YESHIVA UNIVERSITY UNDERGRADUATE LAW REVIEW

1.1 - Spring 2024

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Letter from the Editors

Dear Reader,

Welcome to the inaugural issue of the Yeshiva University Undergraduate Law Review (YUURL), the primary journal of legal thought from the Yeshiva University undergraduate community. Nearly a century ago, Yeshiva College became the first Jewish liberal arts college, and since then, both Stern College for Women and Sy Syms School of Business have been established, as well. Within all of these schools, there has been a tradition of academic excellence, including for students pursuing careers in legal fields. YU students have been represented across the gamut in both law schools and in wide-ranging professional areas. Yet, until this point, there hasn't been a definitive publication within the university dedicated to legal scholarship for undergraduates.

It was with this lack in mind that we decided to create this publication. The YUURL was announced at the beginning of the spring semester of 2024 and immediately gained a tremendous team. Many of the authors and editors represented in these pages are amongst the best and brightest our university has to offer. It is because of that incredible team of students, the support of our pre-law advisor, Illana Julius, and the Shevet Glaubach Center, not to mention additional support from Yeshiva Student Union, Beren Campus Student Government, and the Office of Student Life, that this journal initiative was able to be as successful as it is.

This year in particular was a fitting time to launch this publication. Conversations about legality, particularly relating to Jewish institutions, have sometimes become unclear. Giving the Jewish students of Yeshiva University the chance to write with such clear-headedness and intellectual freedom, something many of them will continue to do moving forward, is tremendously valuable to our community at this particularly fraught moment.

The range of articles for an inaugural issue is breathtaking. Our students have written about topics as macro as the criminalization of terror in international law and as micro as the legal questions revolving around sports betting. We hope that you find the scholarship in the following pages enlightening, and we thank you for reading.

Sam Weinberg

Kayla Kramer

(Additional note: any minor derivations in formatting, including but not limited to underlines, boldings, size of paragraph breaks, etc., as well as variations in citations and footnoting, are a reflection of the freedom we gave our writers and editors in composing their ideal paper. We have full faith in our team to make decisions they felt were appropriate in each specific context and to pertain to principles of academic integrity.)

All views expressed in the following paper are of the writer alone. They do not indicate the beliefs or thoughts of the editors, senior editors, or Yeshiva University, administratively nor institutionally.

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YESHIVA UNIVERSITY UNDERGRADUATE LAW REVIEW

1.1 - Spring 2024

Matthew Minsk

Editors: Eli Rubin and Aden Lyons

YU Undergraduate Law Review

1.1 (Spring 2024)

The Establishment of a Moral Code and the Free Exercise Thereof

In an age of increasing non-traditional religious beliefs, what qualifies as a religion under the Religion Clauses of the First Amendment?

Abstract

Over the past fifteen years, religious liberty has enjoyed a winning streak at the Supreme Court (Liptak). To note just a few significant wins, the Court has empowered religious organizations to exert more control over their workforce not subject to secular oversight,[1] granted religious entities greater and more widespread rights of conscience,[2] and prohibited state discrimination against religious private schools relative to non-religious ones.[3]

At the same time, organized religion in the United States is dwindling (Jones).[4] As politics takes the place previously reserved for religion in the lives of many (Hamid)[5] — especially for those holding non-traditional beliefs (Burge) — how the Religion Clauses of the First Amendment interact with non-traditional religious beliefs becomes more important. Does the Free Exercise Clause protect unconventional or heterodox beliefs? Alternatively, is the

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[1] e.g. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* and *Our Lady of Guadalupe School v. Morrissey-Berru*

[2] e.g *Burwell v. Hobby Lobby* and *Little Sisters of the Poor v. Pennsylvania*

[3] e.g *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana*, and *Carson v. Makin*

[4] According to Pew Research Center, the percentage of Americans identifying as "nones" (a category Pew uses to combine atheists, agnostics or those who describe their religious beliefs as "nothing in particular") is higher than ever before (Smith).

[5] See also Lewis.

government barred from establishing them?

To explain why classification as a religion would matter, I begin this article with a brief background to the current state of the law surrounding the Religion Clauses, to set out what is at stake. Then, I argue that courts have the capacity to evaluate whether a given belief system falls under the category of religion, in the same way that courts can determine whether a belief is sincere as a threshold matter. Finally, I discuss a handful of potential definitions of religion — some suggested by various courts — and consider their respective benefits and drawbacks.

1. Introduction

In the run-up to World War II, Congress passed the Selective Training and Service Act in 1940, the first peacetime draft in American history (Vergun). Recognizing "there is a higher loyalty than loyalty to this country, loyalty to God," the law granted conscientious objections to those opposed to the war because of "religious training and belief," which Congress defined in 1948 as, "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" (*United States v. Seeger* 172). This attitude towards religion is deeply rooted. As Justice Douglas wrote in *Zorach v. Clauson*:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary… When the state encourages religious instruction or cooperates with religious authorities… it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. (313–314)

Reflecting this sentiment, the Constitution "gives special protection to the exercise of religion"

and religious beliefs compared to the exercise of nonreligious beliefs (*Thomas v. Review Board* 713–714).[6] Courts rarely have to address this normally cut-and-dry distinction: the Roman Catholic Diocese of Brooklyn, as an example, obviously qualifies as a religion. Similarly, the State of Maine barred parents from receiving tuition assistance because of the religious nature of the schools in *Carson v. Makin*, and the parents sued on the grounds that the ban violated their Free Exercise rights (775–776): In any event, both parties' actions were motivated by the plaintiff's religiosity. Furthermore, some judges, including 11th Circuit Judge Kevin Newsom, maintain that courts *lack the wherewithal* to determine which beliefs qualify as religious. In Judge Newsom's understanding, "'What is religion?' just isn't a question that [courts] are particularly well-suited to answer," (*Young Israel of Tampa v. Hillsborough*, Newsom con. op. 4) thereby posing a challenge to evaluating Free Exercise Clause invocations.

However, if courts had to accept any claim of religious belief without reservation or further inquiry, a plaintiff may conceivably transform his or her secular or moral philosophy into a religious one. Addressing this concern, the Supreme Court held in *Frazee v. Illinois Department of Employment Security*, "States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause," which includes both "distinguishing between religious and secular convictions and… determining whether a professed belief is sincerely held" (833). Because religious and secular beliefs enjoy different protections, courts must be able to determine what qualifies as a religious or nonreligious belief.[7]

Nevertheless, drawing the line of legitimate religious standing remains difficult. In 2019, the Satanic Church registered with the IRS as a designated tax-exempt church (Wecker) and more recently has found some success in gaining religious exceptions to abortion restrictions in

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[6] Citing *Sherbert v. Verner* 398 and *Wisconsin v. Yoder* 215–216

[7] See Section III

state courts (Volmert). Does membership in the Satanic Church truly qualify as a "sincerely held religious belief"?[8] Where do secular atheist or humanist beliefs fall? On the other side, would state-mandated Diversity, Equity, and Inclusion (DEI) trainings constitute an establishment of "wokism"[9] as a state religion?

2. Current Case Law

Different courts have suggested a number of definitions, whether formal or informal, to determine what constitutes a "religion" under the First Amendment.[10] Each conception requires analysis of the justifications for that definition and demands considering its ramifications in light of the current landscape of Free Exercise and Establishment Clause jurisprudence.[11]

2.1. Establishment Clause

In the 1947 decision *Everson v. Board of Education of Township of Ewing*, the Supreme Court incorporated the Establishment Clause of the First Amendment to apply against the states

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[8] For example, see *Employment Division v. Smith*, O'Connor con. op. 907. ("This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a *sincerely held religious belief* that conflicts with, and thus is burdened by, the challenged law.") (Emphasis added.)

[9] See, for example, how political commentator Nate Silver defines Social Justice Leftism.

[10] Due to the limited space allotted, I do not attempt to prove one conclusive definition for religion under the Religion Clauses of the First Amendment.

[11] For the sake of simplicity, I will focus in this section mainly on the standard at which Free Exercise and Establishment Clause claims are evaluated. As a result, I will mostly gloss over the status of an organization clearly affiliated with a defined religion but providing a nominally-secular role, the ways in which a religious symbol can become secular (enough) over time to satisfy Establishment Clause scrutiny, or the status of legislative prayer, except when otherwise relevant.
The first topic played a large role in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* and *Our Lady of Guadalupe School v. Morrissey-Berru*, among other cases, and continues to drive the ongoing *YU Pride Alliance v. Yeshiva University* case percolating in the New York state court system. An interested reader can read more about the second bucket of cases in *County of Allegheny v. ACLU* 610–618 (in its analysis of the *menorah* as a nonreligious symbol); *Van Orden v. Perry* 690 (describing Moses and the Ten Commandments as having "an undeniable historical meaning" beyond purely religious significance); and *American Legion v. American Humanist Association* (determining that a large cross serving as a World War I memorial had lost its solely religious significance). Finally, legislative prayer has been protected most recently at the Supreme Court in *Town of Greece v. Galloway*.

(15),[12] opening the floodgates to lawsuits involving state aid that made its way to religious organizations (*Zelman v. Simmons-Harris* and many others), prayer in public schools (*Engel v. Vitale*), tax exemptions for churches (*Walz v. Tax Commission*), and religious imagery on government property (*Lynch v. Donnelly*; *County of Allegheny v. ACLU*; *Van Orden v. Perry*), among other contentious topics. Previously, the Establishment Clause only restrained the federal government, which had traditionally been less involved in those spheres of government.

Since the beginning of its Establishment Clause jurisprudence, the Supreme Court has relied heavily on the practices of the Founding Generation as a guidepost for what the Clause was understood to prohibit and allow (*Abington School District v. Schempp*, Brennan con. op. 294).[13] The *Everson* Court, quoting Thomas Jefferson, took a hard line on the so-called "wall of separation between church and State" (15–16).[14] It ruled that not only did the Establishment Clause forbid the official establishment of a state church and other compulsory measures (9–13), but it also forbade "laws which aid one religion, aid all religions, or *prefer* one religion over another" (15).[15] The Court further interpreted that a state must remain "neutral in its relations

[12] It is worth noting that some scholars and jurists dispute that the Establishment Clause can even be incorporated to the states at all. They argue that the Establishment Clause is fundamentally a "federalism provision" that protects the states' right to establish their own religion free from a *federal* establishment, but it was never structured as an individual right (*Elk Grove v. Newdow*, Thomas con. op. 49–51). Therefore, "incorporation… gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby prohibiting exactly what the Establishment Clause protected" (*Town of Greece v. Galloway*, Thomas con. op. 606). (Internal citations omitted.) Justice Stewart made a similar argument decades earlier in *Abington School District v. Schempp*, writing, "The Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy" (dis. op. 310), as did Justice Scalia in *Lee v. Weisman*, dis. op. 641 ("The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference).") See also Muñoz and Amar 32–42, 246–257.

[13] ("The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment."). See also *Marsh v. Chambers* 790–791 ("It would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.")

[14] Quoting *Reynolds v. United States* 164

[15] (Emphasis added.) This standard clearly does not require state coercion to trigger the Establishment Clause. See *Abington School District v. Schempp* 223 ("[A] violation of the Free Exercise Clause is predicated on coercion, while the Establishment Clause violation need not be so attended.") and *Committee for Public Education v. Nyquist*

with groups of religious believers and nonbelievers" (18); this neutrality standard itself leaves room for additional clarification and disputes in application.

In later decisions, however, another camp rose at the Court, arguing that a state only violates the Establishment Clause when it actively engages in the "sponsorship" of a certain established religion (*Walz v. Tax Commission* 668) or otherwise "throw[s] the weight of secular authorit[ies] behind the dissemination of religious tenets" (*Thomas v. Review Board*, Rehnquist dis. op. 726).[16] In *Lynch v. Donnelly*, Chief Justice Burger — quoting the influential early American jurist Joseph Story — wrote for the Court, "The real object of the [First] Amendment was… to prevent any national ecclesiastical establishment" (678),[17] although he conceded that to "advance" religion would also be prohibited (681). Unlike the decision in *Everson*, the *Lynch* Court concluded that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid" (683).[18] In this second view, establishing religion was traditionally coercion in favor of that religion, not just favoritism.[19]

Concurring in *Lynch*, Justice O'Connor took a middle path, not requiring the government to stay entirely neutral, but also not allowing "government *endorsement* or disapproval of religion" (688).[20] Whether a government action appeared to endorse religion would have to depend on the circumstances of the case and the takeaway of a "reasonable observer" (*County of*

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786 ("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause.")

[16] Quoting *Abington School District v. Schempp*, Stewart dis. op. 314

[17] See also *Town of Greece v. Galloway*, Thomas con. op. 604 ("As an initial matter, the [Establishment] Clause probably prohibits Congress from establishing a national religion.")

[18] Quoting *Nyquist* 771

[19] See *Lee v. Weisman*, Scalia dis. op. 640 ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.); *Elk Grove v. Newdow*, Thomas con. op. 52 ("The traditional 'establishments of religion' to which the Establishment Clause is addressed necessarily involve actual legal coercion."); and *Town of Greece v. Galloway*, Kennedy plur. op. 586 ("It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise") (internal citations omitted) and 589 ("Offense, however, does not equate to coercion."). See also McConnell, "Coercion: The Lost Element of Establishment".

[20] (Emphasis added.) The Court later adopted this approach in *County of Allegheny v. ACLU*.

Allegheny v. ACLU, O'Connor con. op. 631),[21] a standard which became known as the "endorsement test."

In the 2022 case *Kennedy v. Bremerton*, the Supreme Court confirmed that it had "long ago abandoned… [the] endorsement test," after years of moving in that direction (534). Instead, it returned to a standard based on "reference to historical practices and understandings" at the time of the Founding (535).[22] Certainly, a neutral government program through which money *also* winds up in the hands of religious organizations does not violate the Establishment Clause as an impermissible entanglement between church and state (*Espinoza v. Montana* 474).

2.2. Free Exercise Clause

Reynolds v. United States (1879), the first Free Exercise case heard by the Supreme Court, involved the case of a polygamous Mormon man who defended his second marriage — which was outlawed in the Territory of Utah — on the grounds that his religion required it. In that case, the Supreme Court held that although the government "cannot interfere with mere religious belief and opinions, they may [interfere] with practices" because allowing religious practices to override the law would "permit every citizen to become a law unto himself" (166–167).

While maintaining concern about the effects of exempting religious practitioners from generally applicable laws, the Supreme Court later recognized, "The 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts" *(Employment Division v. Smith* 877).

In *Thomas v. Review Board*, Chief Justice Burger prescribed that a state must show it

[21] ("The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices.")
[22] Quoting *Town of Greece* 576; see also *American Legion v. American Humanist Association*, Alito plur. op. 61.

employed "the least restrictive means of achieving some compelling state interest" if it wishes to restrict religious practice (718). However, Justice Rehnquist's dissent — which argued that a law must only survive strict scrutiny if it facially targets religious activity, but not if a neutral law happens to make religious practice more difficult (722–723) — would soon become the opinion of the Supreme Court. In *Employment Division v. Smith*, Justice Scalia extended a lower standard of review: Even a law that *prohibits* religious behavior stands, as long as it is neutral, generally applicable,[23] and does not target religion directly but only has an "incidental effect" (878).

Although the test put forth in *Smith* was hotly contested at the time — only five justices signed on originally, and Congress responded by passing the Religious Freedom Restoration Act to reinstate the strict scrutiny barometer (Novak 1) — the holding remains good Constitutional law. That said, more recent decisions have limited *Smith* by narrowing what laws are considered generally applicable. In *Fulton v. Philadelphia* — a case in which many expected the justices to overturn *Smith* entirely[24] — Chief Justice Roberts wrote for the court, "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" (533).[25] The Court also applied this test in a COVID-era lawsuit against capacity limits that included churches and synagogues but not certain non-religious activities (*Roman Catholic Diocese of Brooklyn v. Cuomo* 18).[26]

[23] Justice Scalia clarified his opinion from *Employment Division v. Smith* three years later, when he wrote, "In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment" (*Church of the Lukumi Babalu Aye v. Hialeah*, Scalia con. op. 557). (Internal citations omitted)

[24] See, for example, Oleske. Three justices expressed a desire in *Fulton* to overturn *Smith* (545; 551), and three others signed onto a concurrence which explicitly did not endorse *Smith*, but simply thought the case could and should be decided on narrower grounds (544).

[25] (Cleaned up, internal citations omitted.)

[26] ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest.") See also Justice Kavanaugh's concurring opinion in the same case: "Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class" (29).

One other noteworthy Free Exercise development is the ultimately short-lived "status-use" distinction. In *Trinity Lutheran Church v. Comer*, the Supreme Court ruled that if a church-run preschool would otherwise have received state funds to refurbish its playground, "disqualifying them... solely because of their religious *character*" violates the Free Exercise Clause (462).[27] Even in that case, Justice Gorsuch expressed skepticism that "it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use)" (469). Just five years later, the Court eliminated this distinction in *Carson* (786–788).

2.3. "Playing in the Joints"

Dating back to *Everson*, the Supreme Court has noted that, even while ensuring compliance with the Establishment Clause by not favoring or becoming entangled with religion, states must also be cautious not to violate their citizens' Free Exercise rights (16).[28] *Walz v. Tax Commission* explained that the Establishment and Free Exercise Clauses "are cast in absolute terms, and… would tend to clash with the other" (668–669), necessitating that states have "room for play in the joints" to ensure "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (669).

Dissenting in *Thomas v. Board of Review*, Justice Rehnquist argued that the "tension" between the two Religion Clauses only exists because of what he viewed as the Court misconstruing those dictates (721). Picking up the thread in *Locke v. Davey*, Justice Scalia argued

[27] (Emphasis added.) Chief Justice Roberts explained further: "And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion: To condition the availability of benefits… upon a recipient's willingness to… surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties" (462). (Internal modifications cleaned up.)

[28] ("We must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.")

in dissent that "play in the joints… is not so much a legal principle as a refusal to apply any principle when faced with competing constitutional directives" (728). More recently, in *Trinity Lutheran* (466),[29] *Espinoza* (485),[30] and *Carson* (781),[31] the Supreme Court has limited the "play in the joints" by disallowing anything beyond the strict requirements of the Establishment Clause to serve as a compelling state interest in restricting Free Exercise obligations. Rejecting the alleged "conflict" and "tension" described in earlier cases, the *Kennedy* Court maintained, "A natural reading of th[e First Amendment] would seem to suggest the Clauses have 'complementary' purposes, not warring ones" (533).

3. Evaluating Religious Claims for Sincerity and Religious Character

The Supreme Court has long held that the First Amendment's explicit protection of free exercise places religion on a Constitutional pedestal above other beliefs or forms of expression. As Justice O'Connor concurred in *Smith*, "[A]n individual's free exercise of religion is a preferred constitutional activity" (902).[32] Because challengers have an interest in portraying their actions as religiously based,[33] courts *must* be able to differentiate between religious beliefs and those that are "essentially political, sociological, or philosophical views or a merely personal

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[29] ("[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.")

[30] ("An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty.")

[31] Quoting the previously-cited opinions, Chief Justice Roberts wrote for the Court, "Maine's decision to continue excluding religious schools from its tuition assistance program after Zelman thus promotes stricter separation of church and state than the Federal Constitution requires…. But as we explained in both *Trinity Lutheran* and *Espinoza*, such an interest in separating church and state more fiercely than the Federal Constitution… cannot qualify as compelling in the face of the infringement of free exercise." (Internal citations omitted.)

[32] Quoting McConnell, "Accommodation of Religion" 9 ("[T]he text of the First Amendment itself 'singles out' religion for special protections"). See also *Thomas v. Review Board* 713 ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); *Frazee* 833 ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause. Purely secular views do not suffice.") (internal citations omitted); *Van Orden*, Scalia con. op. 692 ("[T]here is nothing unconstitutional in a State's favoring religion generally…")

[33] One could also conceive of an inverse case, in which the challenger claims a state has violated the Establishment Clause by favoring or paying for the promulgation of a certain ideology, and the state responds that it merely supports a *secular* ideology.

moral code." (*United States v. Seeger* 165). The Supreme Court recognized in *Thomas* that there does exist "an asserted claim… so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause" (715).[34]

Normally, this determination does not pose a challenge because the action or actor — for example, the church-owned preschool in *Trinity* — is self-evidently religious. Sometimes, however, the decision is less clear. In *United States v. Seeger* — albeit a case of statutory interpretation — the Supreme Court had to (and *did*) determine whether certain heterodox worldviews[35] qualified as "religious" for the purpose of a conscientious objection to the military draft (174).

Some judges and justices have expressed reservations about whether courts are qualified or even *allowed* to make such determinations. In *United States v. Ballard*, Justice Robert Jackson urged the court in dissent to be "done with this business of judicially examining other people's faiths" (95). Concurring in *Seeger*, Justice Douglas argued that the "fluidity and evanescent scope" of religion prevents clear demarcation of religion (189), and Judge Newsom of the 11th Circuit was similarly skeptical, writing, "I'm not sure that any policymaker could define or identify 'religious' speech using 'objective, workable' standards" (*Young Israel of Tampa v. Hillsborough*, con. op. 2). Rejecting potential standards, Judge Newsom came to the conclusion that any definition will "exclude faith or thought systems that most have traditionally regarded as religious" (con. op. 3). Instead, he argued, "'What is religion?' just isn't a question that [courts]

[34] Similarly, concurring in *Fulton*, Justice Alito wrote, "No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice" (566, n. 28).

[35] For example, Daniel Seeger, the lead named plaintiff, expressed "belief in and devotion to goodness and virtue for their own sakes" without believing in a God, instead appealing to Plato, Aristotle, and Spinoza as philosophical inspirations (166). A second plaintiff, Arno Jakobson, professed to believe in "Godness, which was the Ultimate Cause for the fact of the Being of the Universe" that exists "horizontally… through Mankind and the World" (168). (Internal quotations omitted.) The third challenger, Forest Peter, "felt it a violation of his moral code to take human life," which he defined as religious under Rev. John Haynes Holmes's definition that religion is "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands" (169).

are particularly well-suited to answer" (con. op. 4),[36] and in fact, one that the Supreme Court has barred courts from wading into (con. op. 4, n. 1).[37]

Without discounting the difficulty in distinguishing between secular and religious ideas[38] and Judge Newsom's opinion notwithstanding, courts have consistently concluded that they *are* empowered to draw lines. In fact, they must: To begin with, only "sincerely-held beliefs" are protected by the Free Exercise Clause. Beyond that, although courts cannot decide whether the religious belief is *true*, they *can* decide if the belief is religious at all.

3.1. Religious Truth

Before proceeding, it must be clarified that while courts can and must examine a belief system to ascertain if it is religious and sincerely held, the veracity or truthfulness of the religion has been understood beyond the purview of the courts. Acknowledging that many religious beliefs cannot be proven by their adherents, the Supreme Court recognized back in 1871 in *Watson v. Jones*, "The law knows no heresy, and is committed to the support of no dogma" (728). The Supreme Court made clear in *Ballard* (86),[39] *Seeger* (185),[40] *Thomas* (714),[41] and other

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[36] Judge Newsom cited his own concurring opinion in *Kondrat'yev v. City of Pensacola*, in which he wrote, "[C]an it really be that I—as a judge trained in the law rather than, say, neurology, philosophy, or theology, am charged with distinguishing between 'psychological' injury, on the one hand, and 'metaphysical' and 'spiritual' injury, on the other?" (38).
[37] In *Young Israel of Tampa*, Judge Newsom quoted an 11th Circuit opinion from 2007, *Watts v. Florida International University*. Based on *Thomas* and *Seeger*, the *Watts* court claimed, "[T]he Supreme Court has at least twice instructed us not to engage in any 'objective' test of whether a particular belief is a religious one" (15).
I am more partial to Judge Tjoflat's dissent in *Watts* distinguishing between examining the *truth* of the religion — which courts cannot do — and determining whether the belief system is, in fact, a religion at all (27–29, 31–34), as I lay out.
[38] See *Thomas* 714 ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task…") and *Frazee* 833 ("Nor do we underestimate the difficulty of distinguishing between religious and secular convictions…").
[39] ("We do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury.")
[40] ("We hasten to emphasize that… the "truth" of a belief is not open to question…")
[41] ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.")

cases[42] that religious beliefs do not need to persuade the outside observer; they cannot be *wrong* on their own merits.

3.2. Sincerity

To receive First Amendment protection, religious beliefs must be sincere.[43] Judges and justices have disagreed about how to test for sincerity. Justice Jackson assumed that courts have to accept a challenger's sincerity in his declared belief (*Ballard v. United States*, dis. op. 92–93),[44] a stance to which the scholarly consensus agrees (Chapman 1188). That said, the Supreme Court has consistently maintained the ability to examine the sincerity of religious beliefs. In *Seeger*, the Court held that whether a belief was sincere represents, "a question of fact — a prime consideration to the validity of every claim for exemption as a conscientious objector" on which courts can weigh in (185). Chief Justice Burger understood the role of the court in *Thomas* was to figure out if the petitioner's conviction was "honest" (716), a stance echoed on other occasions.[45] As evidenced by a willingness to examine the sincerity of a religious belief, it is clear religion is not simply an opaque box whose inner workings are obscured from the courts.

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[42] For example, the Court held in *Employment Division v. Smith*, "We have warned that courts must not presume to determine… the plausibility of a religious claim" (887).

[43] For example, Chief Justice Stone wrote in dissent — but appealing to common principles — in *Ballard*, "I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences" (89).

[44] ("The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which, in common experience, provide its most reliable answer.")

[45] See *Frazee* 833 ("Nor do we underestimate the difficulty of distinguishing… whether a professed belief is sincerely held."); *Employment Division v. Smith*, O'Connor con. op. 907 ("This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law."); and *Ramirez v. Collier*, Thomas dis. op. 461 ("The relevant issue is whether Ramirez himself *actually believes* that it is 'part of his faith to have his spiritual advisor lay hands on him.'") (Cleaned up.)

3.3. Religious Character

The ability of courts to assess whether a belief is sincere and whether it is religious in nature go hand in hand. The Supreme Court joined the two factors together in *Frazee*, holding, "States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause," which includes "distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held" (833).[46]

To provide one prominent example, the Supreme Court embarked on this form of analysis in *Church of the Lukumi Babalu Aye v. Hialeah*, noting that the city could not even suggest Santeria is not a religion because animal sacrifice has historically been a form of religious worship, even if it has fallen out of favor more recently (531).[47] More recently, the Satanic Church sued Scottsdale, Arizona, for not allowing its representative to offer a prayer before the city council session. The district court determined that "although courts normally are reluctant to venture into the question of what is and i[s] not a religion," it had no choice in that case — and was not forced to simply accept Satanism as a religion because the plaintiffs so alleged (*Satanic Temple v. City of Scottsdale* 776).

In an Establishment Clause decision, the Supreme Court splintered over, at least partially, to what extent a menorah is more similar to the secularized Christmas tree as a symbol of the "winter holiday season," or whether it retains its religious status more akin to a nativity scene (*County of Allegheny v. ACLU* 610–618).

The *Church of Lukumi Babalu Aye* Court, Arizona district court, and *Allegheny* Court

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[46] See also *Thomas* 714 ("The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task…" but recognizing the task as one that courts can tackle) and *Thomas*, Rehnquist dis. op. 726 ("By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant's belief is "religious" and whether it is sincerely held.")

[47] The Supreme Court also walked through the history of Santeria, which is a combination of African and Caribbean spirit-based religions with Roman Catholicism (524–525).

were simply following the path set forth by the *Seeger* Court, which found no issue in setting a test for a belief to be considered religious (*Seeger* 176).

4. What is Religion?

Having concluded that the courts can decide what beliefs qualify as religious, the more controversial question remains: Where should that test be set?[48]

4.1. Established Sect

Precedent makes clear that an individual's religious beliefs or practice do *not* have to follow those of any established sect or church to receive First Amendment protection. Although such association would make the question easier, the Supreme Court held in *Frazee*, "Never did we suggest that, unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference, rather than a religious belief" (833). The Supreme Court favorably cited the Maine Department of Education's definition that "[a]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school, but it is not dispositive" (*Carson* 775).

Moreover, the Supreme Court has held that courts cannot look to the official doctrine of the religion with which the plaintiff claims compels his action or inaction. In *Thomas v. Review Board*, the plaintiff quit his job because he believed producing turrets for military use would violate his faith as a Jehovah's Witness. Although a co-religionist co-worker did not think their work constituted a violation of their shared belief system, the Supreme Court declared, "It is not within the judicial function and judicial competence to inquire whether the petitioner or his

[48] The practical difficulty in creating this test was Justice Douglas's main objection to a test at all (*United States v. Seeger*, con. op. 189) and the source of Judge Newsom's difficulty as well when he wrote, "I'm not sure that any policymaker could define or identify 'religious' speech using 'objective, workable standards'" (con. op. 2).

fellow worker more correctly perceived the commands of their common faith," as long as Thomas truly understood *his* religious requirements in that way (716). Following this precedent, the Seventh Circuit acknowledged that the fact that an employee's religious conduct "is unique to her" does not lessen the employer's anti-discrimination obligations (*Anderson v. U.S.F. Logistics* 475).

4.2. Supreme Being

The conscientious objector statute in *Seeger* defined religion as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" (165, 172). At first glance, this "Supreme Being" test seems appealing: Justice Douglas wrote in *Zorach*, "We are a religious people whose institutions presuppose a Supreme Being" (313), and this was the conception of much of the founding generation, a key time period in Constitutional interpretation.[49] James Madison, the drafter of the First Amendment and a primary proponent of disestablishment in Virginia, acknowledged that "our national life reflects a religious people who are 'earnestly praying, as in duty bound, that the *Supreme Lawgiver* of the Universe guide them into every measure which may be worthy of his [blessing]'" (*Abington School District v. Schempp* 213).[50] George Washington declared Thanksgiving Day in 1789 "to be devoted by the people of these States to the service of that *great and glorious Being* who is the beneficent author of all the good that was, that is, or that will be" (*Van Orden v. Perry*, Rehnquist plur. op. 687).[51] Unsurprisingly, all eleven of the states (and Vermont) to ratify a

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[49] See, for example: "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment" (*Abington School District v. Shempp*, Brennan con. op. 294).
[50] (Emphasis added. Ellipses omitted.)
[51] (Emphasis added.)

constitution or Bill of Rights between 1776 and 1783[52] protected some version of religious liberty, and nine of the twelve explicitly mentioned an "Almighty God," "Supreme Being," or some variation (Cogan 13–45).[53]

Additionally, the Native American Church and Santeria (the religious beliefs in *Employment Division v. Smith* and *Church of the Lukumi Babalu Aye*, respectively) are centered around the worship of a higher power or supreme being, together with New World-infused spiritualism (The Editors of Encyclopaedia Britannica; *Church of the Lukumi Babalu Aye* 524–525).

However, this definition has major downsides. First, it appears to run directly against Supreme Court precedent in *Torcaso v. Watkins*, which protected an atheist's right to hold public office without swearing to believe in God.[54] In that decision, the Supreme Court quoted James Iredell (later appointed by George Washington to the Supreme Court in 1790), who said at the 1788 North Carolina Federal Constitutional convention that "the people of America may, perhaps, choose representatives who have no religion at all" under the proposed Constitution (495, n.10). In a footnote, the Court included "Ethical Culture [and] Secular Humanism" among religions that do not teach a "belief in the existence of God" (495, n.11).[55]

Second, requiring a "Supreme Being" does not provide concrete guidance for what

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[52] Connecticut was governed by its 1662 Charter of the Colony of Connecticut, which did not contain a list of protected rights, until 1818 (*Constitution of Connecticut. 1818.*). Rhode Island also maintained its 1663 Royal Charter until 1843 ("Introduction"), although that charter did specify "worship of God" (Cogan 32).
[53] Georgia, New York, and Virginia were the three exceptions, protecting religious exercise writ large. See *Fulton v. Philadelphia* 571–578.
[54] I write that this case only *appears* to include atheist beliefs within the Free Exercise Clause because its central holding — if not much of the language therein — could be narrowly construed to prevent an individual from being *compelled* to exhibit religious behavior, without similarly granting the so-called "favored nation" status of religion arguably exhibited in *Fulton* and *Roman Catholic Diocese of Brooklyn* (see Buckner). This distinction could be sustained from *Everson*, which held that a state cannot "force [an individual] to profess a belief or disbelief in any religion" (citation) — but professing any specific belief or disbelief is a more core First Amendment protection (implicated also, perhaps, by the Free Speech Clause) than allowing exceptions for specific atheistic practices (if any such exist).
[55] On this basis, the District Court of Oregon recognized Secular Humanism as a religion which was entitled to authorization for a religious study group (*American Humanist Association v. United States*).

constitutes religion. The entire dispute in *Seeger* was about what belief systems are included under the guise of a "Supreme Being," as defined in the statute (174).

