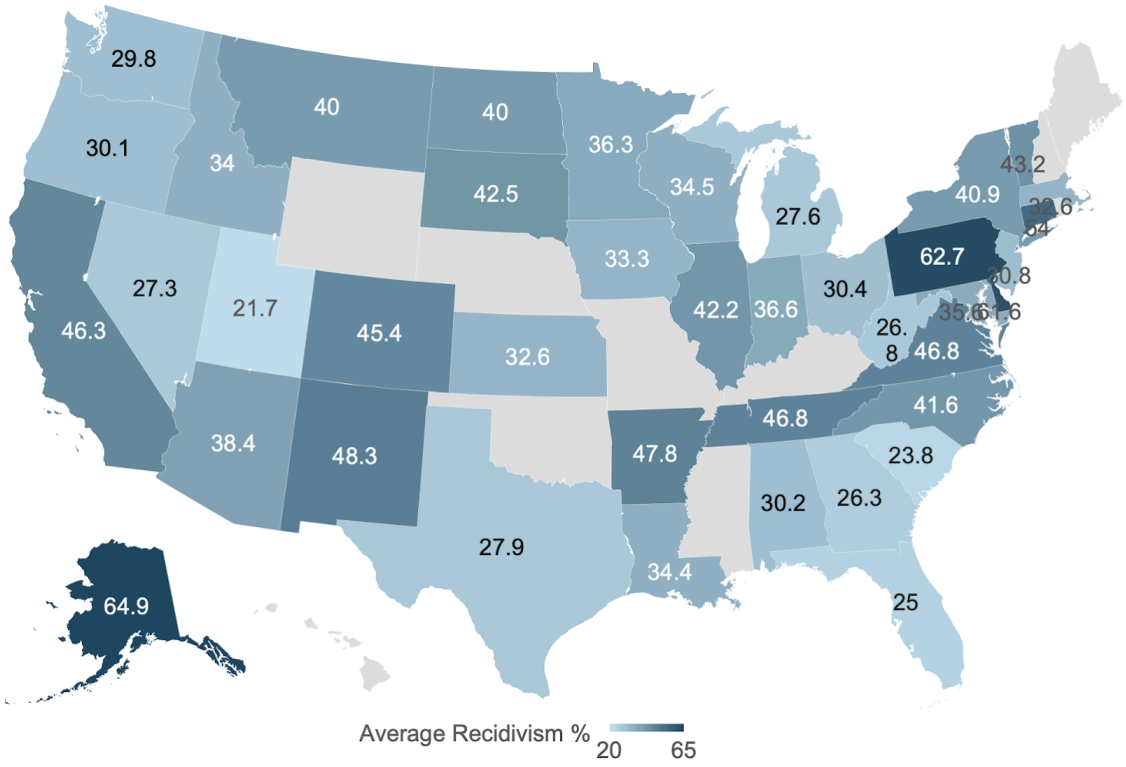

Figure 3. Recidivism Rates by State, 2010-2019
(Data Source: CSG Justice Center)