Finally, and perhaps most pressingly, this definition would exclude — or at least, put on the borderline — faith systems widely considered religious. The *Seeger* Court noted that Buddhism and Hinduism don't neatly fit into the standard Judeo-Christian concept of a Supreme Being (174), and the question of a Supreme Being ensnares a number of non-traditional Protestant movements (180–183). Furthermore, the same footnote in *Torcaso* that mentioned "Ethical Culture" and humanism also included Buddhism and Taoism (495, n.11).[56]

That the general public at the time of the First Amendment's ratification (or at the time of its incorporation to the states through the ratification of the Fourteenth Amendment) would not have included Eastern religions, for example, within the meaning of "religion" does not prove dispositive. The Federal Constitution — unlike many of the other Founding-era constitutions — employs simply "religion," without reference to any specific deity. As such, in the same way that the freedom of speech includes the internet (*Reno v. American Civil Liberties Union*) and the Second Amendment guarantees the possession of firearms "in common use at the time," even if they didn't yet exist in the late 18th century (*District of Columbia v. Heller* 624), a definition of "religion" that fails to cover the beliefs of billions of people worldwide commonly recognized as religiously-based seems facially deficient in the context of the First Amendment.

4.3. Atheism, Humanism, and Secularism

As mentioned, *Torcaso* protected the right of atheists to serve in public office without taking an oath affirming belief in God, in any capacity; the opinion also recognized "Ethical

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[56] In *Young Israel of Tampa v. Hillsborough*, Judge Newsom noted his concern that some proposed definitions of religion would "eliminate many Buddhists and Jains" (con. op. 3).

Culture [and] Secular Humanism" as nontheistic religions. If, in fact, secularism qualifies for protection under the Free Exercise Clause,[57] it would be worth considering what that would look like when applied to the Establishment Clause. The Supreme Court has long held that a state cannot impose a secular orthodoxy as a manner of ensuring it does not favor any religion,[58] but those statements came in the context of not *dis*favoring religion; if secularism has full rights as a religion, favoring it as a default option could become more problematic.

For example, the Supreme Court held in *Carson* that although a state can operate a fully secular public school system, once it creates a voucher system to allow parents to route public money to private schools, preventing that money from reaching specifically sectarian schools violates free exercise (785).[59] Maine's sectarian prohibition finds its source in the state's "mini" Blaine Amendment, originally an attempt by Protestants in the late nineteenth century to undercut Catholic schools and preserve the default Protestant education (*Espinoza* 482). In the years since, the Protestant character of public schools was reformed as the United States diversified religiously and Establishment Clause challenges demanded secularism — but if secularism is a religious belief no different than Protestant Christianity, it stands to reason that

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[57] I previously expressed my skepticism for this proposition based on *Torcaso* alone in footnote 54. *Torcaso* n.11, which recognizes "ethical culture" and "secular humanism" as religions, can easily be resolved at dicta if needed. For the sake of space, I note that I am unconvinced, but I nevertheless assume the simplest — and binding — read of *Torcaso* for the sake of this section.

[58] See *Everson* 18 ("That Amendment requires the state to be a neutral *(sic)* in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.); *Abington School District v. Schempp*, Goldberg con. op. 306 ("[U]ntutored devotion to the concept of neutrality" must not "lead to… a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."); *County of Allegheny v. ACLU*, Kennedy con. op. 677–678 (Complaining that the "[o]bsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular…"); *Town of Greece* 581 ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.")

In contrast, Justice Sotomayor, dissenting in *Trinity Lutheran*, wrote that a state has "a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State 'atheistic or antireligious.' It means only that the State has "establishe[d] neither atheism nor religion as its official creed" (493).

[59] ("Maine may provide a strictly secular education in its public schools… but once a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious.")

the current secular standard to which public institutions are held might itself run afoul of the Establishment Clause.

4.4. Belief Systems

As established, the Religion Clauses only address religious beliefs, not other moral, ethical, or philosophical beliefs,[60] but drawing that line remains a different task. Judges, justices, and litigating parties — in various contexts — have floated possibilities; many of them have been quickly found unsuitable.

In *Seeger* alone, the Supreme Court addressed several possibilities. Arno Jakobson (the second plaintiff) offered that religion constitutes the “sum and essence of one's basic attitudes to the fundamental problems of human existence” (168). The Court also considered the Rev. John Haynes Holmes’s definition that religion is “the consciousness of some power manifest in nature which… is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best” (169). Justice Clark also entertained, “Religion as a way of life envisioning, as its ultimate goal, the day when all men can live together in perfect understanding and peace” (174). Finally, he concluded with what he determined the appropriate test: Religion is “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God” (176).

Similarly, Justice Breyer, dissenting in *Carson*, quoted Thomas Jefferson that it would be “sinful and tyrannical” to compel an individual to pay “for the propagation of opinions which he disbelieves” (793), implying that religion is nothing more than opinions in which a person can

[60] Concurring in *Fulton v. Philadelphia*, Justice Alito noted that there do exist “outer boundaries of the term ‘religion’ as used in the First Amendment” (566, n.29).

believe or disbelieve.[61]

To give another example, the Ninth Circuit held in *Alvarado v. City of San Jose* that "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters" and "consists of a belief-system as opposed to an isolated teaching" (1229).

These standards make quite difficult the task of differentiating between religious and nonreligious beliefs. The Ninth Circuit's definition in *United States v. Ward* — "Religious beliefs, then, are those that stem from a person's *moral, ethical, or religious beliefs about what is right and wrong* and are held with the *strength* of traditional religious convictions" (1018)[62] — conflates religious beliefs with moral or ethical beliefs on other occasions defined directly in contrast![63]

To show the consequence of defining religion in this broad of a manner, take an ideology that is indisputably foremost political: the "Social Justice" movement, or wokism. At first glance, it sounds absurd that Washington, D.C., violated the Establishment Clause when painting Black Lives Matter on 16th Street during the George Floyd riots in 2020 (Shabad): The city was expressing a political or moral opinion, which it is entitled to do. Yet, if Birmingham, Alabama painted "Christ is king" on a city street, or if Crown Heights, New York, painted "*Yechi Adoneinu Moreinu v'Rabbeinu*,"[64] the cities would undoubtedly face Establishment Clause violations. Yet, it is hard to say that adherents of "wokism" would not "envision[], as [social justice's] ultimate goal, the day when all men can live together in perfect understanding and peace," in Justice Clark's words (174), or any number of the other aforementioned definitions.

[61] Similarly, legal commentator David French defined religious liberty as, "The ability to think, speak, and crucially act in accordance with your **deepest beliefs**" (29:30).
[62] (Emphasis added. Cleaned up.)
[63] It is in this context that Judge Newsom expresses frustration there is no clear way to tell whether Randian Objectivism, Transcendental Meditation, or even Scientology would qualify as religions (*Young Israel of Tampa*, con. op. 3–4).
[64] Trans. "Long live our master, our teacher, and our rabbi," a slogan that Chabad messianists use to refer to the late Rabbi Menachem Mendel Schneerson

Nor can we employ a cop-out along the lines of "if nobody calls an ideology a religion, it isn't a religion even if it 'quacks' like one" because opponents *do* treat it as a religion, noting commonalities with traditional religion such as repentance and salvation (Lewis).[65]

If wokism qualifies as a religion under the First Amendment, it is worth considering some of the other startling results. For one, regardless of any Free Speech discussions,[66] Florida's "Stop WOKE Act" (Kennedy) would facially target the free exercise of religion — in the name of the bill, no less. On the other "side," a mandatory course in anti-racism, as required by the University of California, Los Angeles School of Medicine (Sibarium), would seem no different than the University of Tennessee requiring Bible instruction — a gross violation of the Establishment Clause. Paying clergy has long been one of *the* quintessential markers of disestablishment (*Locke v. Davey*); does that put any government-funded Diversity, Equity, and Inclusion (DEI) staffer, office, or training on the chopping block? In the Free Exercise context, Harvard University or other private institutions might be able to skirt the Supreme Court's recent ban on affirmative action in *Students for Fair Admissions v. Harvard* as a religious action.[67]

Even as the "Supreme Being" test fails under its counterexamples, broader definitions fare little better. The over-encompassing definitions fail to distinguish between religious beliefs and moral, ethical, political, and philosophical ideologies, enveloping wide swathes of non-religious beliefs if applied rigorously and consistently. The resulting distortion of the Religion Clauses would at once weaken religious protections and misclassify nonreligious beliefs — beneficially for adherents under the Free Exercise shield and detrimentally through the Establishment sword.

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[65] It is interesting to note that the Supreme Court assumed in *Church of the Lukumi Babalu Aye* that contested actions were religious in nature because animal sacrifice has historically been a form of religious worship (524–525).
[66] See Duster.
[67] Notwithstanding the Supreme Court's holding in *Bob Jones University v. United States*.

4.5. Satanism

After the Supreme Court returned the regulation of abortion to the states in *Dobbs v. Jackson Women's Health Organization*, a number of states have re-restricted abortion or allowed trigger laws to snap back into place. In response, the Satanic Temple has sued on behalf of its members to engage in its abortion ritual (*TSTHealth.org Satanic Abortion Ritual*) even where otherwise prohibited.[68] The Satanic Temple[69] — which received religious tax-exempt status from the Internal Revenue Service in 2019 (Wecker) — boasts seven "fundamental tenets," including that "one should strive to act with compassion and empathy" and "beliefs should conform to one's best scientific understanding of the world" ("About Us"). In a legal pleading, the Satanic Temple claimed that it "venerates, but does not worship" the Satan of Milton's *Paradise Lost* (*The Satanic Temple v. Holcomb* 1).

On its own terms, the Satanic Temple seeks to be represented in "limited public forums" by offering legislative prayers and displaying its goat-headed Baphomet statues on public property to achieve its goal of religious pluralism ("Satanic Representation Campaign"). Taken less charitably, the Satanic Church does not stand for its own principles, but rather to bully others to hold back from exercising religion in the public square (Picciotti-Bayer),[70] a position to which co-founder Lucien Greaves admitted in an interview with *Vice* (Bugbee).[71]

Satanism — in addition to the general difficulty in placing secular humanism and other nontheistic worldviews within the Religion Clauses framework — poses two other related challenges that are worth considering and have started to percolate in the lower courts. First, are

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[68] Thus far, at least some of the lawsuits have failed on standing grounds (*The Satanic Temple v. Rokita*; *The Satanic Temple v. Young*).
[69] Not to be confused with the Church of Satan, another organization that claims to represent Satanism, but with whom the Satanic Temple is not on good terms ("Church of Satan vs. Satanic Temple").
[70] This view is supported by the fact that the Satanic Temple chooses to use intentionally offensive imagery.
[71] ("[The founders] envisioned it more as a "poison pill" in the Church/State debate.")

Satanists sincere in their professed "religious" beliefs in the "seven tenets," or is the underlying value — revealed through behavior if not statements — really pluralism *qua* pluralism and the elimination of religion entirely from the public view?[72] And second, relatedly, can a "religion" rank as facially insincere, such that even adherents who are sincere in their practice of it remain insincere in asserting religious privileges?

5. Conclusion

By singling out the "establishment of religion" and "the free exercise thereof," the Founding Fathers placed religion in a category of its own, distinct from other deeply held beliefs. As such, courts have a responsibility to ensure that any religious liberty claims — whether under the Establishment Clause or Free Exercise Clause — are both sincere and constitute a truly *religious* belief. Evaluating sincerity and drawing the line between religion and secular is undoubtedly a "difficult and delicate task" (*Thomas* 714): Define religion too narrowly and religious believers lose their fundamental protections under the law, but define it too broadly and everything is a religion. As traditional and conventional religion declines in the United States, the Court will need to grapple with precisely which beliefs and behaviors constitute the "preferred constitutional activity" (*Employment Division v. Smith*, O'Connor con. op. 902) that the Founding Fathers protected through the Religion Clauses of the First Amendment.

[72] For example, the Satanic Temple recently celebrated tanking a Utah bill which would have allowed volunteer chaplains in public schools by threatening to send in its own chaplains. The blog post expressed excitement that it tanked the bill, not disappointment that it would not be able to send its own chaplains into the schools ("Fearing The Satanic Temple…).

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The History, Theory, and Future of Chevron Doctrine

Abstract

This article delves into the historical trajectory of the Chevron deference doctrine, a crucial element in administrative law originating in the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* It will examine its origins, judicial interpretations, and potential future, and attempt to provide a comprehensive overview of its evolution and some examples of its impact on American law and administration. This piece is particularly relevant due to a pending Supreme Court decision in the cases *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* that could overturn Chevron, requiring both a legal and practical analysis of the implications of overturning Chevron. Through a measured exploration, I will assess the doctrine's impact, strengths, and potential weaknesses, offering a perspective on Chevron's chances in its current legal challenge.

1. Background

When Congress writes laws that delegate power to administrative agencies in the Federal Executive Branch, it is up to the executive agencies to implement them. Often, disagreements arise about whether or not the agency is faithfully upholding the law as set forth by Congress, and the agencies are brought to court. The central question of Chevron and all related cases is: should the courts defer to the agency's understanding of the statutes and laws that they are tasked

with carrying out, or interpret them *de novo*, taking the agency's understanding into consideration, but making the decision without deference to any other entity's understanding?

The Supreme Court ruled in the 1944 case *Skidmore v. Swift & Co.* that administrative agencies should be granted deference to the extent that they were convincing. In other words, deference was nearly non-existent. It just meant considering "that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Skidmore* 1944) The administrators were experts in the field, with potentially valuable insight, but nothing more. Their arguments as to what the law means would thus be evaluated on their merits.

In 1984, the Supreme Court again took up the question of deference to administrative agencies in *Chevron*. In 1977, Congress added a clause to the Clean Air Act of 1963 stating that any project creating a "source" of air pollution had to be reviewed by the EPA. This was understood at the time to mean that any new piece of machinery or building needed to be reviewed. In 1981, the EPA changed its understanding of this rule to define "source" as only a whole factory, such that a minor change could be made that created air pollution, as long as a concurrent reduction in emissions elsewhere in the factory offset that pollution. The Natural Resources Defense Council challenged this change in interpretation, and they won in the Circuit Court. In the Supreme Court, however, Justice Stevens wrote a unanimous decision[73] against the NRDC. This decision established what we now know as the Chevron Doctrine.

2. The Chevron Doctrine

[73] The decision was only decided 6-0, since Justices Rehnquist, Marshall, and O'Connor did not participate in the case.

The Chevron Doctrine, first laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, holds that courts should defer to administrative agencies' reasonable interpretations of ambiguous statutes they administer. This involved a two-step process, which has since been updated in later cases:

Step one consists of establishing the ambiguity of the statute. Such ambiguity is illustrated well in the facts of *Chevron*, where the meaning of "source" seems to have been left to the EPA to decide, implicitly giving them the power to determine how to apply this law. Next is step two, where the court must conclude that the interpretation of the statute being used by the agency is *reasonable*, even if the court thinks that it may not be the *best* interpretation.

This doctrine has come to practically define American administrative procedure. *Chevron* has racked up tens of thousands of citations in legal documents and a lot of focus has been placed on the power it gives Executive Branch agencies over "policy decisions." (Chevron 1984)

However, over the years, understanding of the Chevron Doctrine has evolved, and these are briefly outlined below, as they are key to understanding what Chevron is today.

In the 2001 case *United States v. Mead Corporation*, SCOTUS narrowed the Chevron doctrine by creating what later came to be widely referred to as step zero (Cass Sunstein 2006). Step zero requires the court to establish that the case at hand pertains to a statute that the agency in question is authorized by Congress to carry out. In other words, does the Chevron doctrine even apply to this case? If not, then Chevron cannot be invoked, though Skidmore deference still might pertain. This curtailed the reach of Chevron.

Chevron was also given greater explicit power by the Court in 2005, in the case *National Cable & Telecommunications Ass'n v. Brand X Internet Services*. This case established that judges should defer to administrative agencies even when that requires violating the general

assumption of precedent. Brand X thus established that agencies could change their interpretation of a statute, and as long as it met the requirements of Chevron (steps zero, one, and two), courts would defer to the agency's new interpretation, even if it contradicted a prior court interpretation. *BrandX* gave agencies much more flexibility in adapting their interpretations over time, allowing for the flip-flopping agency policy that occurs when administrations in DC change every few years.

In recent years, there has been a substantial push against Chevron, with a 2022 case "*West Virginia v. EPA*" having presented a possible opportunity for SCOTUS to kill the doctrine entirely. This, however, did not occur. The decision instead invoked the major questions doctrine, which states that when confronted with an ambiguous statute, the court should decide the meaning themselves, rather than deferring to an agency's understanding. The Court concluded somewhat narrowly that major rules made by agencies, in this case the EPA, cannot stray beyond directly interpreting Congress's words.[74]

3. Major Chevron Cases

Chevron's impact is too extensive to note all of the cases in which the doctrine hasbeen invoked, but a sampling of such cases demonstrates clearly how fundamental it has been in numerous areas of law and regulatory procedure.

In a key tax law case, *Cottage Savings Ass'n v. Commissioner* (1991), the Court applied Chevron deference in a manner slightly beyond traditional administrative law, affirming that the IRS's interpretations of tax regulations, within the bounds of Chevron, should be given deference. This understanding of Chevron deference has been utilized many times. For example, in Atlantic Mut. Ins. Co. v. Commissioner (1998), the Court invoked Chevron and *Cottage*

[74] The direct effects of this decision were reversed by an act of Congress, but the legal effects stand.

Savings in upholding the Treasury Regulation's understanding of the phrase "reserve strengthening," as used in the Tax Reform Act of 1986. This decision states "Since the term is ambiguous, the question is not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one."

INS v. Cardoza-Fonseca (1987), decided that the standard for asylum claims could not require proving a certainty of persecution, but rather a "well-founded" fear of persecution. The INS invoked and had a "heavy reliance on the principle of" Chevron deference, though it did not accept that request for deference, invoking "the inconsistency of the positions the BIA has taken through the years" (a ruling which, in light of *Brand X*, might no longer be consistent with the Court's use of Chevron).

NLRB v. United Food & Commercial Workers Union (1987) invoked Chevron deference in understanding labor law. The Court said "Our task, under *Cardoza-Fonseca* and *Chevron*, is not judicially to categorize each agency determination, but rather to decide whether the agency's regulatory placement is permissible." This use of Chevron allowed the National Labor Relations Board to issue rules and regulations interpreting the National Labor Relations Act. It concluded that "Congress has made plain its unequivocal desire that, absent statutory direction to the contrary, such examinations be made first by the Board, or not at all. At least in the context of this statute, we are left with no doubt that Congress intended the right of judicial review on the merits of an unfair labor practice charge to be had only through the express provisions of the NLRA." Chevron is invoked as a way to show the congressional interest in an agency deciding the details of an issue.

This is a sampling of the many thousands of court cases in which Chevron deference is explicitly invoked. In addition, there are tens of thousands of federal regulations involving

interpreting ambiguous statutes that are never challenged due to the understanding that *Chevron* would be successfully used in the agency's defense.

4. Justice's Opposition to Chevron

Opponents of Chevron, several current Supreme Court justices included, have a variety of arguments that they make as to why the doctrine should be killed by the Court. Notably, in 2013, Chief Justice Roberts wrote, and Justice Kennedy (since retired), and Justice Alito signed, a dissenting opinion in the case City of Arlington v. FCC, arguing that *Chevron* is used too expansively and is misunderstood. He said that the majority in that case was wrong about the proper application of *Chevron*: "My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference." *Chevron*, in other words, was being applied to situations that did not pass the two-step test explicitly laid out in that case.

What does Roberts suggest in its place? He says that every agency rule should undergo a *de novo* judicial review as a way to prevent unpredictability and maintain stability. He suggests that applying Chevron to "jurisdictional" interpretations could lead to excessive agency power and chaos, proposing a significant revision of Chevron jurisprudence. The dissent also questions the existence of a separate category of "jurisdictional" interpretations and emphasizes the importance of courts determining if Congress has delegated interpretative authority to an agency before deferring to its interpretation of the law.

Justice Thomas, who is in many respects the intellectual force behind the Court's majority (see Romoser), wrote a scathing critique of *Chevron* in his concurrence in the case *Michigan v. Environmental Protection Agency* (2015). Thomas even attacks his own 2005

decision in *Brand X* (he and Justice Scalia, who often voted together, used to be defenders of *Chevron*), stating that “Chevron deference precludes judges from exercising that judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction” (The quote within the quote is his own, from *Brand X*).

Thomas goes on to say that “It [Chevron] thus wrests from Courts the ultimate interpretative authority to ‘say what the law is,’ and hands it over to the Executive” (citation removed), invoking the famous phrase from *Madison v. Marbury*. Thomas thus expressed concern with the Constitutionality of *Chevron* and its contradiction with Article III’s Vesting Clause, which states that “The judicial Power of the United States, shall be vested in one supreme Court…” (Art. III §1) This separation of powers issue is a common theme among critics of *Chevron* (see Pazzanese, Ballotpedia), and a Supreme Court Justice embracing it is significant.

Justice Gorsuch has also expressed serious concerns with *Chevron*. In a concurrence he wrote when he was a 10th Circuit judge in 2016, in the case *Gutierrez-Brizuela v. Lynch*, he laid them out: “There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.” He goes on to describe the constitutional issues with the *Chevron* Doctrine and the separation of powers issues that it creates. *Brand X*, in particular, causes him a lot of consternation, due to its ruling stating that “courts are required to overrule their own declarations about the meaning of existing

law in favor of interpretations dictated by executive agencies." This does not sit well with Gorsuch, who, as a current Supreme Court Justice, has the power to overturn those precedents.

In addition to these issues, Gorsuch points out what many other critics do; that he believes the concept undergirding *Chevron* is flawed. The premise of *Chevron* is that ambiguities in the law are designed by Congress, which is delegating the power to decide the precise parameters of certain rules and regulations to the administrative agencies. However, in the Administrative Procedure Act of 1946, Congress wrote that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions." This is not consistent with *Chevron*.

Furthermore, Gorsuch points out that the stability and consistency of the laws of the United States are threatened by the *Chevron* doctrine. Within the rather arbitrary bounds of "reasonableness," an agency will often "reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail [in court]." This is a significant critique of a doctrine that promises to increase stability and functionality by allowing experts to make rules on various issues.

Another significant critique Gorsuch brings up, the last I will cover here, is that many proponents of *Chevron* say that it does not entail interpretation of Congressional statutes, but rather lawmaking that has been delegated to the agencies, based on the principle that they are best equipped to make certain decisions and rules. They are not interpreting law, but deciding what it should be. This, Gorsuch writes, is a violation of the basic principle that "congress cannot delegate legislative power to the president." (*Marshall Field and Co. v. Clark*)

Together, these ideas being taken up by Supreme Court Justices will cause a reconsideration of *Chevron* when a case comes before them that focuses on the issue of judicial deference; as indeed one has.

5. *Loper* and *Relentless*

In two cases currently before the Court, which were argued together (to allow Justice Jackson, who cannot participate in one, to be part of the arguments), the Court is taking up the question of whether to limit the scope of *Chevron* or even overturn it entirely. These two cases are *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*.

Loper is a question regarding whether the National Marine Fisheries Service can use an existing statute to mandate that herring fisheries pay the cost of a federal monitor. The District Court ruled that it could, on the grounds that it failed to even pass the first step of Chevron; it unambiguously allowed for enforcing industry-funded federal monitors. The Circuit Court affirmed that decision, though it did not agree that the statute was unambiguous, and instead went to step two, ruling that deference was given to the NMFS under *Chevron*. The Supreme Court accepted the petition that Loper sent it only on the question of whether to overturn or limit Chevron.

Alongside *Loper*, the Court heard the case *Relentless, Inc. v. Department of Commerce*, which is a similar case involving the NMFS and its ability to leverage fees based on *Chevron*, which Justice Jackson was able to sit for. The oral arguments reveal a lot about what we can expect in the decision, which will likely be released at the end of the Court's term.

Roman Martinez, the lawyer for Relentless, made the arguments that we’ve already brought up, pointing to the fact that the *Chevron* doctrine undermines the responsibility of the

courts to make decisions about how to interpret the law, and passes it off to the Executive branch. In the closing of his brief, Martinez sharply stated, “The government says that even if all nine of you agree with us that the agency's construction is worse than ours, you should nonetheless defer to that construction and uphold their program under Chevron. That's not consistent with the rule of law. If we have the best view of the statute, we should win this case.”

Paul Clement, the lawyer for Loper, made the same points as Martinez and pointed out something that seemed to hit home with at least one Justice: The effect of *Chevron* was often to allow federal agencies to simply beat small businesses in court, regardless of the merits of the case or the injury faced. He also pointed to the APA as another reason to overrule *Chevron* and called the doctrine “unworkable” and “hopelessly ambiguous.” “It is also a reliance-destroying doctrine because it facilitates agency flip-flopping,” Clement said as he opened his time up to questions.

Solicitor General Elizabeth Prelogar, representing the United States in both cases, argued that it was important to not alter the *Chevron* doctrine, in keeping with stare decisis. She said that there is not a significant enough issue with *Chevron* to warrant overturning the precedent. She further warned that “litigants will come out of the woodwork” to relitigate cases resting on *Chevron* if it is overturned.

Among the Justices, opinions were split during the questioning. The three liberal Justices, Kagan, Sotomayor, and Jackson, all seemed opposed to overturning the precedent.

Kagan discussed the idea that agencies, full as they are with experts in the areas they are administering, are more qualified than courts to resolve ambiguities. For cases like AI, she said, Congress could hardly keep up with developments fast enough to set up proper regulations, so they wanted agencies to make regulations about them. The advocates for the petitioners said that

AI regulations could be set by Congress, with discretion explicitly granted to agencies, but that after that, interpretation was up to the courts.

Sotomayor pointed to the need for someone to fill the "gap" in an ambiguous piece of legislation and said that agencies were best equipped to fill that role, and so courts ought to defer to them. This was countered with the idea that if no agency had yet ruled, the courts would not simply throw up their hands, but would discuss what the best interpretation of the statute was.

Jackson asked about the value that she thinks *Chevron* serves in terms of allowing Congress to delegate power to agencies in the gaps, a power that would be taken away if Chevron was reversed. This, again, elicited disagreement.

The six conservative Justices, however, seemed to view *Chevron* more negatively. The most unlikely to overturn it seemed to be Chief Justice Roberts and Justice Gorsuch, who asked about the potential of not having to deal with *Chevron* to resolve this case and instead stopping the analysis of this case at step one. Both asked questions to the state to the effect of there being potential to understand the statutes as non-ambiguous enough to not have to get into *Chevron*. The SG concurred with that assessment, though Gorsuch noted, "Yes, you think you win under step one, and so does Mr. Clement. And yet, here we are." Roberts also asked about the *Skidmore* precedent, which some have suggested would gain prominence if *Chevron* is no longer in place. An interpretation of *Skidmore*, Gorsuch suggested, can avoid deferring to agencies in favor of simply accepting the government's argument because it is persuasive; even if there is only a subtle difference between the two, there is a massive distinction. He also mentioned that less powerful individuals; "the immigrant, the veteran seeking his benefits, the Social Security Disability applicant, who have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking," often get

the wrong end of Chevron and end up suffering for it. This Prelogar acknowledged, though she mentioned it being "in accordance with Congress's intent and wishes," though Gorsuch pushed back on that idea.

Justices Thomas and Alito, the two members of the Court considered the most conservative and the most opposed to *Chevron*, both indicated in their questioning that they were prepared to reverse the doctrine entirely. Thomas asked questions of Prelogar about finding delegation in statutory silence and, critically, where and how exactly she thought the courts should be deferential, as opposed to using de novo review. Alito asked questions about ambiguity and a very pointed set of questions to Martinez and Clement about the potential issues with the courts applying de novo interpretation, the issues that could arise, and why those were less of an issue, especially in the context, as Martinez pointed out, of the APA. Clement pointed out that the courts have "come a long way in statutory interpretation," lessening the fear of "freewheeling" courts injecting policy into things, and pointing out the issues with handing the decision over to experts in agencies, who do not have as systematic an approach to deciding interpretations.

Justice Kavanaugh, too, seemed ready to overthrow the *Chevron* regime, saying that Chevron deference, unlike *Skidmore* deference, leads to significant changes with new presidents in power, since *Skidmore* deference has to remain consistent. He also referred to "abdication to the executive branch" in his questioning, implying that he is not a fan of *Chevron*. He also was very tough on Prelogar on that point, asking her about the "shocks to the system every four or eight years when a new administration comes in," which she said were "a small sliver of cases or circumstances." He was assertive regarding agencies enforcing policy over the interests of

Congress was an issue, while she asserted that the idea of Chevron deference is that Congress has not spoken to a certain issue in a concrete way.

Barrett, too, was very harsh on *Chevron* deference, especially as understood by *Brand X*. "I understand Brand X to say that a court must let go of its best interpretation of a statute if an agency advances an inferior but plausible one." This is about as scathing as it gets, and while she went on to ask about other options, like "Kisorizing" *Chevron* (making it limited in scope), there was no missing the implications of those questions. She also pointed out that even in classical *Chevron* cases, the courts were going to have their best understanding of what the law meant, and *Chevron*, certainly when combined with *Brand X*, required the courts to stray from that best understanding. Prelogar pushed back on this understanding of ambiguity, as well as pointing out the "indeterminacy and inconsistency" that would exist without *Chevron*.

Overall, these arguments support the idea that the *Chevron* doctrine will not survive the current Court term, certainly not intact. It appears that at least five Justices (all the conservatives but Roberts) are ready to ditch it to some extent, and four (excluding Kavanaugh) are ready to throw it out entirely. However, it remains to be seen how the Court will decide in this case.

6. Conclusion

Over the years, the *Chevron* doctrine has been created, morphed, expanded, shrunk, and mortally threatened. Throughout cases, it has remained controversial, with a notable growth in dislike for it in the 21st century. The arguments about the *Chevron* doctrine cut to the core of how the American legal system functions, how statutory interpretation ought to be carried out, and the role of the legal and administrative systems in the lives of American citizens. As we

pass, most likely, into a post-*Chevron* world, we will have to try to appreciate the doctrine and see its strengths and weaknesses to better understand the law going forward.

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The Criminalization of Terrorism in International Law

Abstract

The prosecution of terrorism on an international level is a contentious issue. The international community remains incapable of reaching a unanimous definition, handicapping any efforts to prosecute acts of terror. This article evaluates the various means of prosecuting terror and their effectiveness. It initially explores the significance of defining terrorism to the general effort of combating terrorism. The importance of treaty laws as well as precedent for prosecuting non-state actors are examined as well. The bulk of the article focuses on the catalog of criminal charges applied in international law, viewed in consideration of how they intersect with matters of terrorism and the prosecution thereof. Building upon that progression, the article closes with a consideration of terrorism as an independent crime.

1. Introduction

Starting with the Nuremberg Military Tribunals, a new era of international jurisprudence has emerged, one that looks at the greatest crimes across the globe and holds the perpetrators accountable. Acts of evil, in theory, can no longer go unpunished. Crimes of the highest order fall under the jurisdiction of the various bodies of international law. To that end, a close look must be taken at how this international justice system deals with acts of terror. Terrorism has rapidly become one of the most contentious issues in international law. Lives are claimed across

the globe in the name of terror, but unlike established crimes such as genocide, there is no clearly defined way to deal with terrorism. The legal issues in dealing with terror abound. This article will explore those issues in defining terrorism and stresses the importance of achieving a single agreed-upon definition. It will consider the way in which conventions serve as a response to the definitional challenges as well as how international law can prosecute non-state actors. The primary focus of this article, however, will be on the various charges that can be applied to terrorists and acts of terror under existing international law. The article will look at the intersection between terrorism and the crimes of genocide, crimes against humanity, war crimes, aggression, and piracy. Finally, the importance of developing a distinct charge against terrorism, regardless of broad definitional challenges, will be evaluated.

2. The Issue of Defining Terrorism

Legal action against terror on the international level has been limited in scale.This lack of direction and action can be traced back to the absence of an agreed upon definition of terrorism. As academics, states, and international bodies alike have all found, the definition of terrorism is fiercely subjective. The nuances of developing a universal definition are virtually guaranteed to foster disagreement. Countries define terrorism in vastly different manners. Certain definitions are logical for one country, yet they criminalize another country's actions.[75] Accordingly, attempting to create one unified definition of terrorism is a precarious political endeavor.

The lack of definition leaves the field with no concrete framework or legislation to offer a clear direction forward. Without one comprehensive definition of the crime, it becomes difficult

[75] Bekele, Henok Kebede. "Problem of Defining Terrorism under International Law: Definition by the Appeal Chamber of Special Tribunal for Lebanon as a Solution to the Problem." *Beijing Law Review*, vol. 12, no. 2, June 2021, pp. 619-630. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.beijlar12.38&site=eds-live&scope=site.

to detail the specifications of what violates that crime or develop legislation to address it. Consequently, many have made attempts towards drafting an international definition of terror. One of the most notable definitions to emerge in recent years is that of the Special Tribunal for Lebanon (STL), which was formed in the wake of the 2005 attack that killed Lebanese Prime Minister Rafik Hariri and many others to prosecute those responsible. The STL ratified three basic requirements to designate an act as terrorism:

> (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[76]

This definition is significant for several reasons, among them that it was drafted based on both standing international and national legislation, as well as various treaties. Further, this definition conforms with many of the notions of the academy, and it has been actively adopted in several national courts.[77]

This article will not assume any single definition. The goal is to investigate practical ways to charge terror as a crime under the current framework of international law, with consideration for potential future changes that may emerge in this sphere. Committing to any single definition would sacrifice the universality of this approach, considering the current definitionless circumstances. By prosecuting under the various charges that will be discussed at

[76] Special Tribunal for Lebanon. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, 16 February 2011. *Refworld*, www.refworld.org/jurisprudence/caselaw/stl/2011/en/77425.

[77] Bekele 627

length in this article, the adjudicative bodies of International Law can establish the precedent that would be key for developing clearer definitions and framework for the future.

Further, it may even be possible to establish a distinct crime of terrorism despite a lack of a definition. While no agreement has been reached on the precise specifications of the crime, terrorism has been accepted in common parlance as a good way to broadly refer to an existent phenomenon of violence, reflecting the viability of this definitionless approach.[78] The crime of aggression provides a precedent for this. Aggression does not have a rigid definition in International Law. On account of this, it is charged sparingly, but it does get used nonetheless. Aggression teaches that recognition of a crime and the need for punitive action can supersede the need for distinct definitions when the degree of moral reprehensibility demands it.

3. Specific Legal Instruments Addressing Terrorism

The impasse in developing a distinct definition of terrorism brings the conversation around terrorism into the dialectic between laws and treaties. There are two types of accepted laws on the international stage: "international criminal law *stricto sensu* — the so-called core crimes — and crimes of international concern — the so-called treaty crimes."[79] Many of the core crimes are familiar terms, such as genocide, crimes against humanity, war crimes, and aggression. The treaty crimes, termed "the terrorism suppression conventions," are a series of treaties and agreements that exist to target and prohibit specific terroristic behavior and facilitate

[78] Duyvesteyn, Isabelle. "How New Is the New Terrorism?" *Studies in Conflict & Terrorism*, vol. 27, no. 5, Sept. 2004, pp. 439–454. *EBSCOhost*, doi-org.ezproxy.yu.edu/10.1080/10576100490483750.
[79] Boister, Neil. "Transnational Criminal Law." *European Journal of International Law*, vol. 14, no. 5, 01 Nov. 2003, pp. 953-976. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.eurint14.56&site=eds-live&scope=site.

international cooperation in the prosecution process.[80] These treaties operate in a wide range of disciplines, covering such issues as aviation, hostage taking, and maritime laws. These instruments are vital as they create means for addressing specific dimensions of terrorism in the absence of an exact definition of the crime or an accompanying charge to comprehensively encapsulate the violation of any of the crimes contained in the aforementioned treaties.

4. Prosecuting Non-State Actors

Having affirmed the existence of some measure of criminality — despite the lack of a distinct definition — it is important to also briefly deliberate on the capacity to charge and punish terrorists and their organizations for their crimes. The potential difficulty with charging terrorists stems from their position as non-state actors. At face value, the whole system of international law would seem to govern the actions of states; non-state actors, whether individuals or organizations, are meant to be subject to their respective national jurisdictions.

However, a clear legal precedent for holding non-state actors accountable for their actions was established by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the trial of Duško Tadić.[81] Tadić faced charges of crimes against humanity and accusations of several violations of international law and treaties after his militant actions in the former Yugoslavia. The ICTY's decision affirmed, "[U]nder international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a de jure state, or by a terrorist group or

[80] Stigall, D. E.. "The Expansion of the Transnational Counterterrorism Order After 9/11." *Journal of Policing, Intelligence and Counter Terrorism*, vol. 18, no. 4, 08 June 2023, pp. 486–495. doi.org/10.1080/18335330.2023.2222321.
[81] International Criminal Tribunal for the Former Yugoslavia. Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment), IT-94-1-T, 7 May 1997. *Refworld*, www.refworld.org/jurisprudence/caselaw/icty/1997/en/40193.

organization."[82] The ruling specifies that, like Tadić, terrorists can be held accountable for their actions despite being non-state actors.

5. Applicable Criminal Charges

The various treaties and agreements referenced previously provide some measure of coverage in international law when it comes to terrorism. Nevertheless, drastic violations of human rights necessitate a unified international response. A litany of charges could theoretically be brought against a terror organization under the already-existing confines of international law. These charges fall primarily under what is known as *jus cogens*, the universally accepted norms of international law. Also known as peremptory norms, no country is exempt from these basic standards as any violation triggers the application of universal jurisdiction. These charges are reserved for the gravest violations of international norms. As established, the designation of terrorism is not clear cut. It is clear however, that international law should recognize terrorism as a violation of *jus cogens*. Various theories abound as to what peremptory norms may be applied to establish the criminality of terror; these theories of criminality are as follows:

5.1. Genocide

The Rome Statute defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[83] This definition is vague and wide reaching. With few exceptions, terror organizations would not seem capable of actually effectuating violence on the scale of a genocide, but many arguably operate with genocidal intent, which the Convention on the Prevention and Punishment of the Crime of Genocide

[82] ICTY par. 654.
[83] United Nations, General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998. *United Nations*, www.refworld.org/legal/constinstr/unga/1998/en/64553.

criminalizes. “Conspiracy to commit genocide” is listed right after the charge of genocide itself.[84] Terror organizations attempt to destroy victims ranging from States, religious groups, and others, all groups that fall under the protections of the Rome Statute. Accordingly, Fry argues that terrorist groups may act with genocidal intent and can be charged for their intentions.[85]

Despite the relatively limited sample size of prominent international tribunals, there are several instances that establish precedent for the inclusion of genocidal intent under the umbrella of genocide. To give one example, the International Criminal Tribunal for Rwanda found Rwandan Prime Minister Jean Kambanda guilty for his role in the Rwandan Genocide of, among other charges, conspiracy to commit genocide.[86]

The major limitation of this theory of criminality is that it is too one dimensional to deal with terrorism. Terror rarely, if ever, warrants the complete designation of genocide, and the charge of genocide only manages to criminalize the intent of the terrorist and not the actual acts perpetrated. In addressing terrorism, the charge of genocide does not stand as an ideal charge by itself, but rather best compliments a more comprehensive criminal designation that adresses the reprehensible *acts*, not just the *intent*.

5.2. Crimes Against Humanity

The Rome Statute designates crimes against humanity as “acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the

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[84] United Nations, General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide. Treaty Series, vol. 78, p. 277, 9 December 1948. *United Nations*, ihl-databases.icrc.org/en/ihl-treaties/genocide-conv-1948.

[85] Fry, James D. “Terrorism as a Crime against Humanity and Genocide: The Backdoor to Universal Jurisdiction.” *UCLA Journal of International Law and Foreign Affairs*, vol. 7, no. 1, 2002, pp. 169–199. *HeinOnline*, heinonline.org/HOL/Page?handle=hein.journals/jilfa7&div=12

[86] International Criminal Tribunal for Rwanda. The Prosecutor v. Jean Kambanda (Judgement and Sentence), ICTR 97-23-S, 4 September 1998. *Refworld*, www.refworld.org/jurisprudence/caselaw/ictr/1998/en/38168.

attack."[87] Arguably the *jus cogen* norm most compatible with the criminalization of terror, this criminal designation applies most completely on the group level. Terror organizations operate systematically, targeting their enemies – often civilians – in premeditated attacks.[88] This could even apply to individual terrorists, provided their attacks are widespread or systematic as well.

An exhaustive argument exists for categorizing Al Qaeda's attack on September 11, 2001 (9/11) as a violation of crimes against humanity. The scale of the attack, along with evidence gathered after the fact, demonstrate the widespread and systemic nature of the attack, in addition to clear premeditation.[89] The attack was systemic, as it was coordinated and a part of the broader framework of Al Qaeda's terrorist actions against America; it was widespread, as it targeted many people in several locations. The victims were primarily civilians as well, satisfying all of the requirements needed to designate 9/11 as a crime against humanity.[90] Although this idea has not explicitly been put into practice on the international level, the theory holds up.

Looking at the broader context of prosecuting terror attacks, most terror attacks are still effectuated through systematic planning and are perpetuated upon civilians, even if they do not approach the scope of the 9/11 attacks. Consequently, crimes against humanity, at least in theory, may serve as an effective catch-all charge to criminalize terror in international law.

5.3. War Crimes

International humanitarian law, also known as *jus in bello*, are the laws that govern the actions of combatants during a conflict.[91] Violations of *jus in bello* constitute war crimes. In

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[87] Rome Statute Article 7.1.
[88] Fry 190-191.
[89] Fry 190-192.
[90] Galingging, Ridarson. "Prosecuting Acts of Terrorism as Crimes against Humanity under the ICC Treaty." *Indonesian Journal of International Law*, vol. 7, no. 4, July 2010, pp. 746-774. *HeinOnline*, heinonline.org/HOL/P?h=hein.journals/indjil7&i=792.
[91] Cohen, Gal. "Mixing Oil and Water? The Interaction between Jus Ad Bellum and Jus in Bello during Armed Conflicts." *Journal on the Use of Force and International Law*, vol. 9, no. 2, Jan. 2022, pp. 352–90. *EBSCOhost*,

order to qualify as a war crime, something must be in major violation of the Geneva Conventions of 12 August 1949. These violations include, but are not limited to: murder, hostage taking, and unjustified destruction of property during conflict.[92] The requisite violations needed to establish a designation of war crimes coincide with many of the usual methods of perpetrating terror. Further, according to Sebastien Jodoin, in parsing through existent conventions and treaties a broad definition of terrorism emerges, in accordance with international humanitarian law. This theoretical definition categorizes terrorism as: "acts or threats of violence committed… with the primary purpose of spreading terror among these persons."[93]

The difficulty with applying international humanitarian law to terror lies in the designation of conflict. Many terrorist acts are committed in the broader context of conflict or war, but others appear more random. Perhaps the very terror attack itself could be considered the initiation of conflict, the ramification of which would be the triggering of *jus in bello*.

In recent years, individuals have been found guilty of both terror and war crimes. Notably, in 2019, the Netherlands sentenced a former member of the Islamic State for violations of both terror and war crimes.[94] It seems that, at the very least, terror attacks that occur in the context of active conflict can be dealt with according to the parameters of international humanitarian law and treated as war crimes.

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search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.jufoint9.18&site=eds-live&scope=site.

[92] International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, 12 August 1949. *ICRC* ihl-databases.icrc.org/en/ihl-treaties/gci-1949.

[93] Jodoin, Sebastien. "Terrorism as a War Crime." *International Criminal Law Review*, vol. 7, no. 1, Jan. 2007, pp. 77–116. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.intcrimlrb7.7&site=eds-live&scope=site.

[94] Netherlands, District Court of The Hague, Case Number 09/748003-18 & 09/748003-19, 23 July 2019. *de Rechtspraak*, uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2019:7430.

5.4. The Crime of Aggression

The crime of aggression applies when one implements an intensive plan to execute an act of aggression of a scale that would violate the U.N. Charter.[95] The crime is a violation of *jus ad bellum*, the laws that govern the use of force.[96] Aggression has been used sparingly as a criminal designation, as there is little consensus over what actually falls under its jurisdiction. This incoherency is exacerbated with regard to classifying terrorism as a crime of aggression. The Rome Statute delineates that aggressive actions constituting the crime of aggression must be enacted by "a person in a position effectively to exercise control over or to direct the political or military action of a State."[97] While there may be theories on how to circumvent the limitations on aggression as imposed by the Rome Statute, a basic reading of the law demonstrates that only state leaders can be charged under the auspices of aggression.[98] In consideration of this understanding of the parameters of aggression, only a select few global terrorists could stand accused of those charges. Just the leaders of the few terror organizations that are attributed some measure of political legitimacy, such as Hezbollah, may be guilty of the crime of aggression.

5.5. Piracy

Genocide, crimes against humanity, war crimes, and the crime of aggression are the four primary crimes mentioned in dealing with confict and violence in the international justice system. It is intuitive to attempt to base the criminality of terrorism on one of those four crimes.

A different school of thought suggests, however, that a far older aspect of international law may host the best means for criminalizing terrorism. Douglas Burgess argues that legal

[95] Rome Statute Article 8 bis.1.
[96] Fajri Matahati Muhammadin. "Terrorism and the Crime of Aggression under the Rome Statute." *Mimbar Hukum*, vol. 27, no. 1, Feb. 2015, pp. 128–44. *EBSCOhost*, doi.org/10.22146/jmh.15901.
[97] Rome Statute Article 8 bis.1.
[98] Anderson, Michael. "Reconceptualizing Aggression." *Duke Law Journal*, vol. 60, no. 2, 2010, pp. 411–51. *JSTOR*, www.jstor.org/stable/20787393.

precedent for dealing with terror organizations can be found in long-standing laws against piracy. Pirates, organized non-state actors, attack and plunder with impunity. Actions of this nature led pirates to be served with a blanket designation as *hostis humani generi* (enemies of the human race). Acts of piracy were considered to be crimes against the entire international world.[99] Piracy provides a good precedent of non-state actors committing crimes on the international stage, against civilians and states alike. In many ways this resembles modern terrorism. Designating terrorists as *hostis humani generi* targets terrorism as an organization, not just individual perpetrators.[100] In the global battle against terrorism, this theory would allow for the usage of and application of extensive international anti-piracy legislation in the global battle against terrorism.

5.6. Terrorism as Its Own Law

The law has developed in such a manner that most acts of terror are covered by international law to some degree, whether through criminal law, humanitarian law, or even treaty law. However, the issue of terrorism is pervasive and distinct, warranting its own independent designation as a crime. The discrepancy in definitions and policies across the world creates a lack of global oversight or accountability. Efforts to prosecute terror are held back by the lack of uniformity or consistency in the law.[101] Relying on treaties and charges like genocide or crimes against humanity requires cavalier interpretation and applications of the law in a patchwork

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[99] Burgess, Douglas R., Jr. "Hostis Humani Generi: Piracy, Terrorism and a New International Law." *University of Miami International & Comparative Law Review*, vol. 13, no. 2, Mar. 2006, pp. 293–342. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.miaicr13.12&site=eds-live&scope=site.
[100] Burgess 341.
[101] Hare, Angela. "A New Forum for the Prosecution of Terrorists: Exploring the Possibility of the Addition of Terrorism to the Rome Statute's Jurisdiction." *Loyola University Chicago International Law Review*, vol. 8, no. 1, Jan. 2010, pp. 95–104. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.intnlwrv8.9&site=eds-live&scope=site.

manner, rendering them an ineffective approach to countering terror.[102] Creating legislation that establishes terrorism as its own independent crime would rectify those issues.

The global community's inability to agree on a single definition of terror prevents the implementation of this approach. However, the emergence of the STL definition of terrorism reveals a feasible path towards establishing a definition, opening the door for a distinct charge of terrorism. As the law currently stands, national courts represent the most effective means of prosecuting terror as its own crime.[103] Criminalizing terrorism internationally would allow international judicial bodies to prosecute terror when states are unwilling or unable to do so.[104]

6. Conclusion

Terrorism is a major global issue, yet there remains no single comprehensive approach to prosecuting it. A plethora of circumstances and opinions, paired with a dearth of compromise, has prevented the development of an internationally-accepted definition of terrorism, hampering the establishment of specific legislation addressing terrorism. Conventions serve to address aspects of terrorism in a disjointed manner. The Tadić decision affirmed the capacity for prosecuting non-state actors, but the lack of a specific charge makes it difficult to apply.

Theories abound for how to include terrorism under the umbrella of existent crimes in international law. The idea of terrorism as genocide revolves around a focus on genocidal intent; precedent makes this approach feasible, but its specific nature limits its effectiveness. Crimes against humanity could apply to large acts specifically committed by organizations, but may be expanded to cover any acts of terror. War crimes also address many acts of terror, but they

[102] Seid, Abdurahman, "The Possibility of International Prosecution of Individuals for Crime of Terrorism under International Law." SSRN, 22 January 2022. SSRN, ssrn.com/abstract=4015575.
[103] Abdurahman 3.
[104] Hare 100.

exclusively address actions taken during conflict, a designation which might not always apply to terrorism. Aggression is a rarely-applied crime in its own right and would seemingly only apply to leaders of state, which makes it even more difficult to apply to terrorism. Piracy at least provides a precedent for establishing an actor as *hostis humani generis*, but would suffer from definitional issues when determining what acts leave the actor in such international contempt.

The ultimate goal should be a distinct charge of terrorism. If the international community can get behind a single definition, it would be a major step in developing a unified approach to addressing terror, circumventing the various issues that arise from relying on conventions and cavalier interpretations of other crimes.

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The Hebrew Bible and the United States Constitution: Understanding American Constitutional Principles Through Comparison With Biblically-Rooted Political Theories

Abstract

Above the visitors' gallery in the chamber of the United States House of Representatives are relief portraits that depict twenty-three historical figures remembered for their work in establishing the principles that underpin American law (Architect of the Capitol, 1950). At the center of the reliefs is that of Moses, staring down at the lectern of the Speaker of the House — Moses' is the only forward-facing relief — all of the others face his. The placement of Moses's portrait signifies the great deference Congress feels towards the Hebrew Bible and its recognition of the centrality that the Mosaic law played in the formation of the American legal system. Consequently, valuable insight can be gained into our understanding of the United States Constitution by comparing the political theories contained in it, as well as the practical realization of those ideas in the form of the American federal government, to the ancient antecedent acknowledged to be at the deepest roots of American constitutional traditions: the Hebrew Bible.

With both the American colonists and the Israelite Tribes having shared comparable experiences, it is therefore not surprising that the respective core documents established for the two peoples embrace virtually the same basic principles, placing great import on the consent of

the governed, on the balance between states' rights and federal authority, and on checks and balances, and on a tripartite federal government.

1. Introduction

As the core text of the Mosaic faith, the Hebrew Bible is often understood as primarily a code of religious rules. Although "Torah" is literally translated into English as "instruction" (My Jewish Learning, 2021),[105] the Torah's function is significantly more multifaceted than as a mere religious law book. It begins with a description of the creation of the world recounting it as it relates to the Hebrews' founding history; it details the Hebrews' forty-year sojourn in the wilderness, shaping their tribal identities, and emphasizing relationship with the land of Israel. Not only does the Hebrew Bible craft national and spiritual identities for the Jewish People, it imbues the Hebrews with basic principles of governance and political theory, forming a rough constitution.

While self-evidently a codification of the rules, powers, and regulations of the American federal government, the United States Constitution similarly contains allusions to the formation of America's national identity. Having experienced for themselves taxation without representation, unchecked power, and an overbearing monarchy, the Framers sought to include in the Constitution and Bill of Rights protections against precisely these dangers. Mirroring the way the Divine constitution was used by ancient Israelites before them, America's Founding Fathers used their Constitution as the blueprint for the prosperous society that they'd dreamed of.

As a result, despite the millennia-long separation between the two of them, it is not surprising that both the Hebrew Bible and the United States Constitution address similar issues that affected their newly-freed societies. Both documents recognize the fundamental principles

[105] All non-English texts are self-translated except when stated otherwise.

that unite a society behind its government, that enable a complex government to function smoothly, and that allow a government to ensure the success of the people it leads.

National Identity as an Impetus for a Government

2. Comparing National Identities

Before comparing the constitutional philosophies or systems of government of the two respective nations, the founding experiences and guiding principles of the United States and of the Tribes of Israel must be understood on their own.

2.1. Having Recognized and Turned Away From Despotic Rule

As has been explained, the Bible was given to the newly-formed Jewish People after hundreds of years of bondage under the yoke of the Egyptian Pharaoh. Communicating to the Hebrews the importance of maintaining their national identity through robust and devoted leadership, the Bible commands them to form a strong executive branch to rule them led by a monarch to whose authority they consented, a Sanhedrin of elders from amongst their peers to act as a unicameral body of lawmakers and a supreme court, and a developed priesthood to keep the people in their elevated state.

Similarly, after years of oppression by the hand of the British Throne, the people of the thirteen colonies joined together as one nation, forming the United States of America. Like the Jews before them, the Americans recognized that their national existence was tied to their ability to maintain a strong centralized government. Consequently, America's Constitution outlines a bicameral legislature consisting of the House of Representatives and a Senate elected by the people to represent their will, a single elected President to execute the law and to ensure unified

leadership and accountability and a Supreme Court to maintain ultimate judicial authority over them.

2.2. Having Held Themselves to a Higher Standard

Through their freedom of religion the Hebrews would be able to fulfill the sacred task of uniting themselves as a people in service of their Creator following the Bible's command: "You shall be holy, for holy am I, the Lord your G-d" (MT, Lev. 19:2). The Hebrews, in other words, believed in holding themselves to a Higher, Divine Standard in order to attain their nation's success and to achieve its potential. Hundreds of years after Sinai, the Prophet Isaiah further envisioned that the Hebrews had the Divine mandate of becoming a "light unto the nations" (MT, Isaiah 49:6; ibid, 60:3),[106] [107] exposing the world to the pursuit of peace, justice, and the service of G-d.

Like the Hebrews before them, the Founding Fathers dedicated their nation's existence to achieving what they believed to be their G-d-given destiny consisting of the rights to "life, liberty, and the pursuit of happiness" (US Declaration of Independence, Preamble). Not content with the idea of ever being able to truly attain perfection, the Founders too, sought a "more perfect Union" (US Constitution, Preamble), dedicating itself to exceptionalism in order to bring about the best possible future for the American people. Centuries later, President Reagan

[106] "Yea, He saith: 'It is too light a thing that thou shouldest be My servant to raise up the tribes of Jacob, and to restore the offspring of Israel; I will also give thee for a light of the nations, that My salvation may be unto the end of the earth." (MT, Isaiah 49:6, JPS 1917 translation).

[107] "And nations shall walk at thy light, and kings at the brightness of thy rising." (MT, Isaiah 60:3, JPS 1917 translation).

(Reagan 1989),[108] quoting John Winthrop (Winthrop, 1630),[109] himself quoting the Christian Bible, would refer to the United States as a "shining city upon a hill" in recognition of America's dedication to having become a beacon of success for the rest of the world.

3. Divergence of National Goals

Despite sharing similar aspects of their nations' founding experiences, the Hebraic and American visions diverge regarding the purpose of the formation of each society. To what goal was the government of the Hebrews dedicated, and what did the Bible believe the government's mission to be? In contrast, what was the goal of the American government as set forth by the Constitution, and what was the union of states meant to achieve?

3.1. The Kingdom of Israel's Dedication to G-d

The guiding principles of the Jewish People may be encapsulated by two of the most defining mandates in the Torah: "You shall be holy, for holy am I, the Lord your G-d" (MT, Lev. 19:2) and "...do not deviate from all the statements that I am commanding you today to the right or to the left…" (MT, Deut. 28:14) In attempting to explain the system of government set forth by the Judaic tradition, the ancient Judean historian Josephus Flavius recognized that the Jews, uniquely, were not formed as one nation with the fundamental purpose to "promote the general welfare" of their society (as in the case of America), but with the sacred task to serve their

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[108] See Reagan's Farewell Address: "I've thought a bit of the 'shining city upon a hill.' The phrase comes from John Winthrop, who wrote it to describe the America he imagined… But in my mind it was a tall, proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity… And she's still a beacon, still a magnet for all who must have freedom…"

[109] See *A Model of Christian Charity:* "Wee shall finde that the God of Israell is among us, when ten of us shall be able to resist a thousand of our enemies; when hee shall make us a prayse and glory that men shall say of succeeding plantations, 'the Lord make it likely that of New England.' For wee must consider that wee shall be as a citty upon a hill."

Creator. As a result, he created a new term to describe the Jewish system of government, deeming it a "theocracy." In his polemical work *Against Apion,* Josephus wrote:

> *"Some [societies] place the power of the state in the hands of a monarchy, some in an oligarchy, and others in some form of democracy. Our lawgiver [Moses] turned away from these forms, and fixed our government to be what, by straining terms, may be called a Theocracy, assigning the authority and the power to G-d [alone]" (Josephus, C. Ap. 2:164-171)*

As recognized by Josephus, the fabric of the Jewish people is their dedication to the service of G-d, which is guided by their adherence to written law in pursuit of a Higher moral standard. Using these principles, the Great Sanhedrin, the King, and the Priesthood, led the Jewish people. It can be said that in contrast to America, where the government is "of the people … for the people" (Lincoln, 1863), the government of the Jews is also of the people, but "Holy unto the Lord" (MT, Ex. 28:36). Bearing in mind the guiding principle for each system of government, the systems and philosophies of government set forth by the ancient Hebraic traditions and the Constitution of the United States may be compared and understood.

3.2. The United States's Dedication to Man

In the case of America, its guiding principles are made clear in the Preambles to the Constitution and to the Declaration of Independence. As the Framers wrote in the Constitution, the federal government exists to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity…" (US Constitution, Preamble). The Framers and their respective colonies united together in order to attain prosperity and success; they were concerned with the

materialistic well-being of their citizens. Similarly, as the Founders wrote in the Declaration of Independence, man is destined to provide himself with "certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" (US Declaration of Independence, Preamble). In other words, the United States was dedicated to man's own desires: *his* life, *his* freedom, and *his* happiness. The fabric of American society is woven together by its founding texts, which codify the terms of the Americans' association with each other: to work as a united people to "effect their Safety and Happiness" (US Declaration of Independence, Preamble). As a result, America's government took the form of a Democratic Republic, one in which the citizens determine its destiny. Therefore, it can be understood from understanding the divergence between these two perspectives that the ultimate goal of the American Constitution is to facilitate a government for society capable of advancing man's material needs, while that of the Hebrew Bible is to facilitate a government capable of advancing the Hebrews' service of the Divine. Evidently, the fact that the Bible is a G-d -given document orients the Hebrews to His service, while the fact that America's founding documents are man-made orients the American government towards service of society.

Constitutional Principles Guiding a Government

4. Consent of the Governed

Among the foundational principles in governance shared by the Hebrews and the founding Americans was their recognition that a government's legitimacy and authority are derived from the consent and approval of the people it governs.

4.1. In the Kingdom of Israel

Although the Hebraic executive is first appointed by G-d's command, the executive's authority amongst the Jews is predicated on the peoples' approval of the appointment. As encapsulated in the Talmud, "If he is suitable in the eyes of the Holy One… all the more so he is suitable in our eyes" (BT, Berakhot, 55a). Similarly, As Rabbi Yitzchak taught, "one may only appoint a leader over a community if one consults with the community and they agree to the appointment"(BT, Berakhot, 55a). The fact that consent of the governed is required is especially striking, noting the existence of a hereditary Hebrew monarchy for the majority of the time during Jews' first settlement of Israel, and the fact that G-d was the source of its power. A notable instance of the peoples' consent to authority, occurring alongside G-d's own consent to the appointment, was the occasion of Saul's appointment as the first King of Israel. Initially, the people asked the Prophet Samuel to appoint a King, to which G-d told the prophet "heed their demands and appoint a king for them" (MT, I Sam. 8:22). The idea of the requirement for the peoples' consent to the authority of a leader is mentioned elsewhere in the Talmud in the case of appointing judges (BT, Sanhedrin, 88b),[110] as well as in the context of the Sanhedrin imposing restrictive laws on the people (BT, Avodah Zarah, 36a-37b; Horayot, 3b);[111] [112] in both cases the Rabbis reiterate the need for majority consent before either has any authority over the people. In other words, the Hebrews recognized throughout their history that the ability of a government to have authority over its subjects requires that the subjects themselves consent to the government's existence.

[110] Sanhedrin: "Anyone who is wise and humble and the minds of people are at ease with him shall be a judge in his city."
[111] Avodah Zarah: "Our Sages relied upon the statement of Rabban Shimon ben Gamliel and upon the statement of Rabbi Elazar bar Tzadok, who would say: The Sages issue a decree upon the community only if most of the community is able to abide by it."
[112] Horayot: "One does not issue a decree upon the congregation unless the majority of the congregation is able to withstand it."

4.2. In the United States

Among the American colonists' grievances against the British Crown that ultimately led the colonists to revolt was the implementation of taxes on them without having been granted a constituency-elected voting Member of Parliament. As Founding Father James Otis stated, and as was later included in the list of grievances in the Declaration of Independence, the colonists rejected the authority of King George III over them for “imposing Taxes on us without our Consent” (US Declaration of Independence) which would have taken the form of participation in the lawmaking process. As America’s founders wrote in the Preamble to the Declaration: “governments are instituted among Men, deriving their just powers from the consent of the governed” (ibid.). Both peoples having attained national independence after years of subjugation under the hand of an oppressive king, both societies having recognized G-d’s endowment of rights to them, the Jews and the Americans understood that to have a government that truly works as an extension of the people, the people themselves must consent to its existence and submit themselves to its authority.

5. Federalism — States’ and Tribes’ Rights

Both America’s founding fathers and the elders of the Judaic tradition recognized the necessity to allow self-governance to exist on every level of society.

5.1. In the Kingdom of Israel

In the Judaic tradition, where tribal identity and national identity go hand-in-hand, the concept of federalism is alluded to with regard to the necessity of each community to police itself; the Bible sees the maintenance of society as a dual responsibility that existed on both the

national level and on the tribal level (BT, Sanhedrin, 16b; Sif. Deut. 144:1,4).[113] [114] As a result, the source text used to establish the Judaic national judicial branch is the same one used to establish the tribal judiciaries: "judges and marshals you shall appoint for yourself, in all of your cities that Hashem, your G-d, is giving each of you for your tribes…" (MT, Deut. 16:18). As Nahmanides summarized hundreds of years later, "just as a Great Sanhedrin (supreme council) was appointed over all courts of Israel, one Sanhedrin was to be appointed over each and every tribe. And if the members of that [tribal] Sanhedrin found it necessary to ordain or decree any matter for their own tribe, they were empowered to do so… their word was equivalent to the decree of the Great Sanhedrin over all Israel" (Nahmanides, Deut. 16:18).

5.2. In the United States

One of America's most defining Constitutional principles is the result of the reality that the United States is, at its core, the union of individually-sovereign states; as a result, the Founding Fathers went to great lengths to both allow the states to maintain their own sovereignty while at the same uniting the country behind one central government. As the Framers wrote in the Tenth Amendment to the Constitution, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (US Constitution, amend. 10, sec. 1). The Constitution's framers saw state sovereignty

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[113] Sanhedrin: "From where is it derived that society must establish judges for the Jewish people? The verse states: 'You shall place judges' (MT, Deut. 16:18). From where is it derived that society must also establish officers for the Jewish people? The same verse states: 'You shall place judges and officers.' From where is it derived that society must also establish judges not only for the entire Jewish people but also for each and every tribe? The verse states: 'You shall place judges and officers…for your tribes.' From where is it derived that society must also establish officers for each and every tribe? The same verse states: 'You shall place judges and officers…for your tribes.'"