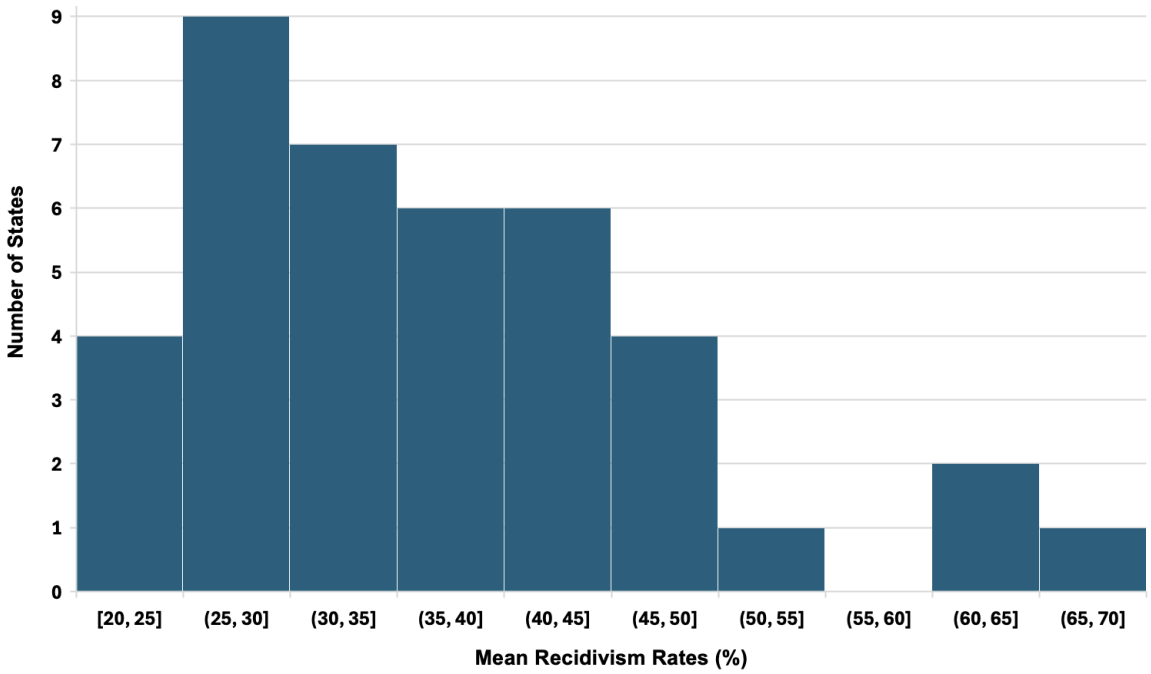

Figure 4. Recidivism Rates Distribution, 2010-2019
(Data Source: CSG Justice Center)

The regression analysis combined both sets of variables to look for a relationship, as seen in Figure 5. Looking at second-strike severity, the coefficient of 1.74 suggests that, on average, states with severe second-strike enhancements have a 1.74 percentage point higher recidivism rate compared to states without severe second-strike enhancements, holding other variables constant. Similarly, the coefficient for third-strike severity indicates that states with severe third-strike enhancements tend to have a 1.85 percentage point higher recidivism rate compared to states without severe third-strike enhancements. Standard error measures the variability between the coefficients, with a larger standard error indicating less precise estimates. The large standard errors for these measures, at 3.27 and 3.71, indicate considerable uncertainty in these estimates, meaning the effects could widely vary. The p-values for second and third strike severity, which explains the likelihood of collecting the observed data, are 0.599 and 0.621, respectively. This suggests that there is roughly a 60 percent chance that the observed results could have occurred under random variation alone. Looking at the two controls, there is a weak negative correlation, albeit statistically nonsignificant, between poverty rates and recidivism rates, and a slight 0.49 percentage point increase in recidivism rates based on the presence of ban-the-box laws. Therefore, there is no statistically significant relationship between the severity of TSLs and recidivism rates, including accounting for poverty rates and ban-the-box laws.

	Recidivism Rates
Second Strike Severity	1.74 (3.27)
Third Strike Severity	1.85 (3.71)
Mean Poverty	-0.81 (0.74)
Ban-the-Box Law	0.49 (4.79)
Constant	45.8 (11.4)
Adjusted R^2	0.06
N	40

Figure 5. Regression Analysis

Discussion and Research Implications

This research examined whether longer prison sentences deter crime, specifically focusing on how, if at all, Three Strikes Laws affect recidivism rates across the nation. I originally hypothesized that an increase in TSL severity would lead to a decrease in recidivism rates since the harsher prison sentences would deter potential reoffenders. Based on the results from the regression, my hypothesis was not supported. The large p-values, high standard error, and low coefficients all point to a high amount of variance, uncertainty, and ultimately no statistically significant relationship between TSL severity and recidivism rates.

Despite the coefficients being nonsignificant, it was surprising to see that recidivism slightly increased in states with more severe TSLs, especially since I hypothesized the opposite would be true. In terms of running a regression, the sample size (n=40) is on the smaller scale, and comparing the severity of states within the sample size explains the high standard error. The severity categories ranged from 4, 6, 9, and 20, respectively, and therefore drawing results without high variation would have been unlikely.

The negative correlation between poverty rate and recidivism rate particularly stood out, especially since I predicted an increase in poverty would be associated with an increase in recidivism. Yet, the opposite was true. Since this was a weak negative correlation and not statistically significant, I believe this result came from the small sample size (n=40), and the high variation between different states (range=9.9). Ultimately, there are many factors that affect recidivism, and while the poverty rate did not capture any relationship, other controls, such as access to housing and healthcare, may have more predictive power.

As for the future of TSLs, based on current trends in criminal justice legislation, progressive reforms for TSLs remain unlikely. Earlier this year, Kentucky introduced legislation for a Three Strikes Law, emphasizing how the introduction of TSLs is still thriving even 30 years after their original introduction in California.[28] Kentucky's TSL would be similar to California's current TSL, where only violent felonies would count as a third strike. During debates on the bill, one Democratic legislator stated, "Why we're doing a rinse and repeat of this failed attempt from the '90s is unclear to me."[29] This legislator's sentiments mirror the findings of this project; recidivism was unaffected by TSL severity, so why incapacitate offenders who can instead be rehabilitated? Even if just a small portion can be rehabilitated, returning to Alex Raskolnikov's sentiments, it is still cheaper to deter someone, especially through rehabilitation, than to incapacitate them via prison sentences.[30]