[114] Sifrei Deut. 144:1: "Whence is it derived that a court is appointed for all of Israel? From "Judges … shall you appoint for yourself" (MT, Deut. 16:18) And whence is it derived that (police) officers are appointed for all of Israel? From "… officers shall you appoint for yourself (ibid)."

Sifrei Deut. 144:4: "And whence is it derived that a court is appointed for each tribe? From "and judges … according to your tribes." (MT, Deut. 16:18) And whence is it derived that officers are appointed for each tribe? From "and officers … for your tribes (ibid)."

as a necessity as a result of the fact that the states were united as one nation only by their respective desires to do so; federalism in American Constitutional law is therefore an effort to respect the identity and authority of each individual state while at the same time balancing it with the unifying authority of the federal government.

6. Federalism — Ultimate Governmental Authority

Unfortunately, to a certain degree, both the Nation of Israel and the United States failed at different points in their history to balance fragmented state/tribal authority with unitary federal authority in true adherence to the principle of federalism.

6.1. In the Kingdom of Israel

For the Tribes of Israel, it was the issue of Benjamin's Tribal Court's lack of prosecution of a heinous rape-murder that led the nation to a Civil War that decimated the Benjamintes, leaving less than a thousand men still alive; their refusal to submit to the authority of the judges and priests highlighted the chaos that results in the absence of a national unitary authority (See Judges 19-21). The last chapters of the Book of Judges, all dedicated to highlighting the failures brought about by the lack of a powerful executive, begin or end with the verse "in those days, there was no king in Israel" (MT, Judges, 18:1; 19:1; 21:25). After hundreds of years without a structured executive branch, the Judges' lack of unifying authority led the people to the conclusion that had been given to them before: a people, no matter how unified it may be in theory, needs a centralized federal government with a responsible executive at its helm to lead it as one unit.

6.2. In the United States

Similarly, for the United States, it was the previously unresolved issue of slavery that sent the Northern and Southern states in completely opposite legislative directions, leading to the South's secession and starting a Civil War that left more American soldiers dead than in any other war in its history. Ultimately, it was President Lincoln's assertion of extreme executive authority that brought the war to a relatively swift end, and it was Congress' passage of the Thirteenth Amendment that ended slavery. Initially viewing themselves as part of as a union of separate states, Americans used to say "the United States are;" only after the Civil War did they begin to say "the United States is." Lincoln understood what the Articles of Confederation failed to foresee: a loose formation of independently sovereign states needed the unifying authority of a central government. While both the Tribes of Israel and the United States valued the right to tribal/state sovereignty, both societies also recognized the need to form strong federal governments, and went to great lengths to respect the duality of tribal/state authority and federal authority.

7. Checks and Balances

An abundance of effort was put in by both the Framers of the Constitution and by the sages of the Judaic tradition to not just establish strong branches of their federal governments, but to define the expanse and limits of each's authority. There are a number of functions for which the branches of federal government serve: to act as representatives of the people, to lead the people, to provide them with clarity, and as a whole, to fulfill the mission towards which the nation is dedicated. According to the American Constitution, authority is vested into three separate branches (US Constitution, Vesting Clauses),[115] with each branch retaining certain

[115] Article I, Section 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

unilateral powers while at the same time having their power checked by the powers of the other branches. Executive authority is instilled in the President, legislative authority in the bicameral Congress, and judicial authority in the Supreme Court. Similarly, according to Judaic tradition, authority is divided into a tripartite system consisting of "the crown of the Torah (the Sanhedrin), the crown of the Priesthood, and the crown of the Kingship" (M. Avot 4:13). However, two of the branches of the Israelite government - the Kingship and the High-Priesthood - are subject to the authority of the third branch - the Great Sanhedrin.

8. Conclusion

In the first part of this comparative law series, we've analyzed the fact that many of the political theories in the United States Constitution harken back to the constitutional principles of the Hebrew Bible. Furthermore, we've explored the idea that both the United States Constitution as well as the Hebrew Bible were both shaped by the national identities of their respective nations. In the final part of this series, we'll analyze how the American and Hebraic constitutional theories affected their tripartite systems of government on a practical level, examining the responsibilities of each branch of government and their relationships with each other.

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1.1 (Spring 2024)

The Legalities of Social Media

Abstract

Since the start of the internet, online communications have become a part of modern life, to the point where social media use is taken for granted. However, this newly developed habit may have subtle but profound implications for various legal issues. For example, it may be playing a part in the teen mental health crisis, perhaps even intentionally. Furthermore, regulation of what is posted on social media raises multiple First Amendment issues. This article aims to explore these various nuanced questions. Were powerful social media platforms designed to profit off of addiction? Are the CEOs of these companies responsible for not warning their users of the alleged health risks? Are social media companies private enterprises or public forums? And finally, are government laws prohibiting censorship on social media platforms a violation of First Amendment rights for the individual or the social media company?

1. Social Media and Addiction

Since its conception, social media has both been seen as problematic and useful. The image of social media is usually associated with teenagers. Various scientific studies show the differences between the adolescent brain and the fully formed adult brain (Messinger). It seems that because of these differences, teenagers are more susceptible to various social pressures and addictions, and they may be affected for longer since addiction occurs as their brains are

forming. It is for this reason that there are age limits to drinking, smoking, and gambling. Social media has yet to be added to the list. A current multidistrict lawsuit is underway in which the plaintiffs are suing major social media companies, such as TikTok, Instagram, Facebooks, Snapchat, and YouTube, for knowingly designing their platforms to profit off of teenage addiction, since this group is more vulnerable (Field, "NYC Sues Facebook, Social Media Cos.. over Teen Addiction"). In other words, social media companies are being sued for knowingly causing harm to their users without warning them.

This issue will first be litigated as a set of "bellwether trials," which are often connected with multidistrict lawsuits, or Multidistrict Litigations, such as this one. Bellwether trials are essentially a small consolidation of lawsuits, taken from a larger, similar group of cases, to be tried first. It functions as a "practice run" to help anticipate possible results of future similar cases. Multidistrict Litigations are federal procedures that quicken a group of common civil lawsuits (TorHoerman Law). This particular multidistrict suit includes hundreds of parents of minors, school districts, and dozens of state attorneys general who claim that social media companies failed to warn users about the known risk of addiction, which likely causes various mental health issues, such as suicidal ideation, self-harm, eating disorders, body dysmorphia, insomnia, anxiety, and depression (Atkins, "Social Media Addiction Fight Akin To Big Tobacco, Judge Says").

New York City is the most recent city to join the lawsuit. In a public statement, Mayor Eric Adams said "Many social media platforms end up endangering our children's mental health, promoting addiction, and encouraging unsafe behavior" (NYC Law Department). Studies by the government of NYC show that while social media use has been on the rise from 2021-2023, almost one in ten NYC high school students have reported having attempted suicide (NYC

Health). Comparable to how past U.S. Surgeons-General have issued advisories against tobacco and firearms, NYC Department of Health and Mental Hygiene Commissioner Dr. Vassan issued a Health Commissioner's Advisory identifying unfettered access to and use of social media as a public health hazard. NYC went on to claim that social media companies "have chosen profit over the wellbeing of children by intentionally designing their platforms with manipulative and addictive features and using harmful algorithms targeted to young people" (NYC Law Department).

This is a multi-faceted claim: First, social media possesses the same harmful qualities as other regulated substances, including gambling. Second, these platforms were intentionally designed to possess these harmful qualities. The multidistrict lawsuit claims that the defendants intentionally use algorithms to generate feeds that encourage compulsive use of these apps, causing users to stay on these apps longer. The plaintiffs claim that the defendants "[borrow] heavily from the behavioral and neurobiological techniques used in slot machines and exploited by the cigarette industry… to drive advertising revenue" and maximize youth engagement through addiction (Field, "NYC Sues Facebook, Social Media Cos.. over Teen Addiction"). By employing intermittent rewards with algorithmic precision, the defendants allegedly cultivate anticipation and cravings for "likes" and "hearts". Furthermore, plaintiffs claim that defendants manipulate their users through reciprocity. Reciprocity is a powerful social force, especially amongst younger people, that describes the way people respond to one positive action with another positive action. This is seen in how social media platforms automatically tell users when their message was delivered or seen, which encourages users to reciprocate by returning to the platform immediately, perpetuating immediate responses and online engagement (NYC Law Department).

This multidistrict lawsuit is currently in its discovery phase, where both parties gather and exchange relevant information and evidence (Fleisher & Falkenberg), and multiple discovery hearings have already occurred. On February 23rd, 2024, California federal Judge Yvonee Gonzalez Rogers compared the social media addiction allegations to the allegations of the Big Tobacco Cases, and seemed to suggest that Meta CEO Mark Zuckerberg may be liable for the platform's allegedly addictive design. This comparison came after Zuckerberg's counsel claimed that users would not stop using social media had they been warned of the alleged addiction risks. He argued this by pointing out that many leading plaintiffs in the case at hand still use Meta platforms and therefore could not hold Zuckerberg accountable for their actions. In response, Judge Gonzalez Rogers referenced the Big Tobacco personal injury cases of the 1990s in which it was found that it is not easy to stop addictive habits. She also mentioned how often criminal defendants struggle to stop using addictive drugs, even after being advised to do so by the courts. Judge Gonzalez Rogers concluded the hearing by instructing the parties to submit briefs of relevant cases that address the different state legal standards, to be reviewed by the judge (Atkins, "Social Media Cos. 'Can't Hold Back' Execs In MDL, Judge Says"). In another discovery hearing, U.S. Magistrate Judge Peter H. Kang told defense counsel that they cannot hold back any relevant executive witnesses after the plaintiff's counsel voiced a concern that defendants failed to include certain high-profile employees from their February 22, 2024 initial disclosures, including Meta CEO Mark Zuckerberg and Snap CEO Evan Spiegel (Atkins, "Social Media Cos. 'Can't Hold Back' Execs In MDL, Judge Says"). Discovery does not close until December 2024, so the defense may still call on additional executive witnesses.

The school districts involved in this multidistrict lawsuit have added a new layer to the allegations, specifically in the way that social media addictions have tampered with schools'

ability to function. They claim that defendants designed their platforms to addict youth, as they are more vulnerable, and thus interfere with public rights to safety, health, and education. School operations have allegedly been disrupted due to social media. Schools say they have had to relocate education funds to provide mental health services for children harmed by social media addiction, and to recover from property damage. They have also seen an increase in absenteeism and disruptions in the classroom due to the hold that social media platforms have on youth. A spokesperson stated that "when Snap once launched an update to Snapchat during the school day, a Kansas teacher called it the most disruptive thing of her 16-year career, likening the update to 'crack' for students." In response to the defendants motion to dismiss, the school districts wrote "Defendants knew their actions were seriously impacting young people and school districts, yet pushed ahead with their plan… for one simple reason: profit" (Field, "Social Media Created Public Nuisance, Schools Say").

Defendants have denied any responsibility for the teen mental health crisis. As previously mentioned, Meta believes that they are not at fault, but rather the parents are at fault for not having better monitored their children's use of social media. In response to Judge Gonzalez Rogers' comparison, Meta stated that social media addiction cannot be compared to cigarette addiction because "unlike tobacco, Meta's apps add value to peoples' lives" (Atkins, "Social Media Addiction Fight Akin To Big Tobacco, Judge Says"). Google claims that they have built services and policies to give youth age-appropriate experiences, and parental controls (Field, "NYC Sues Facebook, Social Media Cos.. over Teen Addiction"). Snapchat claims that their platform was designed differently than other social media platforms, as their app opens directly to a camera instead of a feed of content that encourages passive scrolling. They also claim that they do not have the traditional form of likes or comments (Field, "NYC Sues Facebook, Social

Media Cos.. over Teen Addiction"). With all of this, plaintiffs still accuse these companies of being sufficiently responsible for, at least a large part of, the teen mental health crisis.

In November 2023, Judge Gonzalez Rogers and Los Angeles Superior Court Judge Carolyn B. Kuhl ruled that social media companies must face various negligence claims. Similar cases include motions from Florida, California, Ohio, Utah, Arkansas, and Texas that seek to place limitations on minors' social media accounts. However, the focus in these cases are different, as the concern is specifically over protecting minors from predators and inappropriate websites (Grande, "Florida Becomes Latest to Restrict Teens' Social Media Use"). With regard to addiction, a recently proposed class action against MatchGroup, the parent company of dating apps Tinder, Hinge, and The League, was filed. The suit claims that MatchGroup intentionally built its products to be addictive and encourage compulsive behaviors, like a slot machine, despite alternate advertising. The class action seeks monetary compensation for all users who used these platforms under the false pretense that these apps were "designed to be deleted," when they were allegedly designed to be addictive (Rippetoe).

These examples of corporations who allegedly worsen their products in favor of maximizing profits through addiction, come at the expense of the users' well-being. If this user is a teenager, the implications on their mental health could be even more damaging. Judge Gonzalez Rogers set October 14th, 2025 for the commencement of the first bellwether trial in this multidistrict litigation (Field, "NYC Sues Facebook, Social Media Cos.. over Teen Addiction"). This long string of lawsuits and trials is anticipated to be contentious but exciting. In a world of rapid, modern changes, users deserve to know if social media in fact plays a part in the teen mental health crisis, and whether platforms were intentionally designed to profit off that crisis.

2. Social Media and Freedom of Speech

When discussing the overall legality of social media, an important and current discussion is the relationship between these platforms and our freedom of speech. Although there are an extraordinary amount of constitutional questions regarding this topic, including whether government officials can block users from their social media profiles and whether governments can put pressure on social media companies to remove content that they disagree with, this section will deal with some questions brought up in two specific Supreme Court cases: *NetChoice, LLC v. Paxton* and *Moody v. NetChoice, LLC*.

After the January 6th riots at the US Capitol, many “Big Tech” companies, including Facebook and Twitter, either suspended or banned former President Donald Trump from their platforms (Clayton). Additionally, many people believed that Big Tech was inconsistently censoring conservative voices and right-wing content (Fung). This prompted the State of Florida to enact Senate Bill 7072 in May, 2021, and the State of Texas to enact House Bill 20 on September 9th, 2021 (Schwinn).

S.B. 7072 states that “Social media platforms have transformed into the new public town square” (Social Media Platforms). Because of this, the law prohibits social media companies with annual gross revenues of more than $100 million or at least 100 million monthly users from censoring content inconsistently by banning, de-platforming, shadowbanning, etc. Furthermore, the platforms must provide notice and explanation if censoring content. Harsh punishments ensue from the violation of these laws including a $250,000 daily fine for banning a state office candidate from a social media platform (Schwinn). H.B. 20 is very similar, and according to Governor Greg Abbot’s press release, this bill “prevents social media companies with more than

50 million monthly users [from] banning users simply based on their political viewpoints" ("Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship").

On the one hand, these laws seem to be a big win for free speech. Individuals with conservative viewpoints who have previously had their posts removed are now allowed to be heard. They are allowed to spread their views and ideas just as much as someone with liberal viewpoints. However, this law can also be seen as a violation of the First Amendment rights of the social media companies. These laws compel these companies to have speech on their platforms that they may inherently disagree with. They further force them to write notices and explanations if deciding to take down a post, once again compelling speech. (Schwinn). Because of these First Amendment concerns, NetChoice and the Computer & Communications Industry Association sued Florida and Texas. In the Florida case, NetChoice won in the District Court and the Court of Appeals for the 11th Circuit. In the Texas case, NetChoice won in the District Court, but lost in the Court of Appeals for the 5th Circuit (Savage). Both of these cases were heard in the Supreme Court on February 26, 2024, and a decision is expected to be released in June (McCabe).

One large question that must be answered in these cases is whether, by moderating content, social media companies are engaging in *speech*; if they are, the companies are entitled to their First Amendment rights (Schwinn). The States argue, however, that these platforms are not disseminating any particular message of their own. They are merely *hosting* others' speech (Schwinn). Henry C. Whitaker, the attorney for the State of Florida, said in his oral arguments at the Supreme Court, "Broadly facilitating communication in that way is conduct, not speech...Social networking companies too are in the business of transmitting their users' speech" (*Moody v. NetChoice, LLC)*.

Consequently, according to the States, the laws enacted by Florida and Texas function the same way that common carrier laws function (Schwinn). According to the Legal Information Institute, a common carrier is "a person or a commercial enterprise that transports passengers or goods for a fee and establishes that their service is open to the general public" ("Common carrier"). The same way these common carriers are prohibited from banning certain people from their businesses because they are open to the general public, social media platforms, as enterprises open to the general public, cannot ban certain individuals or certain speech (Schwinn).

Another analogy that has been brought up by the States is in comparing social media companies to private shopping malls. This is important because of the precedent in 1980 of *PruneYard Shopping Center v. Robins*. In this case, the Court ruled that the government in California was allowed to regulate the private shopping mall in allowing students to hand out politically charged leaflets. This did not violate the free speech rights of the shopping center. Similarly, the States argue here that requiring the social media companies to allow users to post anything is not a violation of the company's First Amendment rights (Feiner, "The Supreme Court is about to decide the future of online speech").

To counter all this, NetChoice argues that by deciding what to post and what to censor, the social media platforms are engaging in speech of their own (Schwinn). This can be likened to newspapers who make decisions about which articles or letters will be published (Schwinn). A government may not instruct newspapers or press on what to publish due to their freedom of speech. This was illustrated in the important case of *Miami Herald v. Tornillo* in 1974. The Supreme Court ruled that it was unconstitutional to force newspapers to allow government

candidates a right of reply (Feiner, "The Supreme Court is about to decide the future of online speech"). This is an important precedent to look at in this case as well.

Additionally, due to the vast amount of content on their sites, social media companies engage in "editorial discretion" (Feiner, "Supreme Court hears arguments on the future of online speech: all the news"). Said Elizabeth B. Prelogar (solicitor-general of the United States) in supporting NetChoice, "They are obviously creating something that's inherently expressive in taking all of this quantity of speech on their websites and curating it and making selectivity decisions and compiling it into a product that users are going to consume" (*NetChoice, LLC v. Paxton)*. Social media companies are exercising publishing discretion similar to newspapers in deciding what gets posted (Feiner, "Supreme Court hears arguments on the future of online speech: all the news"). According to NetChoice, because there is a government entity that seeks to control speech that would be protected under the First Amendment in a viewpoint related way, the state laws must pass a test of judicial review called strict scrutiny (Shwinn).

According to the Legal Information Institute, to pass strict scrutiny, the law must further "a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest" ("Strict scrutiny"). NetChoice insists that the state-enacted laws fail both of these conditions (and even less rigorous tests). A government forcing a private company what to say or not to say is not a valid compelling interest (Schwinn). Additionally, these laws are not narrowly tailored as they seem to only apply to "Big Tech" companies, but not smaller conservative-run platforms (Schwinn).

As stated previously, the States insist that social media companies are engaging in conduct and not speech when moderating their platforms. However, they say that even if one concedes that it is speech, the speech that social media companies would be engaging in has no

specific message or viewpoint, and therefore has no protected free speech rights (Schwinn). Henry C. Whitaker explained this with an example. He said in the Supreme Court, "an Internet platform that, indeed, had a platform-driven message, was selective on the front end, Democrats.com, I think that would be a very different kind of analysis compared to a company like Facebook or YouTube, who is in the business of just basically trying to get as many eyeballs on their site as possible" (*Moody v. NetChoice, LLC)*. Even if you disagree with all this, the States say that their laws are only regulating speech in a content-neutral way, so the laws must only satisfy the intermediate scrutiny requirements (Schwinn).

According to the Legal Information Institute, to pass intermediate scrutiny the laws must "further an important government interest (lower burden than compelling state interest required by strict scrutiny test) and must do so by means that are substantially related to that interest" ("Intermediate scrutiny"). According to the states, these laws pass this test (Schwinn). Just as intermediate scrutiny was satisfied in *Turner Broadcasting System, Inc. v. Federal Communications Commission* case, promoting the spread of different ideas, in addition to providing consumer protection by requiring social media platforms to consistently apply their content moderation laws, allows these state laws to pass intermediate scrutiny (*Moody v. NetChoice, LLC)*.

Another point that must be considered specifically in the Florida case is the requirement for social media companies to provide explanations for the content it removes. According to the Knight Institute amicus brief, the requirements for this are overly burdensome, and thus unconstitutional, while the Texas requirements are not (Feiner, "The Supreme Court is about to decide the future of online speech"). This remains a question to be decided by the Supreme Court. There is a further question as to whether these requirements are similar to

commercial-disclosure requirements or "requiring a newspaper to explain every decision not to publish any one of a million letters to the editor" (Schwinn).

Another thing to consider in this case is how the famous internet law, Section 230, plays into this. In Section 230(c)(2), internet websites are told that they will not be held liable for moderating content that is deemed to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected" (United States Code, Section 230). Furthermore, Section 6 of the Florida law states that their law is not enforceable to the extent that it conflicts with Section 230 (Social Media Platforms). When asked about this potential conflict by Justice Gorsuch, Henry C. Whitaker responded by saying that as judged by the district court, Section 230 alone will not be enough to get rid of the case, as there is still the constitutional issue. Additionally, Section 230(c)(2) only allows companies to engage in "good-faith content moderation", and not "bad-faith content moderation" (*Moody v. NetChoice, LLC).*

These are just a few of the questions that must be considered when looking at these two cases. These future decisions of the Supreme Court have the potential to have monumental consequences on social media and freedom of speech. We will discover in June whether the government can legally moderate speech on social media platforms to allow different viewpoints to be disseminated.

3. Conclusion

Social media raises a number of important legal issues. If platforms were intentionally designed to be addictive, and if social media CEOs intentionally profit off of its addictive features, these platforms need to be held accountable. If these claims are inaccurate, the justice

system needs to uphold these platforms' freedoms. Similarly, the constitutionality of the laws enacted in Florida and Texas must be determined. Consequently, the courts must determine whether social media platforms are entitled to freedom of speech, or whether they are violating the individual's free speech rights by engaging in censorship. Social media platforms are used constantly in society, and so to have a flourishing country, the government needs to ensure the safety and freedom of these platforms.

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Seth Coronel

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1.1 (Spring 2024)

Using the Political Questions Doctrine as an Approach to Administrative Law

Abstract

As the Supreme Court is preparing to rule on *Loper Bright Enterprises v Raimondo* – which is discussed here – and *Relentless v Department of Commerce*, a conceptually related case, we consider an impending shift in how the Supreme Court treats administrative law, which are the laws governing how executive agencies can interpret and enforce legislation. Over the past number of decades, the Court has relied on the Chevron Doctrine and shied away from taking an aggressive approach to scrutinizing executive branch agencies' interpretations of congressionally-passed law. With the recent elevation and classification of the Major Questions Doctrine within *West Virginia v. EPA*, the Court seems to be preparing for a fundamentally more aggressive approach to such inspection. This paper surveys the two doctrines and provides a potential compromise framework to *Loper* that, based on the Political Questions Doctrine, allows for the executive branch to continue its autonomy in creating policy while giving the Court desired latitude to opine on the reach of the policy in relation to the Court's judicial responsibilities.

The structure of the paper is as follows: we first briefly discuss *Loper* as reported with both the factual and legal issues at hand, and then we discuss the conceptual conflict between the Chevron and Major Question Doctrines and its implications for the decision in *Loper*. Finally, we

discuss the Political Questions Doctrine and a potential application of the test laid out in *Baker v. Carr* as a compromise approach to adjudicating questions of administrative law.

1. Loper Bright Enterprises v Raimondo

The *Loper* case[116] involves herring fishermen from Cape May, New Jersey, who face a threat to their livelihoods due to a decision by federal agencies to make them pay for third-party monitors on their boats. Despite the Magnuson-Stevens Act's (MSA) silence on who should bear this cost, the National Marine Fisheries Service (NMFS) insists on the fishermen covering it, potentially driving them out of business.[117] The fishermen challenged this in federal court, but the DC Circuit Court of Appeals sided with the federal government under the rationale of the "Chevron Doctrine," which requires that courts defer to executive branch agencies for interpretation of laws where there is an "ambiguity" in the text. Now, their case is before the Supreme Court, questioning the continued application of Chevron in such situations.

The MSA regulates fishery management in federal waters and empowers the NMFS to mandate vessels to carry federal observers onboard for enforcement of regulations. The act allows NMFS to require vessels to cover the salaries of observers in specific circumstances, which at times could amount to 20% of revenue. The first question posed by this petition is whether NMFS can constitutionally extend this cost burden to domestic vessels, demanding a significant portion of their revenues for observer salaries. This question raises issues of statutory interpretation, particularly concerning whether the MSA grants NMFS such expansive authority and whether Chevron's deference applies to agency interpretations of statutory silence rather than ambiguity. The case highlights the tension between statutory construction principles and

[116] https://www.supremecourt.gov/docket/docketfiles/html/public/22-451.html
[117] https://loperbrightcase.com/

deference to agency discretion, prompting scrutiny over the extent of agency power and the role of judicial review in such matters. The second question, a question that could have policy reverberations for decades to come, is "[w]hether the Court should **overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency**." In other words, the petition of *Loper* takes aim squarely at the Chevron Doctrine in hopes of delivering a serious blow to its use as cover for agency rulemaking.

1. Chevron Doctrine

The Chevron Doctrine[118] represents the traditional approach to how the courts treat the executive branch's effort to interpret and enforce laws set out by Congress. Outlined in 1984 with *Chevron v. National Resources Defense Council*, the doctrine says that where the law is either silent and doesn't discuss the specific policy issue at hand or is at the very least ambiguous, deference is given to executive agencies' interpretations of the law. There are a number of qualifications in subsequent Chevron-related caselaw. For one, deference is accorded to the agency in charge of administering the law. As an example, the Bureau of Alcohol, Tobacco, and Firearms wouldn't be deferred to regarding policies that do not relate to the three areas it supervises. Another important point is that the agency interpretation must be "reasonable" or "rational." If the agency wrote policy consistent with congressional intent, then Chevron applies. If the agency goes beyond or contravenes congressional intent, deference no longer applies. Finally, the medium in which the agency writes the interpretation is important. Chevron precedent dictates that the interpretation must be delivered in forms which have the force of law such as an adjudication or what's known as "notice-and-comment rulemaking"

[118] https://www.law.cornell.edu/wex/chevron_deference

which is where agencies submit proposed rules to the public and solicit feedback before making it enforceable. Vehicles such as internal policy documents or manuals aren’t automatically deferred to. The following cases underscore the broad impact of Chevron on administrative law and its role in shaping the relationship between agencies and the judiciary in the United States.

1. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*: As mentioned above, this is the case for which the doctrine is named. In *Chevron v. NRDC*, the Supreme Court established a framework for reviewing executive agency interpretations of statutes in cases of ambiguity or silence within the statutory text. Originating from a challenge to the U.S. Environmental Protection Agency's interpretation of the Clean Air Act, the Court's unanimous decision introduced a two-step analysis: first, determining whether Congress has explicitly addressed the issue and secondly deferring to the agency's interpretation if it is deemed reasonable. This doctrine, known as Chevron Deference, recognizes agencies' expertise, allowing them primary interpretative authority. Over time, the Court has refined Chevron, specifying conditions for its application and, more recently, introduced the major questions doctrine, which scrutinizes the significance of issues before applying Chevron analysis, indicating a potential shift in judicial review of agency actions.
2. *United States v. Mead Corporation*[119]: *Mead Corp.* further clarified the scope of the Chevron Doctrine, establishing that Chevron deference applies only to agency interpretations that carry the “force of law.” The case involved the U.S. Customs Service's tariff classification ruling, which was not issued through notice-and-comment rulemaking and did not have the force of law. As a result, the Court held that Chevron

[119] https://www.oyez.org/cases/2000/99-1434

deference did not apply, highlighting the limits of agency authority and the importance of formal agency procedures in earning judicial deference.

3. *National Cable & Telecommunications Association v. Brand X Internet Services*[120]: The Federal Communications Commission's (FCC) interpretation of the Telecommunications Act of 1996 regarding the classification of broadband internet services. The FCC had classified cable modem services as "information services," subject to lighter regulation, rather than as "telecommunications services," which would have subjected them to more stringent regulatory oversight. The Supreme Court, applying the Chevron doctrine, deferred to the FCC's interpretation, even though it conflicted with a previous judicial interpretation. The Court reasoned that because the Telecommunications Act was ambiguous on the issue, the FCC's interpretation was permissible as long as it was reasonable. This decision reaffirmed the principle of agency deference established in Chevron and illustrated its application beyond environmental regulation, shaping the regulatory landscape in the telecommunications industry.

Loper's petition cites three problems with the DC Circuit's application of Chevron. One, Chevron is grounded in the intuition that executive agencies write policy with the "intention on the precise question at issue" of Congress when writing the law, and the petition argues there is no way Congress imagined the Magnitsky-Stevens Act would be used to justify a 20% revenue cost to fund observers salaries. Secondly, the DC Circuit assumes that despite the law not addressing a 20% reduction in revenue from fishermen paying for their observers salaries, the law does "'require that … observers be carried on board a vessel…' and may include other 'necessary and appropriate' provisions." It may be reasonable, the petition claims, to pay extra fuel costs associated with hosting an observer on their boat. But to lose 20% of one's revenue?

[120] https://www.oyez.org/cases/2004/04-277

That is most certainly inappropriate. By that logic, the National Marine Fisheries Service could "requir[e] the industry to fund a legion of independent contractors to replace … federal employees." Finally, let's assume for a second that in spite of those objections, this is a legitimate interpretation of the Chevron Doctrine. The petition argues that *Loper* is an important case to clarify whether Chevron should apply equally to statutory "silence," which is to say Congress doesn't address the issue one way or another, rather than just statutory "ambiguity," which is to say that the law doesn't explicitly address the issue but intends to.

2. Major Questions Doctrine

While the Chevron Doctrine has anchored administrative law for decades, the recent emergence and codification of the Major Questions Doctrine[121] is serving as a conceptual counterweight to outright deference to executive agencies. The Major Questions Doctrine is a legal principle used to interpret statutes where Congress has not explicitly addressed whether an administrative agency has the authority to regulate a particular area. Under this doctrine, courts presume that Congress does not intend to delegate significant policy decisions to agencies without clear direction. Instead, courts require Congress to speak clearly if it intends to delegate authority over major questions of economic or political significance to administrative agencies. Since the Chevron Doctrine doesn't make a major-minor questions distinction, the Major Questions Doctrine represents a shift in how the Court chooses whether to defer to administrative interpretation. The doctrine emerged as a tool for courts to navigate the boundaries of agency discretion and congressional intent in interpreting ambiguous statutes, particularly in areas where regulatory decisions may have profound societal impacts. It's important to clarify that the Major

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https://www.law.cornell.edu/constitution-conan/article-2/section-1/clause-1/major-questions-doctrine-and-administrative-agencies

Questions Doctrine was formally classified until *West Virginia v. EPA*, though the three following cases are instances where the Major Questions Doctrine was applied in function.

1. *King v. Burwell*[122]: In this case, the Supreme Court applied the Major Questions Doctrine to determine whether the Internal Revenue Service (IRS) had the authority to extend tax subsidies to individuals purchasing health insurance through both state and federal exchanges under the Affordable Care Act (ACA). The Court held that because the ACA's tax subsidy provision involved a significant economic and political question, Congress's intent regarding the availability of subsidies on federal exchanges was not clearly expressed in the statute. Consequently, the Court deferred to the IRS's interpretation, upholding the availability of subsidies on both state and federal exchanges.
2. *Utility Air Regulatory Group v. Environmental Protection Agency*[123]: In Utility Air Regulatory Group, the Supreme Court applied the Major Questions Doctrine to address whether the Environmental Protection Agency (EPA) exceeded its authority under the Clean Air Act when regulating greenhouse gas emissions from stationary sources. The Court held that while the EPA had the authority to regulate emissions from motor vehicles, it did not have the authority to regulate greenhouse gasses from stationary sources based solely on their emission levels. The Court reasoned that regulating such sources would constitute a major expansion of the EPA's regulatory authority, requiring clear congressional authorization, which was absent in this case.
3. *Michigan v. Environmental Protection Agency*[124]: In this case, the Supreme Court considered whether the EPA properly considered costs when regulating hazardous air

[122] https://www.oyez.org/cases/2014/14-114
[123] https://www.oyez.org/cases/2013/12-1146
[124] https://www.oyez.org/cases/2014/14-46

pollutants emitted by power plants under the Clean Air Act. The Court applied the Major Questions Doctrine to assess whether the EPA's decision to regulate power plant emissions without considering costs amounted to an unreasonable interpretation of the statute. The Court held that the EPA's failure to consider costs was a significant policy decision that required clear authorization from Congress. Since Congress had not clearly expressed its intent to exclude cost considerations, the EPA's failure to consider costs was deemed unreasonable, and the regulation was remanded for further consideration.