Research Limitations and Extensions

The primary limitations of this research are in measuring the recidivism rates and TSL severity. While each state measured recidivism slightly differently, some states also provided a wide range of statistics in their annual recidivism report. In these particular reports, states gave a breakdown of recidivism based on conviction, re-arrest, returning to jail, and returning to prison. These different categories all had different rates, and whenever these types of reports appeared, I attempted to use the same measurement. However, sometimes not all of these categories were available, or different categories were included as well. Should I conduct this research project again, I would spend more time exploring how each state defines these other categories, and

[28] Schreiner, Bruce. "Kentucky House Passes Crime Bill with Tougher Sentences, Including Three-Strikes Penalty." *AP News*, AP News, 26 Jan. 2024, apnews.com/article/kentucky-legislature-crime-b62e547d38523e07cbbd8db65c1bd5b1.
[29] *Id.*
[30] Raskolnikov, Alex. "Criminal Deterrence: A Review of the Missing Literature." *Supreme Court Economic Review*, vol. 28, 1 Oct. 2020, pp. 1–59, https://doi.org/10.1086/710158.

therefore better understand which measurement would be most statistically relevant for this project.

The second limitation is the methods used to measure TSL severity. Since only one person conducted this research, there is high subjectivity when coding for severity. This leads to low inter-rater reliability, whereby my own interpretation of severity may differ from someone else's. As explained in the "Research Design" section, while I generally followed two guidelines, states that departed from expected sentencing enhancements were categorized more holistically. In an ideal world, at least one other person would also have scored the states' TSL severity, and therefore increase the inter-rater reliability.

Further research into recidivism and the Three Strikes Law could focus on alternative causal mechanisms that affect recidivism, as well as exploring how population can influence TSL severity. Returning to Figure 2, there seems to be a general correlation between states with higher populations and states with more severe TSLs. A possible hypothesis based on further research could claim that states with higher populations have fewer available resources to limit crime compared to states with lower populations, and therefore introduce stricter TSLs as a means to deter crime through legislation, rather than through outreach (or similar) programs.

Other research could provide a comprehensive report on recidivism from both before and after each state's TSL was introduced. I had originally considered making this my research project, but data availability from the 1990s proved difficult. The data does exist, however, based on other research published at this time, and in the future, if I had more time to conduct this project again, I would have reached out to the respective state agencies to request this data. A wider temporal scope could provide a before-and-after analysis of TSL introduction, as well as provide more data on whether there was a decrease in recidivism that could be causally linked to

the introduction of TSLs. As described in the literature review of this project, there is debate about whether this occurred in California, although this new study could look at all states with TSLs for a possible relationship.

Research can also explore alternative causal mechanisms, such as access to rehabilitation programs both within prisons and in society, and the availability of vocational training. With new, innovative programs taking shape, such as UC Irvine's LIFTED program, which allows incarcerated people to obtain a bachelor's degree while serving sentences, research can examine how these educational and rehabilitative initiatives impact recidivism rates.[31] By investigating the long-term effects of such programs, scholars can also assess whether they contribute to reducing the cycle of incarceration and improving reintegration into society, ultimately providing a more comprehensive understanding of the factors that lead to successful rehabilitation and societal reintegration.

Conclusion

This research examines the relationship between the severity of sentencing guidelines in Three Strikes Laws and recidivism rates nationwide. Ultimately, there was no relationship between these variables, including controlling for poverty rates and employment discrimination laws. The criminal justice system is complicated, and understanding more about what affects recidivism, and perhaps more importantly, what does *not* affect recidivism, can divert the few resources there are toward programs aimed at reducing recidivism and backed by empirical research. This research highlights how Three Strikes Laws are not as effective at deterring crime as previously thought. Hopefully, this will inspire a more critical perspective on how sentencing enhancements alone cannot improve a criminal justice system. Rather,

[31] UCI Lifted, lifted.uci.edu.

adopting an interdisciplinary approach that combines mental health programs, vocational training, and educational/outreach programs may lead to reduced recidivism rates that both politicians and citizens can champion.

It is difficult to predict what the next decade of criminal justice reform may look like, but we can look to the past for clues. Considering that California introduced TSLs to the rest of the nation and later implemented TSL third strike reforms, perhaps further reforms will also originate in California. Therefore, California legislators and voters have a chance to decide how to proceed with continued sentencing reforms, especially since these choices could affect not only Californians but the criminal justice system nationwide.

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Acknowledgements

This journal would not have been possible without the support and generosity of our partners. Volume V was developed with the support of the University of California National Center for Free Speech and Civic Engagement and the University of California, Davis, Center for Student Involvement. On behalf of Davis Journal of Legal Studies, I thank them sincerely for their investment and support in advancing public understanding, legal research, and undergraduate scholarship.

I would also like to note our appreciation for Dr. Lauren Young, Kate Stephensen, and Claudia Guerrero, who provided early support and encouragement necessary to undertake this project.