2.1. West Virginia v. EPA

West Virginia v. EPA[125] revolves around the legal battle over the 2015 Clean Power Plan (CPP) and the subsequent 2019 Affordable Clean Energy Rule (ACE Rule), both established under Section 111 of the Clean Air Act (CAA). The case delves into the interpretation of Section 111(d), which directs the EPA to set emission guidelines for states to establish performance standards for existing stationary sources contributing to air pollution. The CPP proposed emission reduction strategies, including efficiency improvements and shifting to lower-emission energy sources, while the ACE Rule adopted a narrower view of EPA's authority. Legal disputes centered on whether EPA exceeded its regulatory authority by extending emission control measures beyond individual sources to the entire category, a matter crucially scrutinized under the "major questions doctrine." The Supreme Court, in a 6-3 decision, reversed the D.C. Circuit's judgment, questioning EPA's expansive authority under Section 111(d) and highlighting Congress's likely intent to circumscribe EPA's powers in regulating energy policies. The Court wrote that “we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions ‘had

[125] https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf

become well known, Congress considered and rejected' multiple times." In other words, the EPA had created a policy scheme that Congress couldn't have had the intention of authorizing because they had rejected similar schemes in the past. This ruling underscored the significance of the major questions doctrine in delineating agency authority within the broader statutory framework and raised pivotal questions regarding the scope of EPA's regulatory jurisdiction under the Clean Air Act.

West Virginia v. EPA is especially significant since it is the first time that the Major Questions Doctrine is expressly cited as a consistent analysis with which to analyze administrative law. According to a paper published in the *William and Mary Environmental Law and Policy Review*, "[b]efore the Supreme Court's landmark decision in West Virginia v. EPA, the "major questions doctrine" was little more than a handful of cases that shared a few overlapping similarities."[126] That it is now codified as doctrine signals a shift in legal thinking among the Supreme Court, and may lead observers to conclude that the Court is going to take a more active approach to scrutinizing agency autonomy.

In the *Loper* petitioners' brief, *West Virginia v. EPA* is cited as caselaw to make the point that, in parallel to the West Virginia rationale stated above, "Congress has considered multiple proposals over the course of several decades that… would have provided expanded authority for industry-funded observer programs… [b]ut 'the most noteworthy action' that Congress has taken vis-a-vis those proposals is to *reject* them." The Major Questions and Chevron Doctrines are taking two fundamentally different tracks – whether the Court should apply more active scrutiny or not – to the big question of administrative law. Now we turn to the development of the

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126 https://policyintegrity.org/publications/detail/unheralded-and-transformative-the-test-for-major-questions-after-west-virginia#:~:text=In%20West%20Virginia%20v.,Protection%20Agency's%20Clean%20Power%20Plan.

Political Questions Doctrine as a potential compromise framework to accommodate the intuition and logic of both approaches.

3. Political Questions Doctrine

3.1. Pre-*Baker v. Carr* Interpretation

The Political Questions Doctrine is the principle that the courts will not adjudicate on issues that are political in nature. This is a tough needle to thread given that most questions coming before the Supreme Court have major political implications, but the Court tries as much as possible to examine questions from a non-partisan or constitutional angle. The origins of the doctrine emanate from one of the original major cases *Marbury v. Madison*. When William Marbury's commission – given by outgoing President John Adams – was delayed and James Madison, Secretary of State under new President Thomas Jefferson refused to honor it, the Supreme Court was forced to deal with a politically conflicted issue and so was hesitant to rule one way or another. Would forcing President Jefferson to appoint someone he wouldn't otherwise be an infringement on the independence of the executive, or was it William Marbury's legal right to be appointed? The Court ultimately ruled in favor of Marbury solely based on the constitutional nature of Marbury's claim and forced the commission to be delivered. However, the Court qualified this ruling by writing that where the "executive possesses a constitutional or legal discretion, nothing can be more perfectly clear that their acts are only politically [examinable]."[127] In other words, this case was adjudicated solely on constitutional merits. Once an administration does something that is constitutionally legal, the Court backs off. A number of important cases including *Luther v Borden*, where the Court declined to opine on a standard for republican government as mandated by the Constitution's Guarantee Clause; *Martin v Mott*,

[127] https://crsreports.congress.gov/product/pdf/LSB/LSB10757

where the Court declined to rule on a suit brought by Jacob Mott, a New York State militiaman who was court-martialed in 1818 for refusing to be called up by the President under the Militia Act of 1795 during the War of 1812; and *Coleman v Miller*, where the Court ruled that it was up to Congress to decide how and when a Constitutional amendment can no longer be valid to be passed following a 1939 suit brought by Kansas state senators. In all these cases the Court was following a general concept of non-interference, but hadn't yet created a comprehensive test of how to examine whether a question is political in nature.

That approach finally came in *Baker v Carr* where the Court laid out six scenarios where the Court would avoid questions on the basis of being too political. In the case, a Tennessee resident named Charles Baker sued Tennessee's Secretary of State Jim Carr for violating the constitutional principle of "one man, one vote" by not updating congressional maps in over 60 years. Tennessee's state government responded to his claim by saying that this was a matter of the executive purview and a political question rather than a constitutional one. The Supreme Court ruled in favor of Baker and since then *Baker v. Carr* has become standard referenced case law in all future Political Questions Doctrine discussions. The majority opinion gave a comprehensive framework for addressing whether a question is inherently constitutional or political. If any one of the 6 conditions are met, the Court will consider it political and refrain from adjudicating it.

1. If the Constitution clearly designated another branch as responsible for making the decision. (A "textual commitment")
2. If there aren't clearly defined guidelines as to how the courts should rule. In this case, the courts will give the other branches the autonomy to make the decisions. ("judicially managed standards")

3. If it requires the court to make a policy decision rather than a legal one ("nonjudicial discretion")
4. If the court will have to disagree with another branch of government ("lack of respect")
5. If there is a pressing need to follow a political decision already made ("unquestioning adherence")
6. If there will be confusion created by different branches of government giving different approaches to an issue ("potentiality of embarrassment")

In contrast to other potentially political cases, the nature of *Baker v. Carr* – in its relationship to the Equal Protection Clause – gave it a well-defined standard with which to rule upon and was therefore not in danger of encroaching upon the red line of a political question. Since the establishment of the *Baker v. Carr* guidelines a number of critical cases have come across the docket to give more context to how the Court interpreted this doctrine.

3.2. Post-*Baker v. Carr* Interpretation

The Political Questions Doctrine has had robust applications in the post-*Baker v. Carr* legal landscape, and the below cases – *Gilligan v Morgan* and *Powell v. McCormack* – give a landscape with which to consider its evolution.

3.2.1. *Gilligan v. Morgan*[128]

The first major Political Questions Doctrine case post-*Baker*, the suit was filed by students at Kent State University where National Guardsmen had fired upon anti-Vietnam War protests taking place in 1970, killing four students and wounding nine students. The suit alleged that the inadequate training the National Guard received in dealing with student protests is a

[128] https://www.oyez.org/cases/1972/71-1553

violation of their civil rights and sought an injunction against the Governor of Ohio from prematurely deploying the National Guard into situations of civil disobedience or where students' constitutional rights are threatened. Chief Justice Warren Burger wrote that the Court will not opine on the case as "as the relief sought by respondents, requiring initial judicial review and continuing judicial surveillance over the training, weaponry, and standing orders of the National Guard, embraces critical areas of responsibility vested by the Constitution… in the Legislative and Executive Branches of the Government."[129] He elaborates further by saying that the nature of the petition is not about seeking financial damages or relief from an unconstitutional action. Rather, Chief Justice Burger writes, the petition is designed such that the Court will have to be forced to interfere where it's expressly written in the Due Process Clause of the 14th Amendment that it is up to Congress "To provide for organizing, arming, and disciplining the Militia… according to discipline prescribed by Congress."

Burger does note that the Court's decision in *Baker v. Carr* diminished the Political Questions Doctrine's "vitality." In other words, when the Court rendered a decision to interfere in Tennessee's congressional mapping, it took an aggressive step in favor of wading into political questions "to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes." In this case, since there is no potential avenue of examining the procedures from a fairness perspective, the Court declined to intervene.

3.2.2. *Powell v. McCormack*[130]

Adam Powell was a senior congressman representing the 18th district of New York while also serving on the House Committee on Education and Labor. Throughout the 1960s it was

[129] https://supreme.justia.com/cases/federal/us/413/1/
[130] https://crsreports.congress.gov/product/pdf/LSB/LSB10760

coming out that Congressman Powell had committed a number of offenses, including being held in criminal contempt for not paying a civil suit in New York, paying his wife the salary of a staffer despite her not doing any work, and inappropriately using government funds while traveling. After winning reelection in 1966 despite the controversies, House Speaker and fellow Democrat John McCormack initiated a process that stripped him of his chairmanship and eventually led to him being excluded from the House. *(There is a distinction between being excluded and expelled. Exclusion means that a member-elect of Congress is not allowed to take his seat and do anything a member of Congress can do and is generally used when there is a question of eligibility. Expulsion is when a sitting member of Congress is completely removed from the chamber and is exercised for a serious violation.)* With this, ex-Congressman Powell sued Speaker McCormack on the basis that it was unconstitutional to be excluded from his seat given that he met the Constitutional requirements for sitting in Congress outlined in Article I Section II of the Constitution[131]. Speaker McCormack responded by saying that Article I Section V of the Constitution, which says in part that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members" gives the House exclusive license to set the standards for who is truly eligible for becoming a member of Congress and they had determined he was ineligible and therefore not allowed to serve as a Congressman. Adam Powell ended up winning reelection in 1968 and ultimately served in Congress and sued for back pay of his salary.

The Court here ruled in favor of Congressman Powell. The opinion, authored by Chief Justice Earl Warren[132], discussed why this case is not an issue regarding the Political Questions Doctrine even though Speaker McCormack claimed congressional jurisdiction. In this regard, we will only discuss the Court's reasoning in relation to the Political Questions Doctrine. Chief

[131] https://constitution.congress.gov/constitution/article-1/
[132] https://tile.loc.gov/storage-services/service/ll/usrep/usrep395/usrep395486/usrep395486.pdf

Warren notes that the Speaker and the plaintiffs regard this decision as a political question because it meets the first and sixth of the six criteria laid out in *Baker v. Carr*; that "a textually demonstrable constitutional commitment of the issue to a coordinate political department," or more succinctly that the House dictates who is eligible, and "potentially embarrassing confrontation between coordinate branches" where the Court is creating a conflicting approach to the House. With regards to the first *Baker* criteria, Chief Justice Warren reasons that the federal government was founded in part with Alexander Hamilton's philosophy "that the people should choose whom they please to govern them." With that in mind, there is no reason why Congress should be allowed to impose extra standards of who is eligible for the House beyond what the Constitution mandates. If the people want him, they should have him to the extent possible. It's also important to note that he was never actually seated in the post-1966 election and therefore the question of whether he could've been expelled is not applicable. Chief Warren reasons here that since the question at hand is a question of constitutional interpretation, and the Court is the arbiter of Constitutional interpretation, there can't be a conflict with another branch. In other words, this is well within the Court's wheelhouse since it is fundamentally a Constitutional question and therefore not an issue related to internal Congressional governance or the Political Questions Doctrine.

4. Approach Based on Baker v Carr

At its core, *Baker v. Carr* discussed whether a case is justiciable in relation to its political significance. The Political Questions Doctrine has the added advantage of being conceptually related to the Chevron Doctrine with its mandate of judicial noninterference as well as framing the judicial question in terms of constitutional rights rather than administrative interpretation, a

question that the Major Questions Doctrine tries to deal with by understanding administrative law in relation to its reach beyond the legislative standard. In other words, the Political Questions Doctrine allows a more general and directly constitutional approach to understanding the Court's approach to questions of executive overreach within administrative law. Below is a potential application and questions to think about as part of the six-part test to *Loper* based on an understanding of *Baker*'s litmus test.

1. **"Textual Commitment":** One could read this two ways. While it is clear that regarding environmental law writ large both the executive and legislative branches have a broad mandate to create policy, there is a growing body of caselaw that limits the executive branch's right to create administrative law. Depending on how the Court categorizes the policies of the National Marine Fisheries Service could answer this crucial question.
2. **"Lack of Judicially Managed Standards"**: As discussed there are currently no less than two doctrines with which to standardize resolution. According to the traditional Chevron Doctrine, the Court would presumably defer to the National Marine Fisheries Service and dismiss the case. According to the newly enshrined Major Questions Doctrine, the Court might take issue with the policy if it finds that this is an issue of, as the Court wrote in *West Virginia v. EPA*, "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."
3. **"Nonjudicial Discretion"**: This case is on the constitutional foundation of the National Marine Fisheries Service's policy to force fishermen to cover their salaries, not relating to the specific merits of the policy itself.
4. **"Lack of Respect"**: Respect can either be interpreted as deference – which could support the traditional Chevron interpretation – or a mere attitude towards the relevant branches.

5. **“Unquestioning Adherence”**: This policy, which the petitioner admitted only takes place in “three narrow circumstances.” It seems hard to argue that the *Loper* rises to the status of a case where there needs to be “An unusual need for unquestioning adherence to a political decision already made.”
6. **“Potentiality of Embarrassment”**: On the embarrassment question, it is clear that the state of legal thinking regarding administrative law is already undergoing a shift. On the one hand, it could be argued that this case represents an “embarrassing” shift in future federal handling of executive interpretation. On the other hand, one could argue that since it’s a domestic issue and doctrinal conflicts are not uncommon in Court deliberations that it is a high bar to reach and therefore not fundamentally different than any other time the Court overturns or alters precedent.

Based on these more general tests laid out in *Baker*, the Court now has a wider range of conceptual compromises and factors to think about and solve *Loper*’s question of whether to overrule Chevron or clarify its application while preserving its fundamental integrity in the face of the emergent Major Questions Doctrine.

5. Conclusion

The state of the federal regulatory strength is currently in flux. While over the past decades federal policymakers have been largely shielded from judicial oversight based in the Chevron Doctrine, recent Court decisions culminating in *West Virginia v. EPA* have evolved into a formal doctrinal challenge to Chevron’s dominance in the area of administrative law in the form of the Major Questions Doctrine. This could have significant consequences in large bodies of policy that affect American lives on a daily basis, as fully overturning or even altering

Chevron will undermine the rationale of federal policy going back 40 years. The Court or judiciary at large will then have to develop alternate tests and foundations for clarifying what exactly is a "major question" and needs explicit congressional address and what doesn't.

This paper argues that the Political Questions Doctrine, which traces itself back to arguably the original landmark case in American jurisprudence, can serve as an effective legal compromise in preserving legitimate executive interpretation of laws while preventing overreach. While the Political Questions Doctrine may currently have an underdeveloped application in administrative law, it is the most stable alternative to a judicial system where every federal policy can be challenged based on a potential ruling in *Loper*.

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Against All Odds: Analyzing the Legal Landscape of Sports Betting

Abstract

With the recent great rise in the popularity of sports betting, an examination of its legal framework and the evolution of regulations over various jurisdictions is in order. The turbulent legal history surrounding the industry, particularly in the past decade's landmark decision in Murphy v. NCAA, provides an important case study regarding the application of Federalism with the courts balancing the sovereignty of states against the power of Congress to regulate. The case is also instructive regarding the range of interpretations of the broad powers restricted from Congress by the 10th Amendment to the U.S Constitution. This article traces the historical context and the legal issues surrounding what has been called "America's most lucrative vice".

In 2018, the Supreme Court of the United States (SCOTUS) struck down the Professional and Amateur Sports Protection Act (PASPA) of 1992 in the case of Murphy v. National College Athletic Association which had effectively been the anchor behind the outlawing of most forms of sports betting in the vast majority of states[133]. The 6-3 decision authored by Justice Samuel Alito subsequently had major economic and social ramifications for America as states began to legalize various forms of betting en masse. Now, 6 years and over 400 billion dollars of wagered

[133] 138 S. Ct. 1461 (2018)

money later[134], it is more important than ever to analyze the legal and historical factors which led to the transformation of the American sports landscape and along with it, all of American society.

Perhaps the most famous example of sports gambling in American history is the Chicago "Black Sox" scandal in which 8 members of the Chicago White Sox professional baseball team were accused of intentionally losing the World Series after being bribed by gamblers, and were subsequently banned from playing professional baseball for life. The story is a typical example of some of the most immediate possible issues involved with the presence of sports gambling in society with the integrity of the game as well as the players being threatened. Therefore historically it was often the professional leagues themselves who lobbied for sports betting to be heavily restricted[135], initially focused on the state level, with their efforts eventually leading to PASPA being passed after concerns grew following various betting scandals in the later part of the 20th century. The leagues' perspective was generally shared by the American public as state lawmakers throughout the country banned most forms of sports gambling and even many forms of non-sports gambling in general[136]. Indeed by the time PASPA was passed, only 4 states (Oregon, Montana, Delaware and Nevada) allowed for any types of sports lotteries or gambling and the law contained specific provisions which essentially grandfathered them in to continue doing so anyway.

Even prior to PASPA, there had been some federal action taken against sports betting but never meeting the issue head on with an outright federal ban (which would have required a much

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[134]https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/american-gaming-association-legal-sports-betting-hits-record-revenue-in-2023

[135] Holden, John and Edelman, Marc, A Short Treatise On Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice (March 17, 2020). 2020 Wis. L. Rev.

[136] Of course the potential issues were not just related to safeguarding the integrity of the sports product, but also revolved around the possible increase in gambling addictions, particularly among the youth, and the increase of influence gained by organized crime entities.

stronger degree of political support as well as commitment of resources from the Justice Department to prosecute its own gambling cases). In the 1961 Interstate Wire Act, Congress had passed a ban which included language criminalizing anyone who "*[B]eing engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest*"[137]. However, just like in the later PASPA law, there was an exception carved out for states that allowed sports betting and there was also no language seeking to go after intra-state sports gambling[138]. Thus, the goal of the bill was mainly just to allow the federal Department of Justice (DOJ) to go after organized crime groups who had become very involved in sports gambling operations in cases that states themselves were already identifying and attempting to stamp out without success. There was little legal controversy surrounding the Wire Act as it seemed clear that its provisions were part of Congress's enumerated powers of the Constitution as part of its authority to "*[R]egulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*"[139]. This broad understanding of commerce regulation extending to sports betting had already been enshrined by the Supreme Court[140].

Since states overwhelmingly had banned sports betting on their own, the goal of PASPA was mainly to ensure that these laws wouldn't be repealed (as other forms of gambling had been legalized at the state level in the preceding years) and also to allow the DOJ to enforce the original state laws. This enforcement would be twofold as the new law banned both states from running their own sports gambling operations (such as a state sports lottery) and also private

[137] 18 U.S. Code § 1084
[138] Although technically it would have been difficult to run intrastate gambling without people taking part from other states (and thus running afoul of the Wire act), it would have still technically been possible and therefore shows that the motivation was more specific than just banning sports gambling entirely.
[139] ArtI.S8.C3.1
[140] Champion v. Ames, 188 U.S. 321 (1903), known as "The Lottery Case".

entities from running them "pursuant to the law" of a state. The exact language used included that *"It shall be unlawful for-- '(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or '(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity a lottery, sweepstakes, or other betting, gambling, or wagering scheme based… on one or more competitive games in which amateur or professional athletes participate"*[141]. Thus it is important to note that, contrary to popular understanding, PASPA did not actually ban forms of private sports gambling in general at all as most states had done that on their own (and the law specifically provided exceptions for the rest in a separate provision). Rather, it banned any state itself from running sports gambling and banned regular citizens from running sports gambling if a state ended up legalizing it. In such a case, PASPA gave standing for the attorney general to bring legal action against the state under the first clause and against the private citizen under the second.

Despite the many possible drawbacks of legalizing sports betting, some states began to chafe under the prohibitions since sports gambling could provide opportunities for state revenue both through large licensing fees for casinos as well as taxes on their gross profits. New Jersey in particular, sought to secure permission for securing additional revenue for Atlantic City which already had significant (non-sports) gambling infrastructure. Consequently, the state legislature passed a law partially repealing the state's own gambling laws (specifically, beginning to allow gambling for people over the age of 21 and only in Atlantic City) and was sued by various sports leagues including the NCAA for "authorizing" sports betting (by permitting it) which violated the first clause of PASPA. New Jersey had previously attempted to simply pass an affirmative law which legalized gambling but when it had been sued for violating PASPA, a lower court had ruled against the state, holding that the Commerce Clause had been interpreted to give Congress

[141] Text - S.474 - 102nd Congress: Professional and Amateur Sports Protection Act

broad powers in this area (and the law was clearly authorizing gambling by legalizing it in specific circumstances which violates PASPA). Since the "Supremacy Clause" of the Constitution subordinates state laws to federal ones, there could be no conflict allowed. The state therefore tried to get SCOTUS to take up the question of whether PASPA itself was a legitimate expression of congressional authority by instead passing a partial repeal which would show more clearly that the federal government was in effect interfering with state lawmaking as opposed to merely conflicting with it.

In order to reach the point of persuading SCOTUS to take a stand on the more significant issue as to whether PASPA was actually constitutional, New Jersey first sought to prove that its own repeal *necessarily* violated the law meaning any repeal it could possible have tried to pass would be considered "authorizing" sports gambling in some way. In other words, it had to prove that the requirements of PASPA were so onerous that no repeal would be realistically possible, as opposed to there being some sort of unique flaw in the language of its repeal. Indeed the respondents for the government had argued that since the repeal had been only partial (as it still left sports betting illegal in parts of the state outside of certain locations, age groups and locations), it was violating PASPA in a unique way that could have been avoided in which case the fault was with the state. The question would seem to hinge on how one understands the source of a citizen's right to engage in non-criminalized actions in general: it is possible to argue that the citizens have a natural right/permission to engage in any actions not regulated by the government. If so, when a state removes a legal ban on a particular activity, it does not really "authorize" it in the sense of giving people the right to engage in it as by default the people had the right to do so. It is only when a state puts in strategic legalization protocols (such as the state had done in this case) that it can be said to be authorizing that activity. However, SCOTUS

refused to be persuaded by this very technical argument and allowed the bigger question of PASPA constitutionality to go forward. It held that since the historical reality was that most forms of sports gambling at the time of PASPA's ruling were illegal in most places, it was clearly the will of Congress when it passed PASPA to keep that reality in place precluding all sorts of repeals. This can also be seen from the language in PASPA itself: "*The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation*[142]". Since Congress must have intended the bill to prevent repeals in general, it made sense to evaluate whether it really had that authority.

The essential point at stake then revolved around the broad language of the 10th Amendment which proclaims that "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*"[143]. As has been developed by SCOTUS, this means that states are considered to have a certain sovereignty which can't be violated or "commandeered" in cases not specifically enumerated by the constitution. For example, in the 1992 case of New York v. United States, the court had held that a state could not be forced to assume liability for the removal of radioactive waste the way a federal regulatory practice had been ordering[144]. Later in the case of Printz v. United States, the court had held that the federal government couldn't force state officials to conduct certain handgun background checks[145]. As Justice Alito put it, in the Murphy case, "*The anticommandeering doctrine… is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States"*.

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[142] Murphy v. National Collegiate Athletic Association
[143] https://constitution.congress.gov/constitution/amendment-10/
[144] New York v. United States 505 U.S. 144 (1992)
[145] Printz v. United States 521 U.S. 898 (1997)

Of course, regulating interstate commerce and by extension gambling *is* a power that is explicitly delegated to the federal government. Yet in our case, the question was more complicated: a state sought to repeal its own law, yet was being prevented from doing so since doing so would violate a federal law. The court therefore held that the law was considered congressional overreach. It must be stressed that this decision was far from as clear as might seem at first glance as in previous cases discussing similar questions regarding the anti commandeering doctrine, the question had always been one of action- could the federal government *force* states or state officials to undertake certain laws or actions. In our case, the question was a negative one in which the state was just being denied the right to undertake a certain action, namely repealing a law and as a lower court had put it "*PASPA does not require or coerce the states to lift a finger*.[146]" The novelty of the court's ruling was that this difference was insignificant as Congress had effectively seized control of a state's legislature as if "*[F]ederal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals…[a] more direct affront to state sovereignty is not easy to imagine*".

With PASPA struck down, there was nothing to stop states from repealing their old sports betting laws or just passing updated ones and within a year 19 states had passed new sports gambling laws[147]. As of 2024, 38 states allow some type of sports gambling with 36 allowing online/mobile betting and 34 allowing retail brick and mortar locations with Sportsbooks giving people opportunities to legally bet on everything from moneylines (in which one can place bets as to particular outcomes such as which team will win) to point spreads (betting on margins such as how many points a game will be decided by) to even prop bets such as what color of gatorade

[146] https://www.supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf
[147] https://cardozolawreview.com/legalized-sports-wagering-in-america/

will be in the bucket dumped on the winning coach at the Super Bowl[148]. The interest around sports betting has been so high that even places such as Las Vegas that had offered legal sports betting for years prior have seen no decrease in profits despite the many new competitors[149]. Some however have called for the federal government to step back in to tighten regulations as calls for the National Gambling Problem Hotline have increased by 45%. In addition there have been many scandals involving professional athletes with professional basketball and football players being suspended and, just last month, a new investigation opened into former baseball MVP Shohei Ohtani[150]. To that end, there have been renewed calls for Congress to pass some sort of new legislation that would regulate sports gambling, this time directly as opposed to via the requisition of state laws.

This potential ability of Congress to directly regulate even intra-state gambling seems relatively clear based on the case of Gonzales v. Raich. In that case, medical marijuana users in California sued the federal government after their cannabis plants were seized despite compliance with state medical marijuana laws. The plaintiffs argued that the Controlled Substances Act, which criminalized the possession of cannabis , exceeded Congress's power under the Commerce Clause since it was only grown in state. However, the Supreme Court ruled in a 6-3 decision that Congress could regulate and criminalize the production and use of cannabis, *even if it was legal under state law*, because the marijuana trade could still affect interstate commerce. This decision reinforced the broad authority of Congress to regulate activities that have a substantial effect on interstate commerce, even if they occur purely within a single state. A strong argument could be made that sports gambling should be no different. To

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[148] https://www.legalsportsreport.com/sportsbetting-bill-tracker/

[149] https://www.reviewjournal.com/sports/betting/never-been-stronger-nevada-sports-betting-thrives-post-paspa-2776921/

[150] https://www.newyorker.com/news/fault-lines/online-gambling-is-changing-sports-for-the-worse

that end Congressman Paul Tonko (D-NY) has announced plans to sponsor a bill called the Supporting Affordability and Fairness with Every Bet Act (SAFE Bet Act) with regulations on the advertising (such as banning advertising during live sports events) and regularity of sportsbooks (by limiting the amount of deposits one could make to a sportsbook in one day) as well as commissioning a surgeon general report on the public health challenges of sports betting. Thus, it is still very possible that Congress will take regulatory action in the future; for now, all bets are off.

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[e.g., "Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association." Georgetown Law Journal, vol. 26, no. 4, 2019, pp. 313-328.]

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The Convergence of Jewish Law and Intellectual Property

Abstract

This article explores the intersection of intellectual property law and Jewish law, specifically examining how principles of ownership and innovation are addressed within Halacha. Intellectual property law protects creators' rights over inventions, literary works, designs, and trademarks, fostering innovation by granting exclusive rights to creators. In Jewish law, similar concepts of ownership exist, such as the responsibility of a creator for their creations and the importance of respecting the source of goods. The article delves into the principle of dina d'malchusa dina, which asserts the supremacy of secular law in certain situations, and the concept of minhag ha-sochrim, referring to common business practices influencing Halacha. The discussion also touches upon the halachic perspectives on copyright and patents, as well as the ethical implications of protecting intellectual property. Overall, while Jewish law does not address intellectual property in the same manner as secular law, there is significant overlap in recognizing the importance of innovation, ownership rights, and the protection of creators' livelihoods.

Intellectual property law is a branch of law that deals with the legal rights to creations of the mind. This can include inventions, literary or artistic works, designs, symbols, names, and

images that are used in the markets. The intellectual property law is in place to protect these creations from unauthorized use or exploitation. This helps motivate creators to keep producing and inspiring with their innovations.

There are several types of intellectual property rights. We will look at a brief overview and description of certain aspects of the law. Patents protect inventions and grant the inventor exclusive rights to make, use, and sell the invention for a limited period, typically twenty years from the filing date (Kenton, “How Patents Work and Notable Patents That Changed How We Live”). Copyrights protect original works of authorship fixed in a tangible medium, like literary, musical, or software code. The copyright grants the creator exclusive rights to reproduce and distribute. Only he can perform or display the art. And only the creator can use it to create offshoots and derivative works based on the original. These typically last the lifetime of the creator plus about 70 years (Kenton, “Copyright Explained: Definition, Types, and How It Works”). Next, we have trademarks. These protect words, phrases, or designs that identify and distinguish the source of goods or services. Trademark rights can be established through registration with proper government authorities, or through consistent use in commerce (Tardi) (Frankenfield). Trade Secrets protect confidential and proprietary information like formulas, processes, customer lists, and business strategies that provide a competitive advantage to a business. Unlike the others, these are protected indefinitely as long as they remain a secret. And industrial designs protect the aesthetic or physical appearance of products.

Generally the purpose of all of these laws is to strike some balance between the interest of creators and innovators with the public's interest of fostering further innovation, competition

and knowledge. By providing incentives and protections for individuals to invest their time, effort, and assets into developing new ideas.

When assessing aspects of intellectual property rights found in *halacha*, Jewish Law, you will not find it addressed in the same manner that it is in our modern-day legal systems. But there is certainly overlap. Jewish law contains principles that touch upon various aspects of intellectual property law, specifically ownership rights. This article now seeks to move forward and explore how Judaism assesses ownership rights.

First the article will explore if creation means ownership. In the beginning of tractate *Bava Kama,* there is a discussion regarding damages that come from one who digs a pit. The question is raised as to why the digger is responsible for the pit? After all, it is not his property and therefore he shouldn't need to take responsibility. Rabbi Shimon Shkop, prominent nineteenth century Russian Rabbi and Talmudic scholar, answers that when a person creates something he actually does in fact gain ownership. And as a result, this is his pit causing damage. So, of course, it is his responsibility to pay for damages it causes. He extends the responsibility of damages one's creations cause to the possible financial benefit. He owns it completely, both good and bad (Shkop).

However, there are problems with certain types of intellectual property, because it is not necessarily a regular type of property that you can touch and feel. It is referred to as a *Davar She'ein bo mamesh*, something that does not have substance. Only that which is a *Davar She'yesh bo mamesh*, something that has substance, can really be acquired according to *halacha.* You can't really acquire a smell, sound, or idea. Certain contemporary rabbis, like the *Shu"T Shoel U'mayshiv*, do grant ownership to authors over the books they have written (Nathanson). Others, like the *Beis Yitzhak*, disagreed and said there are no property rights at all and only

through something called *dina d'malchusa dina*, does the creator have some status of ownership (Shmelkis).

The next stop in understanding ownership in *halacha* and its relationship with intellectual property rights is understanding *dina d'malchusa dina.* This essentially means that the law of the kingdom is the law. Most commonly it is used to give the government permission to collect taxes and impose other fair demands on the royal subjects and citizens. But it is applicable in other contexts as well. In the tractate *Bava Basra,* the opinion of Shmuel is brought to show that even without a proper *halachic* acquisition between a Jew and gentile, ownership can be transferred simply with cash. this shows that ownership status can be affected according to the local government's ruling. If the state grants ownership of an object to an individual, that is often all that is needed for it to be considered his according to Jewish law.

There are many understandings regarding how this rule works. But I will simplify it down to two understandings. The first is that the sages thought the best way to judge certain monetary cases was through local practice. It is interesting that they saw a world in which the Jews often partook in business with Gentiles, and thought it best to do whatever would be acceptable in the eyes of the system to determine ownership. The other explanation for how *dina d'malchusa dina* works is that as people happily live in the land, they accept all the rules of the land. This is evident because you are required to follow all the rules or move out. Citizens are essentially guests on a government's land and if they want to continue reaping the benefits of leadership and government they have to comply with the laws given to them. This would include how ownership is defined.

There is another important *halachic* concept called *minhag ha-sochrim*. Like *dina d'malchusa dina* this law, essentially translating to "the practices of businessmen", comes to incorporate rulings not rooted in *halacha*. Yet there are certain distinction thats distinguish the two. For *dina d'malchusa dina* to be relevant we must be dealing with law, wheares for *minhag ha-sochrim* that is not the case. All that is needed is that there be a ubiquitous and widespread practice in the business world. Once that is the case, the market norms become intertwined with *halachic* requirements. Interestingly there could be practices not rooted in law that would be upheld because that is the *minhag* (practice), whereas laws that are not often followed could lose status under *minhag ha-sochrim* if that is not the way people operate.

For our discussion, we certainly would be covered by *dina d'malchusa dina* because it is secular law. But for the few *halachic* authorities that seek to allow copyright infringement under Jewish law, certainly this should cause them problems. The scope of *dina d'malchusa* seems to be smaller than the scope for *minhag ha-sochrim*. Many attempt to limit the former's scope by claiming secular law holds no bearing between two Jews, or it only applies when the government itself is involved. Some hold to their opinions that secular law cannot be used when it conflicts with *halacha*, and others say it has no influence whatsoever in the Land of Israel. But, all of these qualifications of when we can apply this law do not come to qualify the *minhag ha-sochrim*. Therefore, even if one tries to argue that intellectual property rights are not protected under the *Torah*, seemingly you would have to give in and recognize that this is certainly a commonplace business practice (Rosensweig).

In many of the *halachic* sources, the main discussion surrounds copyright laws. Few discussions surround patents. Although certainly similar, in secular law these two are quite

different things. You must apply for patents, and ownership and protections are granted based on the government's decisions to allow the patents, while copyright law applies automatically to any creators. But, in *halacha* these seem to be the same thing. No real clear distinction is created between author and inventor, or work and invention.

As mentioned above, one of the most significant discussions on this topic is found in the *Shu"t Shoel Umeishiv*. The question surrounds the right of an author to decide who can and who cannot publish his writings. One publishing company bought the rights to reprint and sell a work, and another decided to publish it anyway. The dispute had little to do with the author. It was between two publishing companies, one with explicit permission to print and one without. Fascinatingly, the printer who purchased the rights gets to reprint, because while it still belongs to the author, he has permission to print. The other printer still needs to get permission. He created it and therefore it is his. This can be likened to copyright law. Any reproductions of the work must have his seal of approval. Seemingly it also lasts at least the lifetime of the author (Nathanson).

Another facet of the *Shu"t Shoel Umeishiv*'s argument was that our halachic system needs to be at least as thorough as its secular counterpart. Therefore, if the secular law recognizes intellectual property, we must figure out how it fits into our judicial system as well. If the world seeks to recognize ideas as property, we must follow suit. He then insists that allowing other people to take ideas from their creators would be a violation of *Hasagat gevul*, which is encroachment, or infringing on one's domain. This is akin to taking away from another man's livelihood. These creators rely on their products and taking them would be dipping into their profits (Nathanson).

Rabbi Yehuda Silman argues on the idea that the *halacha* system has to be comparable to secular law. One cannot use secular law to understand Judaic law, “since the foundations of their laws are not built upon rights and ownership interests, but rather upon logical arguments of what seems to them to be fair, as opposed to the laws of the Torah, where in order to compel [another party to refrain from doing something], ownership is required.” This is not necessarily an accepted distinction. Both are certainly rooted in pragmatic decisions, and secular law is not strictly rooted in “what is fair”, but also concerned with fundamental ownership rights.

Rav Asher Weiss argued using simple logic that intellectual property is real property. He asserts that you cannot deny the fact that certain ideas are just more valuable than tangible things. The ideas Steve Jobs had at Apple are certainly more valuable than an actual apple (Sha'ashuim World Press). Another fascinating defense for the need to recognize intellectual property is the idea of *chamas,* injustice. This is brought from the Biblical story of Noah’s ark. The sages share that the entire generation needed to be wiped out because of the unjust lives they were living (Sha'ashuim World Press). Essentially they kept stealing tiny amounts, so small that you could not prosecute them. But still, it was done so many times that in the aggregate they were stealing a significant amount, tantamount to a livelihood. So even though technically it was not theft, it led to such a destruction of the social contract between people it was considered as such. In that same light, even if people were to argue you cannot own ideas and cannot steal intangible property, it would still be taking from peoples livelihood and therefore a tremendous violation recognized under *halacha.*

Another interesting piece to the story of intellectual property rights found in *halacha* comes from the famed scholar Rabbi Yisrael Meir Kagen, the *Chofetz Chaim*. Interestingly it has

almost nothing to do with an actual ruling, rather inferences from the instructions he left for his works postmortem. He ordered that his *magnum opus* on proper speech, *Shmiras HaLashon,* could be freely republished, while his main *halachic* work, The *Mishnah Berurah*, could be republished by all as long as four percent of its sale was donated to synagogues or schools. The rest of his *oeuvre* however, could not be republished without explicit permission from his family so that the proceeds could help support his widow. His instructions seem to imply that ownership has no fixed maturity date. It is also interesting to note that he did not publish copyright in his books, so it is assumed he assumed ownership through an understanding of intellectual property.

Another interesting place to look for sources for copyright law in *halacha* are the approbations from other figures found in books. The aforementioned dispute between the *Beis Yitzchok* and the *Shoel umeoshiv*, of whether creating is cause for ownership, plays out dramatically. In the *Chovas Yair*'s work, the approbations all address his copyright rights for a certain limited period. However, for the *Shoel umeishiv,* the rights should be his forever, even without any explicit stipulation. Compared to a new edition of the *Shu"t Rivash*, the publisher included a long index highlighting certain aspects of the work.Three approbations were given to the volume and each mentioned that the new index itself is the property of the publisher, for he created something new.

Perhaps a source taken a little out of context, but still containing some relevance, is found in Tractate *Megila*. The Talmud relates in the name of Rabbi Eliezer in the name of Rabbi Chanina that whoever says something and gives proper credit to the one who said it first, brings about the redemption. This could certainly be used as a proof that credit should be given to those who create. This is related to another Talmudic source;The concept of doing something *mepnei darchei shalom*, for peaceful reasons. This concept is often relevant in *halacha* simply to avoid

fighting and disagreement among people. Even if there is no actual *din* subjecting Jews to intellectual property laws, it is still relevant for all of these moral reasons that have sway in Torah law.

Finally, we should think about all of the positive and beneficial effects that intellectual property law brings to our community. They keep the drive to innovate alive, and protect artistic and technological creations for their creators to keep pursuing and publishing new ideas. These values of creative thinking and honoring those that accomplish great feats in the realm of ideas are integral to Judaism. A nation of learners is nothing if we don't have new things to learn. These laws allow for the spirit of Torah to be sharpened and enlightened, through motivating thinkers to keep creating. So, while there are not necessarily clear cut guidelines or frameworks within *halacha* protecting intellectual property rights, and no clear comparison between it and secular law, the values of each are shared and the spirit is practically the same.

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The Rise and Fall of Roe v Wade

After 50 years of Roe v Wade. On June 24, 2022. The Supreme Court ruled upon a case in which five of the justices held that abortion was not a protected right under the Constitution, overturning both Roe v Wade and Planned Parenthood v. Casey.

To understand the impact of this court ruling, we must first understand the origins of Roe v Wade. In 1970, the plaintiff, Norma McCorvey, a mother five months pregnant with her third child, sought permission to receive an abortion but was unsuccessful. Her lawyers, Linda Coffee and Sarah Weddington, changed the case to a class-action suit, against Henry Wade, the district attorney of Dallas County, Texas, where Roe lived. To protect her identity, McCorvery used the fictional name of “Jane Roe.” The lawsuit challenged the state’s blanket prohibition on abortions with the sole exception of saving a mother’s life.

On January 22, 1973, the U.S. Supreme Court ruled (7–2) that unduly restrictive regulations of abortion by the state are unconstitutional. The majority decision, written by Justice Blackmun, recognized a privacy interest in abortions.

In doing so, the court applied the right to privacy established in Griswold v Connecticut (1965). It was decided that at stake in this matter was the fundamental right of a woman to decide whether or not to terminate her pregnancy. The underlying values of this right included decisional autonomy and physical consequences (i.e., the interest in bodily integrity). Because there was a fundamental right involved, the court applied the strict scrutiny test which is a form

of judicial review that courts use to determine the constitutionality of certain laws. The Court divided the pregnancy period into three trimesters. During the first trimester, the decision to terminate the pregnancy was solely at the discretion of the woman. After the first trimester, the state could "regulate procedure." During the second trimester, the state could regulate (but not outlaw) abortions in the interests of the mother's health. After the second trimester, the fetus becomes viable, and the state could regulate or outlaw abortions in the interest of the potential life, except when necessary to preserve the life or health of the mother (Cornell Law).

The ruling of Roe v Wade shows just how powerful the Supreme Court can be with its use of judicial review, as it forced all 50 states to legalize abortion. Before Roe, only Alaska, Hawaii, New York, and Washington had repealed their abortion bans entirely, and 13 other states enacted reforms that expanded exceptions. The majority of the country, meanwhile, had abortion bans.

The ruling sparked outrage, exemplified in the two separate dissents, which emphasized that the people and the legislatures, not the Court, should weigh in on this matter. Justice White argued that, "Its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court," while Justice Rehnquist believed that the majority had misconstrued "privacy." Rehnquist argued that "the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under the standard."

Nationwide, anti-abortion advocates expressed their unhappiness about the decision. Protests and angry statements were quick to come, and one group even urged the excommunication of Justice Brennan as he was Catholic. TIME magazine commented, noting that a poll taken right before the decision, that eliminating first-trimester restrictions on abortion

was favored among Americans by a mere single percentage point more than the opposition. “Such a close division of sentiment can only ensure that while the matter has been settled legally,” the piece commented, “it remains a lightning rod for intense national debate.” Since Roe v Wade was so controversial, it was not surprising that the issue that Roe v Wade ruled upon would again be raised in the Supreme Court.

Almost 20 years after Roe v Wade, the issue was brought up again, this time due to a law in Pennsylvania. Enacted by Pennsylvania Governor Bob Casey, the Pennsylvania Abortion Control Act of 1982 contained five controversial provisions: doctors were required to inform women who were considering abortion about its potential negative impacts on their health, women were required to give notice to their husbands before obtaining an abortion, children seeking an abortion were required to get consent from a parent or guardian, a 24-hour waiting period was required between the mother’s decision to have an abortion and undergoing the procedure, and the requirements in the law were to be imposed on facilities offering abortions.

A group of physicians providing abortion services and five abortion clinics in Pennsylvania filed a lawsuit in the U.S. District Court for the Eastern District of Pennsylvania seeking to enjoin the enforcement of these provisions of the law on the grounds that they were unconstitutional. Conservatives, seeking to undo Roe v Wade, saw this case as an opportunity, as the Court was more conservative, to impose more strict abortion bans. With eight Republican appointees and only two Justices who previously had shown support for Roe v Wade, the odds were stacked against pro-choice advocates at the outset.

Unfortunately for those who wanted to undo Roe v Wade, the Supreme Court’s 5-4 majority opinion, written by Justice O'Connor, rejected the call to overturn Roe v. Wade. In this case, O'Connor did not feel that society had developed a concurrence against abortion similar to

the concurrence against separate but equal education that resulted in Brown v. Board of Education overruling Plessy v. Ferguson. Both Blackmun and Stevens agreed with this section of the opinion, thus giving it the necessary five votes for Roe to survive. However, it nevertheless reshaped some of Roe's guidelines. One of the guidelines that were replaced was the trimester formula in Roe, with an emphasis on viability. The plurality found that a fetus could become viable earlier than when Roe was decided, and it held that a state could ban abortion once a fetus becomes viable unless the health of the mother was at risk. The decision both emphasized the importance of adhering to precedents unless a dramatic change occurred in the area of the previous decision and reaffirmed the existence of a constitutional right to abortion.

The other notable revision of Roe was its replacement of strict scrutiny with an undue burden standard that was more lenient to the state. O'Connor built upon her dissenting opinion from the Court's 1983 decision in Akron v. Akron Center for Reproductive Health in holding that restrictions on abortion before the fetus is viable were constitutional unless they posed a substantial obstacle to the woman seeking an abortion. As a result, the plurality invalidated the husband's notice requirement but it upheld the other provisions of the law. Though Roe survived this case, the addition of the undue burden standard was a substantial obstacle for someone seeking an abortion of a non-viable fetus and tilted the balance in the state's favor when making these determinations on abortions, leading to states being able to start regulating abortion to some degree again. Since the Court was so deeply divided, the door remained open to future challenges to Roe.

For the next 30 years the Supreme Court would uphold Roe and Casey when challenges arose. However, during that time, the court would become more partisan, as the Senate threshold

to confirm a justice to the court would be lowered. The original threshold was 60 Senators, which was the norm until 2017.

In 2017, there was an effort to filibuster President Donald Trump's nomination of Neil Gorsuch, in which only Democratic senators filibustered the vote. The vote threshold to nominate officials to lower courts and executive branch positions had earlier been lowered to a simple majority in 2013 when the Democrats held the majority, sparking Republican's disapproval. The Senate minority ruler at the time declared that Democrats would regret the day that they enacted this reduced threshold.

The Republican majority went around the Democrat filibuster by changing the standing rules to allow for filibusters of Supreme Court nominations to be broken with a simple majority rather than 60 votes. This led to the Trump administration appointing a whopping 3 Supreme Court justices, all passing with partisan, party line vote counts. This, in turn, made the Supreme Court even more conservative than it already was, thus increasing hopes that Roe v Wade could one day be overturned. Those who wanted another chance would not have to wait long for it.

In May 2021, the Supreme Court agreed to review a lower court's decision to strike down a Mississippi state law in the court's October 2021 term. Adopted in 2018, the law banned most abortions after the 15th week of pregnancy, well before the point of fetal viability. Although the law was ruled unconstitutional under both Roe v. Wade and Planned Parenthood v. Casey, Mississippi lawmakers passed the measure in hopes that an inevitable legal challenge would eventually make its way to the Supreme Court, where a conservative majority of justices would overturn or drastically reduce the scope of those decisions. Thus, Dobbs v Jackson was born.

In March 2018, the Mississippi state legislature adopted the Gestational Age Act (HB 1510), which prohibited almost all abortions after 15 weeks of pregnancy, well before the point

of fetal viability. Jackson Women's Health Organization, the only licensed abortion clinic in Mississippi, filed suit in federal district court. It argued that abortion is grounded in the Fourteenth Amendment. It asserted that physical autonomy and body integrity are "essential elements of liberty protected by the Due Process Clause." For example, contraception was argued to be included in the word "liberty." Women's Health also argued that abortion is important in the common law tradition. Furthermore, Women's Health pointed out that federal courts have uniformly applied the viability line when it came to the legality of abortion bans.

In contrast, Mississippi, through Dobbs, argued that the Constitution does not provide a right to abortion (and as such, states can freely ban abortions if it is rationally related to legitimate government interests). Mississippi leaned on the text of the Tenth Amendment, that denies states powers like making treaties, but does not directly deny the power to restrict abortion. Additionally, Mississippi argued that "liberty" as written in the Fourteenth Amendment only implicates fundamental rights that are "deeply rooted in U.S history and tradition." Mississippi further argued that abortion is not a fundamental right, since many states at the time of the Fourteenth Amendment's ratification had bans on abortions. Additionally, Mississippi contended that the "viability line" prevented a state from protecting its interest, and was too arbitrary or subjective.

This time, the pro-life advocates got their way. On June 24, 2022. In a 6–3 judgment, the Supreme Court reversed the Fifth Circuit's decision on Dobbs v. Jackson and ended Roe V Wade. The majority opinion, written by Justice Alito, explained that the critical question was whether the Constitution as "properly understood" confers a right to obtain an abortion. It first stated that the Constitution makes no express references to abortion. Further, Alito argued that Court precedent holds that state regulation of abortion is not a sex-based classification (and is not

therefore subject to heightened scrutiny). From there, the opinion established that abortion is not deeply rooted in the nation's history and traditions. The opinion then elaborated that the Due Process Clause protects only two types of substantive rights, rights guaranteed by the first eight Amendments, and rights that are deemed fundamental. As such, the opinion noted that the history of abortion in the U.S is "as a crime"-- that at the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. The Court explained that this was true until Roe v. Wade and thus, "liberty" would not recognize abortion as a fundamental right rooted in the nature, history, or traditions of the nation. Indeed, the Court stated that "Roe either ignored or misstated this history." The Court also explained that "the people of various states" may evaluate the interests between "potential life" and a "woman who wants an abortion" differently than the Court. Finally, the Court concluded that abortion is not part of a broader entrenched right—that justifying this premise "proves too much." The Court said that linking abortion to a right to autonomy or to "define one's concept of existence" would also license fundamental rights to "illicit drug use, or prostitution."

The impact of Dobbs led to abortion no longer being awarded the status of a fundamental right. Essentially, states may regulate abortion "for legitimate reasons" and if those laws are challenged under the Constitution, they are entitled to "a strong presumption of validity." It also caused an outcry among Americans. According to a Pew Research poll 57% disapprove of the court's sweeping decision compared to 41% of Americans who approve of it, making the issue even more divisive and unpopular.

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Prosecuting ISIS Leaders and Members for the 2014 Yazidi Genocide

1. Introduction

On August 3, 2014, forces belonging to the Islamic State (ISIS) attacked and captured the predominantly Yazidi town of Sinjar in northern Iraq as part of an ongoing offensive to add territory to their self-proclaimed "Caliphate." ISIS terrorists targeted the Yazidi religious group, killing an estimated 3,100 and kidnapping 6,800 by the end of August.[151] ISIS held the region until late 2017, and during that period, the Yazidi population was subjected to forced displacement, slavery, sexual abuse, and executions.[152] An international coalition was formed in September 2014 to combat ISIS militarily, counter the group's propaganda campaigns, and target financial resources.[153] Beyond military actions against ISIS, however, criminal prosecution against ISIS leaders and other participants in the Yazidi genocide has been limited.[154] This research paper will analyze the obstacles currently preventing the prosecution of ISIS for genocide and crimes against humanity. Further, it will examine potential avenues to overcome these obstacles, including the International Criminal Court, *ad hoc* tribunals, domestic prosecutions, and national prosecutions based on the principle of universal jurisdiction.

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[151] Valeria Cetorelli et al., "Mortality and Kidnapping Estimates for the Yazidi Population in the Area of Mount Sinjar, Iraq, in August 2014: A Retrospective Household Survey," *PLOS Medicine* 14, no. 5 (May 9, 2017): e1002297, https://doi.org/10.1371/journal.pmed.1002297.
[152] Rania Abouzeid, "When the Weapons Fall Silent: Reconciliation in Sinjar After Isis" (European Council on Foreign Relations, 2018), https://www.jstor.org/stable/resrep21655.
[153] "Mission - The Global Coalition Against Daesh," May 16, 2018, https://theglobalcoalition.org/en/mission/.
[154] "Justice for the Yazidis," accessed December 19, 2023, https://www.ibanet.org/Justice-for-the-Yazidis.

2. Background

It is wise to have a clear understanding both of the parties involved in the Yazidi genocide as well as the basic facts of the event before examining the legal issues that arise from it. The Yazidis are an ethnically Kurdish religious group whose faith is influenced by Zoroastrianism, Nestorian Christianity, Islam, and indigenous Middle Eastern faiths. They worship the angel Tawusi Melek, who is identified as Satan by many Muslim clerics. This belief has led the Yazidi community to be considered devil worshippers by many of their Muslim neighbors. The largest concentration of Yazidis has historically been in Iraq, with an approximate population of 400,000-700,000 in the country. Even before the ISIS onslaught, the Yazidis were subjected to persecution by various rulers in Iraq, including the Ottomans and the Baathists.[155]

The Islamic State initially began as an Al-Qaeda branch called Tanzim Qaidat al-Jihad fi Bilad al-Rafidayn Zarqawi, also known as Al-Qaeda in Iraq in English.[156] In 2013, the group took advantage of the ongoing Syrian Civil War and invaded territories in the country. The leader at the time, Abu Bakr al-Baghdadi, renamed AQI the Islamic State of Iraq and Syria, and in 2014, the leadership of Al-Qaeda broke ties with the newly branded ISIS.[157] ISIS continued to expand its territory in Iraq and Syria, bringing the group to Northern Iraq. On August 3, 2014, the Islamic State's fighters attacked the Sinjar district with explicitly religious motivations to destroy the Yazidi community.[158] ISIS terrorists forcefully emptied the cities of Sinjar, Senouni, and the approximately 85 villages in the region of all Yazidis, totaling about 350,000 people.[159]

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[155] Washington Kurdish Institute, "The Status of the Yazidis: Eight Years on from the ISIS Genocide," *Washington Kurdish Institute* (blog), May 27, 2022, https://dckurd.org/2022/05/27/the-status-of-the-yazidis-eight-years/.
[156] © Stanford University, Stanford, and California 94305, "MMP: Islamic State," accessed December 20, 2023, https://cisac.fsi.stanford.edu/mappingmilitants/profiles/islamic-state.
[157] Ibid.
[158] Fazil Moradi and Kjell Anderson, "The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations," *Genocide Studies International* 10, no. 2 (2016): 123.
[159] Ibid., 128.

The inhabitants were given an ultimatum of conversion or death, and men who refused were executed, while women and children were abducted into slavery. An estimated 10,000 Yazidis were either killed or kidnapped in the Sinjar region.[160]

In 2016, a United Nations human rights panel concluded that ISIS was committing genocide against the Yazidis in the region.[161] The panel relied on testimonies as well as extensive documentary evidence to determine that ISIS had intent to destroy the Yazidi population in a manner that fit Article II of the 1948 Genocide Conventions's definition of genocide[162]. Despite the UN's recognition of the Yazidi genocide, the chief international instrument tasked with prosecuting perpetrators of genocide, the International Criminal Court, has not attempted to prosecute ISIS leaders and perpetrators.

3. The International Criminal Court

The ICC was constructed to be a complementary court to national criminal courts, as asserted in the ICC's founding document, the Rome Statute.[163] The Court was limited to only investigating and prosecuting those who were alleged to have committed the crimes of genocide, crimes against humanity, war crimes, and aggression.[164] The independent report commissioned by the UN states: "The public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis of Sinjar, composing the majority of the world's Yazidi

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160 Washington Kurdish Institute, "The Status of the Yazidis."
161 "UN Human Rights Panel Concludes ISIL Is Committing Genocide against Yazidis | UN News," June 16, 2016, https://news.un.org/en/story/2016/06/532312.
162 "Convention on the Prevention and Punishment of the Crime of Genocide" (UN General Assembly, December 9, 1948).
163 UN General Assembly, "Rome Statute of the International Criminal Court (Last Amended 2010)" (UN General Assembly, July 17, 1998), 1.
164 Ibid., 3.

population, in whole or in part."[165] As genocide is of primary concern to the Court, why have the perpetrators of this United Nations-recognized genocide not been subject to prosecution?

The Rome Statute, the founding treaty of the ICC, limits the Court's jurisdiction to crimes committed within the territory of State Parties or by individuals who are nationals of State Parties, with a few specific exceptions.[166] The genocide of the Yazidis occurred in the broader context of ISIS offensives throughout Iraq and Syria, and many of the prominent leaders of ISIS at the time were either Iraqi or Syrian nationals. Iraq and Syria are not among the nations that have become Party to the Rome Statute. In 2015, the Prosecutor of the Court, Fatou Bensouda, addressed this and stated: "The information available to the Office also indicates that ISIS is a military and political organization primarily led by nationals of Iraq and Syria. Thus, at this stage, the prospects of my Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited. In this context, I have come to the conclusion that the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage."[167] Bensouda was discussing ISIS's atrocities overall, but the legal predicament is the same concerning the Yazidi genocide in particular.

However, there are a few avenues to providing the Court the necessary jurisdiction highlighted in the Rome Statute. Article 12, paragraph 2 states that a state that is not Party to the Statute can grant jurisdiction to the ICC concerning a crime that has occurred within its territory.[168] In the case of the Yazidi genocide, the non-Party states would be Iraq and Syria, as

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[165] Independent International Commission of Inquiry on the Syrian Arab Republic, "'They Came to Destroy' : ISIS Crimes against the Yazidis" (UN Human Rights Council, June 15, 2016), 1.
[166] UN General Assembly, "Rome Statute of the International Criminal Court (Last Amended 2010)," 10.
[167] "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS | International Criminal Court," accessed December 20, 2023, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-alleged-crimes-committed-isis.
[168] UN General Assembly, "Rome Statute of the International Criminal Court (Last Amended 2010)," 10.

many of the Yazidi victims were taken to Syria by ISIS captors.[169] It is unlikely that the Syrian or Iraqi governments would accept ICC jurisdiction since that could potentially open actions committed by other groups to investigations as well, even if a referral made specific reference to ISIS. This was seen in 2004 when Uganda referred a situation to the ICC and made reference to a particular group, the Lord's Resistance Army. The Prosecutor replied that the Court would be "analyzing crimes within the situation of northern Uganda by whomever committed."[170] This meant the ICC would not limit itself to only investigating the LRA's actions. The governments of both Iraq and Syria would not be likely to accept the ICC jurisdiction with the possibility of their actions coming under scrutiny alongside those of ISIS.

Another option, perhaps the most realistic or potent, would be for the United Nations Security Council to refer the situation to the ICC. Article 13, paragraph (b) of the Rome Statute provides this exception, which allows the ICC to investigate crimes beyond its ordinary jurisdiction. Since the Rome Statute went into force in 2002, the UNSC has referred situations occurring in Sudan and Libya to the Court, neither of which are State Parties.[171] The UNSC has the option to refer to the ICC the situation in territories in which ISIS members perpetrated genocide and other crimes. In such a case, there remains the possibility that the prosecutors will use jurisdiction granted by the UNSC to investigate further reports of crimes in Syria and Iraq, including those committed by forces belonging to or allied with members of the Security Council. In May 2014, Russia and China vetoed a resolution that would have referred the case in Syria to the ICC.[172]

[169] "2.11.6. Yazidis," European Union Agency for Asylum, accessed December 20, 2023, https://euaa.europa.eu/country-guidance-syria/2116-yazidis.
[170] "Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I | International Criminal Court," accessed December 20, 2023, https://www.icc-cpi.int/court-record/icc-01/04-01/06-10.
[171] "How the Court Works," accessed December 20, 2023, https://www.icc-cpi.int/about/how-the-court-works.
[172] "Russia, China Block Security Council Referral of Syria to International Criminal Court | UN News," May 22, 2014, https://news.un.org/en/story/2014/05/468962.

That obstinacy could extend to any referral regarding ISIS in Syria. Addressing this concern, international lawyer Cóman Kenny argues that since the UNSC designated ISIS as a threat to international peace, it would be justifiable to consider the crimes of ISIS as a singular "situation" independent of other incidents in the same region and time frame.[173] He states that it would be practical to separate the actions of ISIS from other groups due to the scale of the violence in Iraq and Syria at the time of ISIS's territorial height.[174] This is a reasonable argument, but it is still highly likely that any potential for the ICC to investigate all crimes occurring during fighting in Iraq and Syria would result in the United States, Russia, or China vetoing resolutions granting the Court jurisdiction.

Another option would be to prosecute ISIS members who are nationals of State Parties. The Prosecutor of the Court mentioned this in his aforementioned 2015 statement regarding ISIS. He acknowledged that thousands of State Party nationals joined ISIS but noted that the leadership was comprised mostly of Syrian and Iraqi nationals.[175] Although the ICC has the authority to investigate and bring State Party ISIS members to trial, it would effectively grant impunity to the bulk of ISIS members who remain outside the Court's jurisdiction. Due to the jurisdictional limits set by the Rome Statute and the current political realities in Iraq and Syria, the most substantial possibility for enabling the ICC to pursue justice against ISIS members remains a UNSC referral.

4. *Ad Hoc* Tribunals

[173] "Resolution 2170 (Syria and Iraq) S/RES/2170," Global Centre for the Responsibility to Protect, accessed December 20, 2023, https://www.globalr2p.org/resources/resolution-2170-syria-and-iraq-s-res-2170/.
[174] Cóman Kenny, "Prosecuting Crimes of International Concern: Islamic State at the ICC?," *) Utrecht Journal of International and European Law*, 2017, 124–25.
[175] "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS | International Criminal Court."

Although the International Criminal Court has been the preeminent prosecutorial body in the world for perpetrators of crimes such as the Yazidi genocide, it is not the lone option. An *ad hoc* international criminal tribunal could be established independently of the ICC. The government of Sweden proposed this option in 2019 and was supported by the Kurdish Syrian Democratic Forces, which held hundreds of ISIS fighters in captivity at that time.[176] The Swedish plan was modeled on the international tribunals initiated by the UNSC for genocides in Rwanda and Yugoslavia (ICTR, ICTY).[177] The UNSC has the authority to establish *ad hoc* tribunals pursuant to Article 41 of the United Nations Charter, which states: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[178] The previously mentioned tribunals in Rwanda and Yugoslavia were established prior to the entry of the Rome Statute into force. Still, the UNSC can create a similar tribunal for crimes committed by ISIS.

European nations such as Sweden and Denmark also analyzed the possibilities of initiating such a tribunal or a hybrid international-domestic tribunal such as the trial created by the UN and the government of Sierra Leone in 2002.[179] In our case, this could be a hybrid court

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[176] Anthony Dworkin, "A Tribunal for ISIS Fighters?," ECFR, May 31, 2019, https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/; Sarah El Deeb Press The Associated, "US-Backed Kurdish Fighters Want International Tribunal for ISIS Detainees," Military Times, March 25, 2019, https://www.militarytimes.com/flashpoints/2019/03/25/us-backed-kurdish-fighters-want-international-tribunal-for-isis-detainees/.

[177] Helen Warrell, "Sweden Proposes International Tribunal to Try Isis Fighters," May 19, 2019, https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201.

[178] United Nations, "United Nations Charter (Full Text)," United Nations (United Nations), accessed December 21, 2023, https://www.un.org/en/about-us/un-charter/full-text.

[179] Dworkin, "A Tribunal for ISIS Fighters?"; "The Special Court for Sierra Leone Rests – for Good," Africa Renewal, March 24, 2014, https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good.

between international parties and the government of Iraq. However, this trial would be illegal according to Article 95 of the Iraqi Constitution: "The establishment of special or extraordinary courts is prohibited."[180] Unfortunately, another issue may prevent the establishment of an *ad hoc* tribunal: previous international tribunals have been notoriously costly, such as the ICTR and the ICTY, which cost over ten percent of the UN's annual budget at one point.[181] It is still possible that the UNSC may seek to establish a tribunal directly concerning the crimes of ISIS, despite the potential cost. As of now, discussions of an international tribunal have not progressed past the 2019 discussions between several European nations.[182]

5. Domestic Prosecutions in Iraq

Another alternative to the ICC route is conducting domestic trials within Iraq and the autonomous Kurdish Regional Government. These two entities have jurisdiction over the bulk of areas in which ISIS's atrocities were committed, including the Yazidi genocide. Both the Iraqi government and the KRG have already conducted judicial proceedings for the thousands of ISIS members in their custody. However, according to Human Rights Watch, both the KRG and Iraq lacked a cohesive prosecution strategy to effectively bring those who committed the most grave atrocities to justice. In 2017, HRW published a report on these flawed systems of accountability, which documented a widespread lack of due process and prosecutions of those even with only loose affiliations with ISIS. Additionally, these trials have included minimal involvement of victims and their testimonies. The report states that Iraq established a special Judicial Investigation Board for Crimes Against the Yazidis, but, as of the 2017 report, it had no budget

[180] "Iraq 2005 Constitution - Constitute," accessed December 21, 2023, https://www.constituteproject.org/constitution/Iraq_2005.
[181] Richard Goldstone, "26 International Criminal Court and Ad Hoc Tribunals ," in *The Oxford Handbook on the United Nations*, ed. Thomas G. Weiss and Sam Daws, Second edition, Oxford Handbooks (Oxford University Press, 2018), 467.
[182] Dworkin, "A Tribunal for ISIS Fighters?"

or set location.[183] Overall, the courts established by the KRG and the Iraqi government have not been effective in bringing true justice to the many victims of ISIS, including the thousands of Yazidis still suffering from ISIS occupation and abuse.

Although the domestic judicial system is flawed, it is still possible to reform and reorganize these courts to prosecute perpetrators of crimes effectively and allow the testimony of victims to be broadcast. A genuine effort to revitalize domestic tribunals would most likely need to have foreign assistance in the form of funding and legal advice. The HRW report advises that these tribunals be accompanied by improved compensation for victims to restore order to ravaged communities across Iraq.[184]

6. Universal Jurisdiction

In the absence of a concerted effort to prosecute ISIS members in the ICC or through *ad hoc* tribunals, along with flawed prosecutions in Iraq, another possibility is for unrelated nations to bring ISIS members to trial in their respective court systems relying on the principle of *universal jurisdiction*. In the case of the Yazidi genocide, one nation has already invoked this principle to prosecute perpetrators. In July 2022, Germany sentenced German national Jalda A. to five years imprisonment for aiding in the genocide of the Yazidis. In November of the same year, a German court convicted an Iraqi national of genocide for enslaving and abusing two Yazidis.[185] In the prosecution of non-German nationals, the courts relied on the principle of *universal jurisdiction*, a theory that allows national courts to prosecute perpetrators of serious crimes since those crimes harm the international community overall.[186]

[183] "Flawed Justice," *Human Rights Watch*, December 5, 2017, https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq.
[184] Ibid.
[185] "Justice for the Yazidis."
[186] "Universal Jurisdiction," *International Justice Resource Center* (blog), February 7, 2010, https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/.

According to a 2012 Amnesty International report, 147 countries have enshrined *universal jurisdiction* for one or more of the crimes typically adjudicated in international law (genocide, crimes against humanity, war crimes, and torture were mentioned in the report).[187] Therefore, one of these states can potentially prosecute ISIS members in their national courts for the crime of genocide. However, questions about the practicality of such prosecutions arise, particularly regarding the detainment of suspected individuals. For example, around 10,000 ISIS members or ISIS affiliates are in the custody of the Syrian Democratic Forces in northern Syria.[188] Negotiations to extradite these prisoners to nations relying on the last resort principle are unlikely to occur, as nations have been reluctant even to repatriate their nationals held in custody in Syria. This is due to the difficulties in gathering evidence in destabilized regions in Iraq and Syria, on top of fears of ISIS members spreading influence in domestic prisons, which are issues that would extend to prosecuting non-nationals as well.[189] It is still a possibility that trials may occur if nations can bring perpetrators into their custody and gather enough necessary evidence to warrant these extraditions. However, it is unlikely that trials based on *universal jurisdiction* would be comprehensive in prosecuting those most responsible for ISIS crimes if this option is pursued by individual nations with limited resources. It would still be valuable on a moral level, but trials of this kind would not serve as an overarching international response to the Yazidi genocide.

7. Conclusion and the Prospects of Prosecution

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[187] "Universal Jurisdiction: A Preliminary Survey of Legislation around the World - 2012 Update," Amnesty International, accessed December 25, 2023, https://www.amnesty.org/en/documents/ior53/019/2012/en/.
[188] *The Prisoner Dilemma: Policy Options to Address Circumstances of ISIS Prisoners in Northeastern Syria* (RAND Corporation, 2023), https://doi.org/10.7249/RRA2287-1.
[189] Ibid., 23.

Following the ISIS invasion of Sinjar in 2014, the United States began a series of airstrikes in the region to defend Yazidis who were stranded in the nearby mountains. As ISIS continued to enlarge its territory and violence escalated, the U.S. expanded its military response, naming the campaign "Operation Inherent Resolve."[190] 86 nations joined the U.S. in a coalition against the terror organization, highlighting the widespread international concern with a terror group that by 2014 controlled vast portions of Iraq and Syria.[191]The coalition's main goal was to liberate land and population centers from ISIS, and part of the strategy was to target critical leaders of ISIS and eliminate them. In 2019, U.S. special forces conducted an operation that resulted in the death of ISIS leader Abu Bakr al-Baghdadi, and in 2022, another U.S. operation was successful in eliminating his successor, Abu Ibrahim al Hashimi al Qurayshi.[192] In tackling the terror organization, the United States has seemingly preferred elimination rather than detainment and prosecution of ISIS leaders. This is a continuation of American counterterror policy, as was seen in the 2011 elimination of Al-Qaeda founder and perpetrator of the 9/11 attacks, Osama Bin Laden.[193] This policy is based on the categorization of terrorist leaders as lawful military targets and the strategic value of removing enemy leaders from action.[194]

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[190] "Timeline: The Rise, Spread, and Fall of the Islamic State | Wilson Center," accessed December 25, 2023, https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state.

[191] "Members – The Global Coalition To Defeat ISIS," *United States Department of State* (blog), accessed December 25, 2023, https://www.state.gov/the-global-coalition-to-defeat-isis-partners/; "National Counterterrorism Center | FTOs," accessed December 25, 2023, https://www.dni.gov/nctc/ftos/isis_fto.html.

[192] "U.S. Forces Kill ISIS Founder, Leader Baghdadi in Syria," U.S. Department of Defense, accessed December 25, 2023, https://www.defense.gov/News/News-Stories/Article/Article/1999751/us-forces-kill-isis-founder-leader-baghdadi-in-syria/https%3A%2F%2Fwww.defense.gov%2FNews%2FNews-Stories%2FArticle%2FArticle%2F1999751%2Fus-forces-kill-isis-founder-leader-baghdadi-in-syria%2F; "ISIS Leader Killed in U.S. Raid in Syria | Wilson Center," accessed December 25, 2023, https://www.wilsoncenter.org/microsite/8/node/109340, https://www.wilsoncenter.org/article/isis-leader-killed-us-raid-syria.

[193] "Osama Bin Laden Dead," whitehouse.gov, May 2, 2011, https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead.

[194] Thomas Byron Hunter, "Targeted Killing: Self-Defense, Preemption, and the War on Terrorism," *Journal of Strategic Security* 2, no. 2 (2009): 1–52.

The tactic of targeted killing of ISIS leaders, along with the conventional military campaign, has been successful in reducing the terror group's territorial control in Iraq and Syria.[195] In addition to the elimination of leaders, tens of thousands of ISIS fighters have been killed, according to U.S. Special Operations chief General Raymond Thomas.[196] This result means that many of the perpetrators of the Yazidi genocide, especially those at the top of the ISIS command chain such as Al-Baghdadi, are no longer alive and able to be prosecuted. However, it can be valuable to prosecute the thousands of ISIS members still in custody for involvement in the Yazidi genocide and similar atrocities.

Many legal obstacles remain in prosecuting ISIS members who participated in the Yazidi genocide. The International Criminal Court lacks jurisdiction in Iraq and Syria and over nationals of those states. To overcome this, the most plausible option for criminal prosecutions is a UNSC referral of ISIS crimes to the ICC, which would give the Court an exception to its jurisdictional boundaries. The ICC is the key tool of justice in cases of genocide, so this option would be the most legally straightforward and hold the most international legitimacy. Beyond the ICC, the United Nations Security Council can establish an *ad hoc* tribunal of its own. However, the prospect of that occurring in the case of the Yazidi genocide is currently weak.[197] Domestic trials of ISIS members in Iraq conducted by the Iraqi government and the Kurdish Regional Government have been flawed, but those courts can be improved.[198] Individual third-party nations can also pursue justice by relying on *universal jurisdiction*, but these trials would lack the international legitimacy or national relevance that an international or Iraqi-led tribunal would have. It remains that an internationally comprehensive and effective judicial response to the

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[195] "Timeline."
[196] "Special Ops Chief: More than 60,000 ISIS Fighters Killed | CNN Politics," accessed December 25, 2023, https://www.cnn.com/2017/02/14/politics/isis-60000-fighters-killed/index.html.
[197] Dworkin, "A Tribunal for ISIS Fighters?"
[198] "Flawed Justice."

Yazidi genocide can only be pursued through an ICC investigation based on a UNSC referral or an *ad hoc* tribunal either established by the UNSC or a collective of nations. Nine years have passed since the Yazidi genocide began, and bringing those who perpetrated the atrocity to justice remains an essential objective for the international community today.

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Rina Press

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1.1 (Spring 2024)

Is America a Christian Nation?

Abstract

Is America a Christian nation? The answer should be an absolute no. America as a country should in theory be entirely non-affiliated with religion and religious ideologies including those of legislators and judges due to the notions of freedom of religion and separation between church and state (US Const. amend. I, cl. 1). President Thomas Jeffeson was the first to advocate for, “a wall of separation between church and state," he argued, "the legitimate powers of government reach actions only, and not opinions." Although the United States is not considered to be a country affiliated with any particular religion (US Const. amend. I, cl. 1), one might say that America is ideologically rooted in Christian ideology and that many laws and official documents contain unequivocal Christian influence. The tension between America's social identity as a Christian nation and its legal status as a secular one has sparked ongoing debates and controversies. While Christianity continues to play a significant role in shaping American society, the country's laws and government should remain neutral in matters of religion. The issue arises when human error and personal opinion interfere with constitutional rights and dictate legislation. Understanding this complex balance between law and personal beliefs is crucial in understanding the dynamics of the socio-religious influence that is prevalent in American life and law.

1. Religious Foundations of America

The Constitution of the United States, which many revere as a fundamentally significant document, initially did not contain any imagery of god or notion of religion. However, this was soon amended through the Establishment Clause, which is located in the First Amendment in the Bill of Rights. The provision states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” indicating that Congress does not have the ability to impede upon religious rights or promote religious establishment. Additionally, the Treaty of Tripoli explicitly states, “The government of the United States of America is not in any sense founded on the Christian Religion,” Despite this technical assertion, references of God can be observed throughout the founding documents of the United States.

Fundamental American documents that are integral to American culture and policy are strewn with mentions of god. Explicitly, the Star Spangled Banner, which Congress declared as the official national anthem of the United States, states, “And this be our motto: “In God we trust”. The same terminology can be observed on the one-dollar bill (P.L. 84-851), which was also mandated by Congress. Additionally, In the Declaration of Independence (US 1776), there are three varying references to God: the first states, "Nature's God," followed by "Creator" and lastly, "Divine Providence." The nature of these terms is debatable, but evidently, they all appear to hint at some notion of a god. Furthermore, In the Pledge of Allegiance, “under God” appears, which was explicitly added to the verse in 1954 through President Eisenhower’s encouragement (Text - S.2690), allegedly due to the threat of communism. These documents remain somewhat problematic due to Congress’ involvement in instilling religious beliefs into American culture despite the First Amendment’s direct prohibition of congressional intervention in religious affairs (US Const. amend. I, cl. 1). Although challenges concerning the inclusion of God in these

documents have been made, the Supreme Court ruled that "ceremonial deism" is not inherently religious (*Elk Grove Unified School District v. Newdow,* 542 U.S. 1). Additionally, all of the prior references to religion have predominantly remained non-specific in reference to God, with no distinct preference for one religion over another.

2. Social Law

All current and former presidents have been Christian by upbringing, with nearly every president incorporating God or a religious allusion into their inaugural addresses. It is well within the rights of the Presidents to embellish their speeches however they desire; nevertheless, it makes a statement about the American people. The Presidents are utilizing religious values and the concept of God in order to appeal to the masses who embody the same ideologies as a religious nation. Currently, over 70% of the nation identifies as being a part of a sect of Christianity while about 6% of citizens identify within a minority religion. The remaining 24% of the nation is unaffiliated with religion (PPRI). The issue of whether the continual mention of God is a violation of 24% of people who are unaffiliated with religion may arise. With the First Amendment explicitly stating that there should be no establishment or prohibition of a religion, does the mentioning of God violate the rights of those who don't believe in God? Furthermore, can the exclusivity of referencing a monotheistic God be considered discriminatory towards those of polytheistic faiths? Regardless of the answer, all references to God and religion are symbolic in nature and ultimately hold no legal power (*Elk Grove Unified School District v. Newdow*, 542 U.S. 1,). However, the references to God do create a socio-political understanding of America's fundamental values and beliefs, therefore, impacting the law through voting and other Democratic means.

A unanimous Supreme Court ruling voiced by Justice David Josiah Brewer coined the term "Christian Nation" as a title for America (*Church of the Holy Trinity v. United States*, 143 U.S. 457, 471). The reasoning behind this was due to Justice Brewer's observations of a large Christian presence in America and because of the constitutional statute of respecting the Sunday Sabbath in the Constitution. Justice Brewer claimed that the Christian ideologies observed throughout the law "speak the voice of the entire people." Justice Brewer's opinionated ruling has since been countermanded in *McGowan v. Maryland* (1961), in which the court acknowledged that the Sunday Closing Laws originally had religious intent but "are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion," the court continued by emphasizing that the purpose of the Sunday Closing Laws is not counteracted by the fact that it is on the Christian Sabbath and that the same goals can still be achieved regardless of religious significance. While the case makes a compelling argument about the original intent of the law being irrelevant, it inadvertently highlighted the Christian influence on national law.

Additionally, the Christian influence of law can be similarly observed in several other legal outcomes. For example, Christmas is considered to be a national holiday. While Christmas is fundamentally a Christian holiday, many argue that it has been secularized and that it is a national holiday simply due to the social calendar. It is estimated that 85% of Americans celebrate Christmas, many say that it has been added as a holiday due to its social prevalence, but the implications still remain ("Topic: National Holidays"). In 1870, President Ulysses S. Grant signed the bill that made Christmas a federal holiday (Pub. L. No. 90-361 § 6103 80 Stat. 515). In practicality, it simply gave federal workers Christmas Day off. In theory, even the labeling of Christmas as a Federal holiday seems to violate the Establishment Clause, but

President Grant signed a bill for “December 25th” to be instituted as a holiday (Santos). Additionally included in the bill, were New Year’s Day, the Fourth of July, and Thanksgiving, which are all secular holidays. Therefore, the addition of Christmas as a federal holiday can be viewed as a social holiday rather than an explicitly religious one.

Additional examples of religiosity impacting American law can be observed through laws of monogamous marriage, the creation of the weekend, as well as former laws banning homosexual marriage. All of which would be deemed as legislation with underlying religious tones (Shin). However, one can argue that all of these laws are a part of the social agenda and that the nation has ultimately chosen its legislation through representatives in government. Some may argue that the role of an elected official is to promote justice and equality and to listen to the governed by whom they were elected (Balkin). There is a system of checks and balances in place to ensure that legislation is abided by, but there are corrupt individuals who abuse the system.

3. Personal Beliefs Impacting Law

There are three mainstream classes of approach that Judges and Jurists apply regarding the interpretation of the First Amendment (Parcel). The first approach is that of secularism, which according to Justice Hugo L. Black, creates a “high and impregnable wall of separation” between church and state (*Everson v. Board of Education*, 330 U.S. 1) Another approach is separatism, which views any law regarding religion to be in violation of the First Amendment. Lastly, there are those who abide by an accommodation perspective, which views the constitution as barring the establishment of a specific religion, but not that of a religion itself. While it may seem unjust that some of these approaches exist in practice, it is simply a reality that all legislators and judges are humans who possess personal opinions that may intervene with

what is just. However, the courts must rely on a concept of Stare decisis or precedent, which in regards to The First Amendment, is the Lemon Test (*Lemon v. Kurtzman*, 403 U.S. 602).

The Lemon Test was created via the *Lemon v. Kurtzman* (1971) case; it was initiated to determine whether a law is constitutional under the First Amendment religious clauses. There are three components of the Lemon Test. The first requirement is that a law must have a secular purpose and that it cannot solely serve a religious purpose. Second, its main effect must remain neutral towards religion. Lastly, it must avoid excessive entanglement of Church and State. The Lemon test serves as an established way of avoiding the insertion of personal opinions of judges into legislation. For about two decades, the Lemon Test remained undisputed and was used by the court to create a separation between church and state (Bobic). But ultimately, the third clause of the Test was ambiguous and allowed for unwarranted sovereignty in defining "excessive entanglement of church and state." Which allowed for judges and jury members to insert their own opinions into areas of law.

The Lemon Test faced many criticisms from those who thought it was ineffective or unjust. Some of the main concerns are its potential censorship of private religious speech, its tendency for ambiguity, and its disregard for precedent that resulted in historical inaccuracies ("The Lemon Test"). Ultimately, it continued to serve as the basis test for nearly four decades until 2022, where it was abandoned due to ineffectiveness. However, an ineffective test lasting for nearly four decades hardly seems constitutional, and its unconstitutionality has determined the outcomes of numerous religious cases. Ultimately, the promotion of equity is the role of the Justices, but it is the responsibility of the people to advocate and elect capable representatives.

Many believe that the decisions of legislators should align with the will of the people (Balkin). While this remains true for most elected officials, the authority to appoint Supreme

Court Justices is left solely to the President with two thirds of Senate approval. (U.S. Const. art. 2, § 2, cl. 2) An issue that arises is the topic of the Justices' lifelong sentences during "good behavior" (U.S. Const. art. 3, § 1) Without limitations on the Justices' lifelong terms, they are able to disregard the will of the people, which allows the Justices to solely abide by the constitution without facing external pressures. However, in recent years there has been a considerable amount of debate regarding the Justices' personal viewpoints having potential influence on the outcomes (Tevington). This is particularly true in regard to personal religious values of certain justices which may be impacting national law. Notably, the religious demographic makeup of the current Supreme Court Justices does not match that of the general population (Newport). Some argue that conservative religious beliefs held by the Justices is what led to the overturning of *Roe v. Wade* (1973), which was a precedent case. The Court's statement of "We therefore hold that the Constitution does not confer a right to abortion." (*Dobbs v. Jackson Women's Health Organization*, 597) entirely denies prior legislation and legal precedence. A notable difference between the rulings is the significant increase in religious Catholic Justices, of whom many speculate may have inserted personal beliefs rather than those of the Constitution.

Furthermore, the statistical data indicates a declining trend in religious observance in the United States, as the younger generations are displaying decreased levels of devoutness with each passing generation (Pew Research Center). If this trend persists, it may have a significant impact on the socially Christian aspect of American culture and future legislation. Regardless of the prevailing trend, Christianity is embedded in American society and continues to uphold numerous fundamental Christian values. While the diminishing population of Christians may have an impact on future legislation, it would present a formidable challenge to undermine a few

centuries' worth of fundamental laws and ideology. Therefore, despite a decline in strict religious practices and conservative beliefs, the nation may persist in adhering to its foundation of social Christianity especially due to its casual integration into daily life in America.

Conclusion

In conclusion, despite potential discrepancies in the legal interpretation of the separation between church and state, the United States is formally recognized as a non-religious state under the law (U.S. Const. amend. I, cl. 1). However it is important to acknowledge the social influence that Christianity has on law due to its prevalence and widespread number of voters who justly elect representatives within the democratic system. (PRRI). The Christian influence can be felt in numerous national symbols and formalities that encompass American values and faith. An issue arises when a democratically elected official abuses the system and inserts personal religious beliefs into American legislation. This could be prevented through political advocacy and cognizance of the system. It is imperative for American voters to defend our democratic country by advocating for legislative change regarding the infinite tenure of Supreme Court Justices. Personal and religious beliefs may have a social impact on America, however, it is important that they should remain separate from the political sphere and not intervene with legislation.

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Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, art. 11, U.S.-Tripoli, Jan. 3, 1797

U.S. Const. amend. I, cl. 1 (Free Exercise Clause, Establishment Clause)

U.S. Const. art. 2, § 2, cl. 2

U.S. Const. art. 3, § 1

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Editors: Hadassah Reich and Aryeh Teller

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1.1 (Spring 2024)

The Evolution of Patient Autonomy and Legal Consent

Abstract

This paper explores the concept of patient autonomy within Western legal and ethical contexts, tracing its evolution from ancient philosophical interpretations to its codification in landmark legal cases. It examines the foundational cases of Mohr v. Williams and Schloendorff v. Society of New York Hospital, which established the necessity of patient consent for medical procedures. The discussion extends to the Nuremberg Code and its impact on the principles of informed consent after World War II. Additionally, the paper considers the legal distinctions between competence and capacity in decision-making, highlighting their implications for medical ethics and patient rights. Through this analysis, the paper aims to elucidate the historical and contemporary significance of patient autonomy in healthcare, emphasizing the balance between individual rights and medical practices.

1. From Ancient Governance to Modern Medicine: The Evolution of Patient Autonomy and Legal Consent in Western Jurisprudence

The concept of autonomy has shaped the way in which Western society views an individual's medical choices. “Autonomy” is an ancient word initially used in Greece to characterize city-states (Piper). The word comes from the Greek “auto,” meaning self, and “nomos,” meaning law (Taylor). The definition of “autonomy” has been debated and redefined

throughout history. The most notable and currently recognized definition of “autonomy”, which links this word to self-governance, is that proposed by John Stuart Mill and Immanuel Kant. They defined an individual’s self-governance as the ability to have control over making their own medical choices. In 1979, Beauchamp and Childress later came and wrote a revolutionary article on patient autonomy, defining it as a person's control over their medical care, even if their decisions contradict that of their physician (Sedig). Our modern understanding of legal consent was codified with four major legal decisions. Both *Mohr v. Williams* and *Pratt v. Davis* decided in 1905, involved a patient suing a doctor for performing an operation without consent, resulting in the court ruling in favour of the plaintiffs. The following statement was released by the appellate court in the case of *Pratt v. Davis:* “…under a free government, at least, the citizen's first and greatest right, which underlies all others—the fight to the inviolability of his person, in other words, his right to himself is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least the necessary first steps in treatment and care) to violate without permission the bodily integrity of his patient”(Dankar et al.). These landmark cases laid a foundation for the recognition and discussion of patient autonomy, establishing legal precedents that emphasized an individual's right to make informed decisions about their own medical care.

In the third case, *Rolater v. Strain*, the plaintiff was ostensibly due for a procedure that required an incision and drainage of fluid from her foot. The surgeon requested that the bone be removed while the plaintiff resisted. As the surgeon was performing the surgery, he removed the bone from her foot without her approval. This situation was different from the previous two in which the patient had agreed to the performance of the surgery; however, the operation was not

done in the manner agreed upon as the doctor decided to remove a bone in her foot. The Supreme Court ruled in her favor as she did not consent to the manner in which the surgery was performed. The 1914 case of *Schloendorff v. Society of New York Hospital* was the final breakthrough for the legal definition of patient autonomy. In this case, Mary Schloendorff underwent a hysterectomy to remove a fibroid tumor, despite expressly refusing consent for the surgery. The ruling by Judge Benjamin Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."(Richards) These cases collectively emphasize the critical legal principle that medical procedures require explicit consent from the patient, thereby reinforcing the foundational right to personal bodily autonomy in medical ethics and law.

Another formative point in history which helped shape modern understanding of patient autonomy was the Nuremberg Trials of Nazi doctors. On August 20, 1947, twenty three Nazi physicians and bureaucrats were put on trial for crimes against humanity and war crimes on inmates in different concentration camps. The tribunal of judges consisted of three American judges endorsed by the Allied powers. The verdict of this trial, known as the "Nuremberg Code," set forth ten basic ethical rules of conduct that must be followed while experimenting or performing a procedure on an individual(Bazzano, et al.). The meaning and definition of voluntary consent on a human subject was defined by the court as such:

> "This means that the person…should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. This latter element requires that, before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the

> nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person, which may possibly come from his participation in the experiment." (Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10)

This excerpt highlights major concerns regarding the process of informed consent. Firstly, it demonstrates that a patient must be fully aware of where and how the procedure will be conducted. Secondly, the patient must be notified of the potential ramifications of the process (Bazzano, et al.). The results of this trial have shaped the way the Western world perceives informed consent and patient autonomy.

The *Canterbury v. Spence* [1972] case solidified the idea that a patient has complete control over both the choice and information of any required medical procedure (Marks). In this case, the defendant told the plaintiff he needed a laminectomy, a procedure known to correct injured vertebrae, but withheld the risk of a 1% chance of paralysis (Edwin). The doctor even went as far as to describe it as "no more serious than an ordinary, everyday operation." (Langer). The plaintiff ended up paralyzed and sued the physician, Spence, for malpractice on the grounds of negligence. The verdict determined Dr. Spence was vindicated; however, the court advised looking forward:

> "Except in the case of an emergency or where disclosure would prove damaging to the patient, a medical practitioner has a duty to warn the patient of a material risk inherent in proposed treatment. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the

> particular patient, if warned of the risk, would be likely to attach significance to it. The fact that a body of reputable medical practitioners would have given the same advice as the medical practitioner gave does not preclude a finding of negligence. Generally speaking, whether the patient has been given all the relevant information to choose between undergoing and not undergoing the proposed treatment is not a question the answer to which depends upon medical standards or practice."

This court statement was so groundbreaking in the history of patient autonomy over choice and information that Robert Veutch, a professor at the Kennedy Institute of Ethics at Georgetown University, considers it as "one of the most important cases in medical ethics." (Langer)

The question arises of who is considered an individual of "sound mind", who has the ability of self-designation over their body. The first mention of this idea of self-designation in American law is seen in the Bill of Rights. A result of these amendments "is the common-law principle of self-determination that guarantees the individual's right to privacy and protection against the actions of others that may threaten bodily integrity."(Leo) The capability to have complete control over one's body is derived from this law. For example, the ability to accept and refuse medicine. As one accepts or refuses medical care, it is assumed they can make a competent decision and are responsible and accountable for their choices.

This issue arises specifically when an individual is deemed to be incompetent and, therefore, loses their autonomy to accept and refuse treatment. "Competency" is a legal term that refers to an individual's "having sufficient ability… possessing the requisite natural or legal qualifications" to engage in a specific activity (Black's Law Dictionary, 257). This definition is very broad, encompassing many legal issues which require different verdicts depending on the situation, such as the ability to prepare a will, draft a contract, stand trial, and make medical

decisions. Therefore, the definition is tailored to the situation at hand. The decision to determine someone as incompetent is a judicial decision, and a person deemed such is referred to as *de jure incompetent* (Leo). After it has been decided that the *de jure incompetent* cannot make sensible decisions, the court will appoint a guardian on their behalf to execute decisions.

A person is believed to be competent unless proven otherwise (Leo). To preserve as much autonomy or self-determination legally possible of an individual, the court will determine one's competency in a limited manner. For example, someone can be incompetent in creating a will but competent in making medical decisions. The court will attempt to adjudicate competency in this manner whenever it is possible. Sometimes, the court can determine an individual to be generally incompetent in all circumstances. In such cases, individuals who are in a severe vegetative state, severely demented, mentally retarded, or actively psychotic would be considered incompetent in all scenarios due to their inability to make rational decisions caused by their impairment.

Another determination of one's ability to make rational decisions is called capacity. Capacity is determined by any physician and not the judiciary. Capacity refers to an evaluation from a psychological standpoint of an individual's ability to make rational decisions, "specifically the individual's ability to understand, appreciate, and manipulate information." (Leo). If a doctor believes this individual is unable to perform these actions, he is referred to as de facto incompetent. Such an individual is unable to accept or decline medical treatment and requires a guardian to execute decisions on their behalf.

The majority of cases in which a physician requests an examination of an individual's capacity is when the patient declines a rational choice of using a medication to heal their ailment. In reality, empirically derived data demonstrates that the majority of cases in which a patient refuses a medication are caused by communication problems between patient and doctor, lack of

trust in the treating source, and psychopathological factors (Leo). The ability to understand relevant information is a factor in determining if a patient has the capacity for self-determination. The best way to know if a patient understood the assessment is to ask them to paraphrase what was said. Additionally, focusing on the impact of various treatment results can determine medical autonomy. If a patient cannot understand the different consequences of the treatment, they clearly cannot make their own decisions.

According to Dr. Rafael Leo, the following questions should be asked while assessing a patient's capacity:

1. Does the patient understand the current medical condition?
2. Does the patient understand the natural course of the current medical condition?
3. Does the patient understand the proposed treatment of intervention
4. Does the patient understand the risks and potential benefits of the proposed treatment and or intervention?
5. Does the patient understand what is likely to happen if the proposed treatment/intervention is refused?
6. Does the patient understand whether there are any viable alternatives to the proposed treatment intervention?
7. Does the patient understand the potential risks and benefits of the alternative treatments?

The assessment of a patient's capacity for decision-making in medical contexts involves a comprehensive understanding of their comprehension and appreciation of their medical condition, treatment options, risks, and potential outcomes.

In the realm of patient self-determination, the assessment of a patient's capacity for decision-making is paramount. It requires not only a thorough evaluation of their understanding

and awareness of their medical circumstances but also a recognition of their right to autonomy and self-determination. As George Carlin aptly put it, "Rights aren't rights if someone can take them away. They're privileges." This quote underscores the fundamental principle that patients' rights to make informed decisions about their own bodies are inherent and should be respected as choices that must be safeguarded. Healthcare professionals and legal systems alike must uphold and protect these freedoms, ensuring that patients are empowered to make decisions that align with their values and wishes.

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An Overview of Antitrust Law

Making it “big” in America is not only a measure of personal success; some of the world's greatests companies have risen in fame due to their expansive and robust operations within the US. And while this drive for success is certainly beneficial to the growth and development of the US economy, there are serious consequences that have resulted in the history of corporate law. Which in turn, has led the US government to impose heavy regulation on said growth. This paper will provide an overview of the history and development pertaining to these laws.

The rise in monopolized corporations in the late 19th century saw congress enact serious legislation to control and mitigate the dominance of monopolies. By doing so, Congress hoped to encourage competition amongst all economic markets. One such regulation introduced was the Sherman Antitrust law of 1890, establishing a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[199] The Sherman Act has since been codified in 15 U.S.C (1-38) and was amended by the Clayton Act of 1914. Along with the Clayton Act, Congress passed the Federal Trade Commision Act, which led to the creation of the Federal Trade Commission (FTC).

[199] Federal Trade Commission: The Antitrust Laws, 2024

In focusing on the Sherman Antitrust law, the Supreme Court has only prohibited trade seen as “unreasonable", but not necessarily every business dealing.[200] Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”[201] Section 2 of the Sherman Act “prohibits monopolization or attempts at monopolizing any aspect of interstate trade or commerce and makes the act a felony.”[202] In further understanding what business practices are reasonable or unreasonable, the FTC lays out a comprehensive breakdown of the Sherman Act’s application:

> *“An agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids”.*[203]

The Sherman Act, through the McCarran-Ferguson Act of 1945 (15 U.S.C Sections 1011-1015) was “extended to the ‘business of insurance’ only to the extent where: (1) such business is not regulated by state law (Section 1012), or (2) there are insurer or acts of, ‘boycott, coercion, or intimidation (Section 1013)”.[204] In terms of violation penalties, the Sherman Act may be prosecuted through either civil or criminal law[205]. Per the FTC, “the Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be

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[200] ibid
[201] ibid
[202] Cornell Law School: Sherman Antitrust Act, 2022
[203] Federal Trade Commission: The Antitrust Laws, 2024
[204] Cornell Law School: Sherman Antitrust Act, 2022
[205] Federal Trade Commission: The Antitrust Laws, 2024

increased to twice the money lost by the victims of the crime, if either of those amounts is over $100 million.[206]

As for the Federal Trade Commission Act, this law bans “unfair methods of competition” and “unfair or deceptive acts or practices”.[207] The Supreme Court has expanded the scope of the FTC Act, in that “all violations of the Sherman Act also violate the FTC Act”.[208] Effectively, “cases can be brought under the FTC Act against the same kinds of activities that violate the Sherman Act”. But in its own right, the FTC Act does cover certain regulations regarding competition issues that the Sherman Act does not explicitly lay out.[209] Finally, one unique aspect of the FTC Act is its exclusive nature of enforcement, as only the FTC has this right.

As for the third core antitrust law, the Clayton Act deals with mergers and interlocking directorates (where the same person makes business decisions for competing companies), as these business practices were not expressed clearly in the Sherman Act.[210] Section 7 of the Clayton Act bans mergers and acquisitions where the result "may be substantially to lessen competition, or to tend to create a monopoly".[211] The Clayton Act has since its fair-share of amendments, originally through the Robinson-Patman Act of 1936, expanding this Act in prohibiting “discriminatory prices, services, and allowances in dealings between merchants. Additionally, the Clayton Act saw further amendments through the Hart-Scott-Rodino Antitrust Improvements Act, which forced “companies to notify the government in advance of large mergers or acquisitions”. Moreover, the Clayton Act enables private parties to seek triple

[206] ibid
[207] ibid
[208] Ibid
[209] Federal Trade Commission: The Antitrust Laws, 2024
[210] ibid
[211] ibid

damages when they have been affected from "conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future"[212].

Despite these three core statutes on Antitrust law, some scholars would advocate for less regulations of Antitrust law. Rush C. Butler, former President of the Illinois State Bar Association and Chairman for Committee on Commerce and the American Bar Association, argued for the implementation of a "constructive antitrust law". He cites various industries in which exceptions to the Sherman Antitrust law were enacted, proposing that this precedent be extended to other markets too. Butler points to 1913 where congress began chipping away at Antitrust regulation:

> *"Beginning in 1913, Congress started to enact laws not only granting exemption from the Sherman Law but regulating the application of the law by administrative agencies. In that year was passed the Panama Canal Act, which was the first recognition by Congress that competition could be regulated. This act entrusted the regulation of the railroads, in their ownership of competing water lines, to the Interstate Commerce Commission, a specialized governmental organization. The act established standards and in effect commanded the administrative agency to see that these standards were complied with."*[213]

Moreover, Butler points to the establishment of the Federal Trade Commission Law of 1914 as further evidence to the need of reforming Antitrust Law. The Act created the Federal Trade Commision, in which "jurisdiction was conferred upon it to administer the rule of conduct laid down in the statute, which provided that unfair methods of competition in commerce were unlawful. This act was a recognition by Congress that competition could not of right be free and

[212] Cornell Law School: Sherman Antitrust Act, 2022
[213] Butler, 1928

unlimited but that under certain circumstances it should be restricted"[214]. Furthermore, Butler points to the Shipping Board Act, which granted the Shipping Board:

> *"The power to approve agreements in restraint of trade made between competing American steamship owners, in which they agreed as to the rates they would charge for transportation of passengers and property, allotted their tonnage and otherwise limited com- petition between themselves. The standard was established in that Act, that these agreements could be effective only insofar as they did not adversely affect American commerce. There is the first recognition by Congress that I know of that it was possible under the Sherman Law for competitors to agree upon prices and to agree to limit their activities and the territory in which they would operate"*[215].

Butler goes on to show further cases of Antitrust law exemptions: by banks in their ability to cooperate in executing overseas banking, by transportation in regards to railroad price agreement among competitors, and in agriculture with price fixing and output restrictions[216]. Based on the obvious precedent of a more "fluid" Antitrust Law, Butler argues that the natural resource industry should receive similar treatment. He writes:

> *There is [a] necessity for a change in our laws at the present time in regard to numerous industries. For instance, the coal industry for forty years has been the football of fortune, and only for very brief, exceptional periods has it experienced prosperity. Today its condition is as bad as, if not worse than it has ever been before. It is not only the industry that suffers; it is the communities dependent upon that industry which suffer most. There are whole communities, as we have heard recently through the Senate Investigating*

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[214] Federal Trade Commission: The Antitrust Laws, 2024
[215] ibid
[216] Federal Trade Commission: The Antitrust Laws, 2024

Committee, in Pennsylvania in particular-and the same is true in Indiana and Illinois-which are suffering for the actual necessities of life because of the condition of the coal industry. The labor situation complicates matters very materially, but that is far from being the main reason for the difficulties in coal. Relief is needed in coal, in lumber and in oil, and Congress has indicated a way in which that relief may be granted."[217]

Almost a century later, Butler's argument may be at the forefront of a current litigation battle between the FTC and Amazon. In September 2023, the FTC and 17 state attorneys general accused Amazon of being "a monopolist that uses a set of interlocking anticompetitive and unfair strategies to illegally maintain its monopoly power. The FTC and its state partners say Amazon's actions allow it to stop rivals and sellers from lowering prices, degrade quality for shoppers, overcharge sellers, stifle innovation, and prevent rivals from fairly competing against Amazon."[218] Amazon, has in turn, responded to these allegations as follows:

"The FTC's case alleges that our practice of only highlighting competitively priced offers and our practice of matching low prices offered by other retailers somehow lead to higher prices. But that's not how competition works. The FTC has it backwards and if they were successful in this lawsuit, the result would be anticompetitive and anti-consumer because we'd have to stop many of the things we do to offer and highlight low prices—a perverse result that would be directly opposed to the goals of antitrust law."[219]

[217] Butler, 1928
[218] Graham, 2023
[219] Zapolsky, 2023

This litigation between the FTC and Amazon strikes to the forefront of the Antitrust debate. For the FTC, they view certain Amazon business practices as a violation of Antitrust Law and detrimental to a competitive market. John Newman, Deputy Director of the FTC's Bureau of Competition, emphasizes the FTC's position on Amazon as follows: "We're bringing this case because Amazon's illegal conduct has stifled competition across a huge swath of the online economy. Amazon is a monopolist that uses its power to hike prices on American shoppers and charge sky-high fees on hundreds of thousands of online sellers. Seldom in the history of U.S. antitrust law has one case had the potential to do so much good for so many people"[220].

As for Amazon, they envision themselves more akin to the idea of Butler, one in which there is a 'legal fluidity' to Antitrust. The term 'legal fluidity' isn't to be taken as a loophole to Antitrust Law; rather, it can describe the established precedent of Antitrust Law in which there are exceptions to be applied for the benefit of US commerce. Amazon communicates this vision of Butler, expressing that "It was our hope the agency would recognize that Amazon's innovations and customer-centric focus have benefited American consumers through low prices and increased competition in the already competitive retail industry"[221].

[220] Federal Trade Commission: The Antitrust Laws, 2024
[221] ibid

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History and Analysis of Bail Reform

The Origin of Bail can be traced Fifteen centuries ago to Anglo-Saxon England. Because the age of courts and civil law was just beginning, the process for settling civil disputes was somewhat barbaric, relying on Martial law to settle cases. The English government saw the flaws in this method of resolution, and thus the court system began to take shape. For such a system to work, people needed to appear in court, and solve any civil disputes there, with people relying on the courts to resolve their issues. Bail was used as a method to ensure that defendants would show up to trial without fleeing from obligation.[222] The idea of bail continued to form and develop in England, and eventually came with the colonies to the New World. In Massachusetts in the 17th century the early governments implemented bail.[223] Many states already had bail laws, and eventually, in the forming of the United States, the law of bail had to be concretized and contextualized in the constitution.[224] The individual states also set in place statues to limit and protect defendants, by implementing their own bail laws.[225] In the early U.S., applications of bail were left to the discretion of the legislature, and capital crimes were not bailable, unless otherwise decided by the Supreme or circuit court.[226] Another development in the United States

[222] William F. Duker, The Right to Bail: A Historical Inquiry, 42 ALB. L. REV. 33 (1977).
[223] Massachusetts Body of Liberties (1641)
[224] U.S. Const. amend. XIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
[225] See for example, N.Y. Const. Art. I § 5, PA Const. Art. I § 13
[226] An Act to Establish the Judicial Courts of the United States, 1 Stat. 73, § 33 (1789)

was that it was harder to control defendants and keep them from fleeing after pretrial release. Therefore, the commercial bondsman developed as a lucrative occupation. Those defendants who could not afford bail would be covered by a bondsman who would take a fee from the defendant, and would then take full responsibility for ensuring the defendant would attend the court date and be adherent with the law.[227]

For many years, the implementation of the 8th amendment remained fairly undramatic, even though interpretations of the constitution varied. The Bill of Rights guaranteed bail in reasonable circumstances, and excessive bail was understood to be unjust. However, whether bail itself was a guaranteed right was not agreed upon. Many lawmakers and judges understood that the constitution did not guarantee every defendant a bail opportunity, rather only that when, the price could not be too high. Each case in context was determined to be bailable or not by the circuit courts adjudicating.[228] However, some courts held bail to be a "constitutionally protected right." Justice Butler interpreted the 8th amendment as granting "the right to bail at least before trial."[229] This argument came up again in 1951, when certain Communists were criminally charged, and their right to bail was argued upon by two Judges.[230]

The implementation of bail becomes much more complicated in the modern day. Clearly, bail was originally instituted as a way to keep defendants from fleeing before being judged in a time when criminals had an easier time fleeing before a court date and law enforcement was significantly less organized and thorough. Today, however, entire departments are dedicated to making sure criminals show up for court dates, and those who don't can easily be tracked down by the police and brought to court against their will.[231] Thus, the question surfaces whether bail is

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[227] Duker, page 70
[228] See for example, N.Y. CONST. art. 1, § 5.
[229] Duker page 88
[230] Carlson v. Landon, 342 U.S. 524 (1952).
[231]http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer

necessary in the modern era. In fact, many critics argue that the bail system assumes that the defendants are guilty, and causes judges and juries to try to increase bail to strip defendants of their freedom before a court date. Superior Court Judge W. Kent Hamlin said, "[B]ail is really being set to keep the person in custody. You have to kind of concede that. It's not supposed to be that; it's supposed to guarantee their appearance in court. They're innocent until proven guilty, but the bail system assumes they're guilty."[232]

Many waves of bail reform have surfaced in the U.S. Modern critics and politicians have understood bail to be disproportionately beneficial for wealthy people who can afford bail, as opposed to lower class citizens who cannot afford bail and are incarcerated before trial, continuing a constant loop of high rates of lower class incarcerations. From these criticisms, Congress enacted the Bail Reform Act of 1966 which reinforced the original goal of bail which was to ensure defendants would show up to trial.[233] The goal of this reform was to prevent unnecessary incarceration of lower class citizens by ensuring that judges not hold defendants unless they have probable cause that the defendant will skip bail. The reform also offers other methods of ensuring appearance in court like placing them in the custody of a guarantor. However, these reforms led to upheaval and increased crime. High risk criminals were being released without bond, and crimes committed by pretrial criminals had caused panic leading many states to change their bail laws.[234] Thus, the new Bail Reform Act was amended in 1984, allowing for the detainment of dangerous criminals, and remanding pretrial release l back to the implementation of bail. However, excessive bail was still constitutionally protected against, and Congress accentuated that point with the new edits to the Bail Reform Act.[235] Immediately after,

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[232] http://nyti.ms/2oVqmYV
[233] Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214 (1966)
[234] John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology, note 68 (1985)
[235] United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985); *see also* S. Rep. 98–225 at 11

though, two defendants who were held without bail challenged the constitutionality of the Bail Reform Act changes, and argued that it violated proper due process and the 8th amendment.[236] The Supreme Court rejected both claims and deemed the current Bail Reform Act constitutional. Ideally, this state of bail reform balances the right to pretrial release and public safety properly. Those who would pose a danger to society would not be released before trial, and those who do not pose any threat should receive bail at a reasonable price. However, many argue that bail amounts are still abused and that certain states are charging higher-than-appropriate amounts of bail, disproportionately affecting the poor.[237]

Many academic journals take this approach, arguing that bail is antiquated and unfit for modern times. For example, Vernonikah Warms writes,

> Although the Eighth Amendment of the U.S. Constitution provides that excessive bail is unconstitutional, the Excessive Bail Clause has only been interpreted by the U.S. Supreme Court three times and has never been incorporated or found applicable to the states. This lack of judicial guidance has allowed the cash bail system to flourish. In 2017, "more than 450,000 people [were] in jail across the country awaiting trial because they cannot afford bail.[238]

In addition to the argument that bail isn't necessary in a society where police are very organized and can arrest those who ignore court dates, many also argue that impoverished citizens being unable to afford bail is a violation of the 14th amendment.[239] The U.S. Justice department wrote that "any bail practices that result in incarceration based on poverty violate the Fourteenth

[236] United States v. Salerno, 481 U.S. 746 (1987).
[237] David Savage, *Obama Administration Challenges the Money Bail System: Can People Be Kept in Jail Just Because They Are Poor?,* L.A. Times (Aug. 25, 2016)
[238] Veronikah Warms, *The Cost of Injustice: How Texas's "Bail Reform" Keeps Low-Income People & People of Color Behind Bars,* (2022)
[239] U.S. Dep't of Justice, Civil Rights Div., Office for Access to Justice, *Dear Colleague Letter Regarding Law Enforcement Fees and Fines* 2 (Mar. 14, 2016)

Amendment."[240] These concerns in today's climate have motivated many states to drastically alter their bail laws, with Illinois even completely eradicating the bail system in 2021. Bail reform has also played a significant role in the general push for criminal justice reform in the wake of many instances of police brutality and targeted mistreatment of minorities. Within this push for change, many argue that bail reform also contributes towards a system of oppression aimed at minorities.[241] In addition, many even argue that the intended goal of bail, which is to guarantee that the defendant shows up to court, may not even affect attendance. There may be evidence that eliminating cash bail entirely will not affect showing up to trial, even though the first Bail Reform Act in 1966 did have immediate consequences of an uptick in crime and upheaval.[242]

In response to the argument that cash bail violates the 14th amendment, John Seebler and Jason Sneed argue that such a claim is wholly false. Many state courts have already demonstrated that bail does not violate the 14th amendment "merely because the defendant may be financially unable to post an amount otherwise meeting the standards above."[243] The supreme court of Vermont also reached such a conclusion, stating that "[a]lthough both the U.S. and Vermont Constitutions prohibit excessive bail, neither this court nor the U.S. Supreme Court has ever held that bail is excessive solely because the defendant cannot raise the necessary funds."[244]

Many questions remain as to what the future holds for bail reform in the United States. The Constitution merely restricts excessive bail, but the constitutionality of bail itself remains ambiguous, leading to many states to take matters into their own hands. Some states reject cash

[240] Ibid.
[241] Lange, J., & Hunnicutt, T. (2020, May 30). Biden Staff Donate to Group that Pays Bail in Riot- Torn Minneapolis. Reuters. Retrieved September 27, 2022, from https://www.reuters.com/article/us-minneapolis-police-biden-bail-idUSKBN2360SZ
[242] Warms
[243] Seibler, J.-M., & Sneed, J. (2017). The History of Cash Bail. The Heritage Foundation. Retrieved April 4, 2024, from https://www.heritage.org/courts/report/the-history-cash-bail
[244] State v. Pratt, 2017 VT 9, 14 (Vt. 2017).

bail entirely, arguing that it is no longer tenable in today's day and age, while other states and their supreme courts argue that bail is constitutional, and shouldn't be abolished. Fundamentally, there is a great divide as to whether the bail which affects lower income people is something that is unconstitutional, or rather something that is inevitable in a capitalist country. The Supreme Court has remained uncharacteristically silent about the issue of bail, and now that states are drastically divided over the issue, national consensus will be difficult, if not impossible, to reach.

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"We Are All Textualists Now": Justice Scalia's Textualism and His Impact On the Court

Abstract

This article explores the history of textualism, how Justice Scalia understood it, and his influence on American jurisprudence. Justice Scalia's commitment to interpreting texts instead of the spirit of the law or the legislative history of a statute simultaneously breaks from past practice and has precedent. This article draws upon a speech Justice Scalia gave a month before he died in which he detailed what textualism means to him, as well as Supreme Court decisions before, during, and after Justice Scalia's tenure. In addition, this article looks at and analyzes Supreme Court decisions authored by different judges and draws an image of the development and acceptance of textualism.

Over his three decades as an Associate Supreme Court Justice, Antonin Scalia's philosophy of law was consistent, both in practice and theory. He firmly believed in following the "prescription of Justinian's Digest, *A verbis legis non est recedendum*. Do not depart from the words of the law (Scalia 249)." A month before his death, Justice Scalia spoke at the Dominican House of Studies in Washington D.C. Although Justice Scalia was a religious man speaking before a religious

audience, his convictions about the role of the judge and jurisprudence led him to disagree with the great Christian philosopher and theologian Saint Thomas Aquinas.[245] Aquinas believed:

> "... it is necessary to judge according to the written law, else judgment would fall short either of the natural or of the positive right…. Hence if the written law contains anything contrary to the natural right, it is unjust and has no binding force….Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view (Scalia 244-245)."

In contrast, Justice Scalia believed "Aquinas was right the first time. It is necessary to judge according to the written law—period (Scalia 245)."

Article one of the Constitution establishes a singular branch to create laws and provides that: "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Although the Framers of the Constitution did not intend the Supreme Court to be anything more than a court, the landmark case of *Griswold v. Connecticut*, 381 U.S. 479 (1965) vastly expanded the scope of power of the Supreme Court as a legislative body. In that case, the Supreme Court decided that penumbras created zones of privacy and, therefore, stated that laws prohibiting contraception were unconstitutional. In their dissent, Justice Stewart and Justice Black argued:

> "My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agent over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious, or irrational."

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[245] Scalia said about Aquinas, "despite my veneration for Thomas Aquinas, I plan to contradict what Aquinas says about judging…. He knows infinitely more about theology; but I have much more experience with judging." *Ibid* p. 245

They argued that the majority opinion could not point to any singular Constitutional Amendment violated by the law in question. Instead, they did not like the law and, therefore, struck it down. Justice Stewart and Justice Black asserted that this is not the intended role of the judge. Ultimately, the final footnote in the dissent said that the Connecticut House of Representatives passed a bill repealing the birth control law.[246] The Court's activism was unnecessary as the legislative body in time reacted to their mistake and listened to the people's will. This dissent serves as a precedent for Justice Scalia's judicial philosophy. Even if the judge thinks a law is "uncommonly silly,"[247] it is not the judge's role to say what he thinks the law should be based on "equity," but instead, according to the letter of the law. Furthermore, Justice Scalia noted in his dissent in *Lawrence v. Texas*, 539 U.S. 558 (2003) that the Court was intended to make sure that the "democratic rules of engagement are observed," [248] so to overreach their scope of power would be a corruption of their role. Judges are meant to safeguard democracy and the constitution, so creating laws and acting on their own accord beyond their intended roles would be the antithesis of their intended role.

In Justice Scalia's dissent in *Obergefell v. Hodges*, 576 U.S. 644 (2015), he argued that the Court acted improperly by not fulfilling the roles of judges but instead doing a poor job acting as unelected legislators. Specifically, he stated:

> Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly

[246] "*See Reynolds v. Sims,* 377 U. S. 533, 377 U. S. 562. The Connecticut House of Representatives recently passed a bill (House Bill No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7." Justice Stewart and Justice Black in their dissent in *Griswold v. Connecticut* 381 U.S. 479 (1965)

[247] Justice Stewart in his dissent to *Griswold v. Connecticut*, 381 U.S. 558 (1965).

[248] "It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." Justice Scalia in his dissent in *Lawrence* v. Texas, 539 U.S. 558 (2003).

> then, the Federal Judiciary is hardly a cross-section of America…. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: *no social transformation without representation*. But what really astounds is the hubris reflected in today's judicial Putsch.

Consistent with his other opinions, Justice Scalia believes that judges are not only poorly fit to legislate, but that it is undemocratic for them to do so. He believes that the judge is not intended to dictate how the law should be or to improve it, but instead merely to apply the law.[249] Furthermore, Justice Scalia warns that allowing judges to dictate policy rather than adjudicate according to the letter of the law opens the pandora's box to judges enforcing their wishes.[250] Furthermore, he argues "[b]ut persuading one's fellow citizen is one thing, and imposing one's view in absence of democratic majority will is something else."[251] When a judge says how the law ought to be instead of declaring what the law is, they no longer act as judges but rather step into the role of tyrants.

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[249] Similarly, Justice Scalia argued in his dissent in *US v. Virginia*, 518 U.S. 515 (1996) that a practice with a longstanding tradition should only be struck down by the Court if there is an express prohibition in the Bill of Rights.

[250] "Equity and spirit tend to be what the judges believes is a good idea; and the unexpressed intention of the lawgiver has an uncanny tendency to comport with the wishes of the judge." *Scalia Speaks* p.246

[251] Justice Scalia's dissent in *Lawrence v. Texas*, 539 U.S. 558 (2003)

In a 2015 lecture at Harvard Law School, Justice Elana Kagan declared, “we are all textualists now.” In that same interview, when asked if she would describe herself as a textualist, she said she very much would (Harvard Law School 8:29). The Supreme Court’s acceptance of the doctrine of textualism was not always true. In the Supreme Court decision Church of the *Holy Trinity V. United States*, 143 U.S. 457 (1892), the Court consciously ignored the statute's text. Instead, it adjudicated according to the spirit of the law. The Court declared, “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” This case is the antithesis of Scalia’s judicial philosophy. In his speech, Justice Scalia emphasized that not only is it outside the purview of the role of the judge to determine the spirit of the law or to decide what the law ought to be, but who are they to determine what the spirit of the law or the natural right is? “Do you really want judges – fallible judges – going about enforcing their vision of natural law, contrary to the dictates of democratically enacted positive law? Lord, no (Scalia 348).” Furthermore, he argued, “Equity and spirit tend to be what the judges believe is a good idea; and the unexpressed intention of the lawgiver has an uncanny tendency to comport with the wishes of the judge (Scalia 246).” Alexander Hamilton shared this concern. In Federalist Paper 78, Hamilton warned against the Court overstepping its jurisdiction. In it he said, “The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

Even more recently, in the famous administrative law case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) the Supreme Court had yet to accept textualism as the choice means of determining what the law is. In *Overton Park*, the Court declared:

> “The legislative history of both § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f) (1964 ed., Supp. V), and § 138 of the Federal-Aid Highway Act, 23 U.S.C. § 138 (1964 ed., Supp. V), is ambiguous. The legislative committee reports tend to support respondents' view that the statutes are merely general directives to the Secretary requiring him to consider the importance of park land as well as cost, community disruption, and other factors. See, e.g., S.Rep. No. 1340, 90th Cong., 2d Sess., 19; H.R.Rep. No. 1584, 90th Cong., 2d Sess., 12. Statements by proponents of the statutes as well as the Senate committee report on § 4(f) indicate, however, that the Secretary was to have limited authority. See, e.g., 114 Cong.Rec. 24033-24037; S.Rep. No. 1659, 89th Cong., 2d Sess., 22. See also H.R.Conf.Rep. No. 2236, 89th Cong., 2d Sess., 25. Because of this ambiguity, it is clear that we must look primarily to the statutes themselves to find the legislative intent.”

The Court initially sought legislative history to determine the law in this decision. When the Court could not determine a clear legislative history, then and only then did they turn to the text of the law to reach a decision. Textualism was merely a backup for when the legislative history was ambiguous.

During his tenure on the Supreme Court, Justice Scalia changed that. Beyond merely stating that “we are all textualists now,” Justice Kagan’s acceptance and advocacy of Justice Scalia’s textualism is evident in her decisions. In fact, whereas legislative history was of paramount significance in the past, Justice Kagan, in her dissent in *Yates v. United States*, 574 U.S. 528 (2015), described legislative history as "extra icing on a cake already frosted." In her lecture at Harvard Law School, she explained that when creating a law, hundreds of people have different opinions, and each goes into forming the law. Ultimately, "you end up getting a

lot of conflicting signals (Harvard Law School 26:54)." Every law will have some level of lack of clarity in its history, “and an unclear legislative history can’t trump a clear statute, that’s perverse.” When Justice Scalia joined the bench, textualism was not the prevailing means of interpreting statutes, and now even those on the other side of the political spectrum have accepted his judicial philosophy.

Justice Scalia's unwavering commitment to textualism has left an indelible mark on the landscape of American jurisprudence. Through his steadfast belief in adhering strictly to the words of the law, Justice Scalia sought to preserve the integrity of the judiciary branch as an impartial interpreter rather than an activist legislator. His dissenting opinions in cases such as *Griswold v. Connecticut, Lawrence v. Texas, and Obergefell v. Hodges* testify to his principled stance against judicial overreach and the imposition of personal beliefs onto legal interpretation. Furthermore, his influence extends beyond his tenure, as evidenced by Justice Kagan's acknowledgment that "we are all textualists now." By championing textualism, Justice Scalia has shaped the practice of law and the philosophical underpinnings of judicial decision-making, ensuring that the rule of law, not men, remains paramount in the American legal system. As we reflect on his legacy, it becomes clear that Justice Scalia's textualism continues to resonate as a guiding principle in pursuing justice and preserving constitutional order. Justice Scalia closed his final speech by saying, “One of my favorite quotations is from Grant Gilmore: “In Heaven there will be no law, and the lion will lie down with the lamb… In hell there will be nothing but law, and due process will be meticulously observed.” Meantime, we live in an imperfect world that is best governed by the text of laws (Scalia, 249).” Textualism is the legacy Justice Scalia left the American people, it was his hope for truth to

prevail, and to create a better future for the judiciary and the American people. While it is rooted in past precedent, it is the present and future of jurisprudence.

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Invasion or Overreaction?

Abstract

In the wake of the ongoing crisis on the United States' southern border, Texas recently passed a new law titled Senate Bill 4 (SB4) that has generated significant controversy from civil rights groups and constitutional scholars. The two main features of the law are the classification of illegal immigration into Texas as a Class B Misdemeanor, giving Texas State Police the power to arrest people they suspect of being in the United States illegally, and secondly, empowering local judges to order deportations of illegal immigrants should they be arrested (Spiller). Passed by the Texas State Legislature and signed by Governor Greg Abbot in December, the bill almost immediately faced lawsuits from both the Justice Department and the ACLU (Chávez). This paper will explore the background surrounding SB 4 and what prompted Texas to pass this law, the various legal challenges it faces and the defenses that Texas has argued in court, the recent decisions from Federal Courts, and the precedent it would set should the Supreme Court rule that SB4 is constitutional.

Background

In recent months, the United States has seen an unprecedented surge in illegal immigration and crossings on its southern border with Mexico. According to estimates, border

authorities faced over 225,000 illegal crossings in December 2023, the highest monthly total since 2000 (Yan). Moreover, the Biden Administration has signaled repeatedly that it does not intend to take a hard-line approach to border control and deportation. This is demonstrated by the 2.3 million migrants that have been released at the border and allowed to enter the United States (Sacchetti and Miroff), and by the significant drop in deportations enforced against illegal immigrants (Rappaport). To many, President Biden's approach is not surprising, considering one of his main campaign promises was a reversal of President Trump's hard-line policies on immigration (Aguilar). Yet, the sheer scale of mass migration and the lack of enforcement by the Federal Government has prompted many border states, specifically those more conservative, to take matters into their own hands to combat this issue.

Prompted by the Biden Administration's limited enforcement of the United States' southern border, Texas passed Senate Bill 4 (SB4) to "allow Texas to protect Texans and to send illegal immigrants back, and to prosecute and incarcerate those that refuse to leave," said Texas State Assemblyman David Spiller, one of the co-sponsors of the bill. Texas considers the problem of illegal immigration an issue it must deal with on its own, even though the Supreme Court has established repeatedly that illegal immigration and border enforcement are the responsibility of the federal government (Supreme Court, "Arizona v. United States"). As a result, this aggressive move by Texas to put illegal immigration in its jurisdiction has put the bill in a severely compromised position legally, with many of the bill's critics arguing that the bill is unlawful from both a constitutional and civil rights perspective.

Legal Challenges

Almost immediately upon being passed, SB 4 was met with severe backlash and multiple lawsuits. On December 19, 2023, The American Civil Liberties Union and the Texas Civil Rights Project jointly filed a lawsuit against Texas, arguing that SB 4 was unconstitutional and discriminatory, arguing the new law would lead to racial profiling and disproportionately affect people of color in Texas (American Civil Liberties Union). Putting aside the constitutional arguments, the suit brings up many potential civil right abuses that could come as a result of this law. The plaintiffs warn that the law will separate families and will directly lead to racial profiling, subjecting thousands of Black and Brown Texans to the state prison system, a system they have already critiqued to be in blatant violation of civil rights (American Civil Liberties Union). Moreover, enforcement of the law would not be contained to just border communities, meaning that Texans across the state would be at risk of arrest, jailing, and deportation under the legislation. "This law blatantly disregards people's right to due process and will allow Texas law enforcement to funnel family, friends, and loved ones into the deportation pipeline" said Rochelle Garza, president of the Texas Civil Rights Project, one of the plaintiffs in the lawsuit (American Civil Liberties Union).

Just a few weeks later, the Justice Department filed its own lawsuit against Texas over SB 4. While the ACLU's lawsuit mainly focuses on civil rights abuses, the Justice Department's suit is more focused on the constitutionality of SB4. The main thrust of its argument is twofold; first, the Justice Department claims that SB4 violates the Supremacy Clause of the Constitution, and second, that the Supreme Court has already set a precedent on the states' inability to enforce federal immigration laws in *Arizona v. United States* (Justice Department).

The Supremacy Clause of the Constitution, located in Article VI, Paragraph 2, is a highly influential piece of the Constitution which establishes that federal law always trumps state law (Hashmall). In addition, the clause establishes the prohibition for states to interfere with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government (Hashmall). One of the key arguments of the Justice Department is that border enforcement and deportation is solely the responsibility of the federal government, insisting that SB 4 is a clear overstep by Texas.

To strengthen its argument, the Justice Department invokes the precedent set by the Supreme Court in *Arizona v. United States* from 2012. In 2010, Arizona passed its own State Bill, SB 1070, which among many things attempted to make being in Arizona illegally a state crime, allowed local police to detain people they suspected of being in the state illegally, granting local police and courts the authority to deport illegal immigrants. In a 5-3 decision, the Court ruled that many sections of the bill were unconstitutional, specifically the section that allowed State police to deport illegal immigrants mainly because deportation is "entrusted to the discretion of the Federal Government," and was thus a violation of the Supremacy Clause (Supreme Court, "Arizona v. United States"). Based on this, the Justice Department argues, "The Supreme Court, in *Arizona v. United States*, has previously confirmed that decisions relating to removal of noncitizens from the United States touch 'on foreign relations and must be made with one voice.' SB 4 impedes the federal government's ability to enforce entry and removal provisions of federal law and interferes with its conduct of foreign relations" (Justice Department).

The two lawsuits have recently combined to form an impressive legal challenge against SB 4 (García). While the arguments against the legality of the bill are ample, Texas has proposed many creative and innovative ways to defend its ability to enforce immigration law and protect its border with Mexico.

In response to the legal challenges that face SB 4, Texas has formulated an innovative means to defend its right to enforce this bill: invoking the Invasion Clause of the Constitution (Somin, "Federal Court Rejects Texas's Argument"). The State War Clause of the Constitution, found in Article I, Section 10, establishes that, "No State shall, without the Consent of Congress…engage in War, **unless actually invaded**, or in such imminent Danger as will not admit of delay" ("Constitution of the United States," art. 1, sec. 10; emphasis added). Relying on this clause, Texas is arguing that the current crisis of cartel members and other dangerous criminals spilling in through the border is considered an 'invasion', and thus the Constitution grants the state the ability to take military action in response, even though it has not received any approval from Congress and is acting in defiance of many federal laws (Somin "Immigration Is Not Invasion"). This argument is the main thrust of Texas' defense for SB 4, both from a Constitutional and civil rights perspective. Texas is arguing that not only do it have the Constitutional right to enforce immigration law under these conditions, but furthermore it is able to suspend *habeas corpus* and due process in its attempt to keep Texans safe from the ongoing invasion from dangerous criminals who have infiltrated their state.

Legal Rulings and Potential Precedent

On March 1, 2024, federal Judge David Ezra issued the first ruling on the case and whether Texas' argument carried any weight. In his view, the argument by Texas that illegal immigration constitutes any form of invasion does not get off the ground. Judge Ezra lays out how, "Contemporary definitions of 'invasion' and 'actually invaded' as well as common usage of the term in the late Eighteenth Century predominantly referred to an 'invasion' as a hostile and organized military force, too powerful to be dealt with by ordinary judicial proceedings. This Court could not locate a single contemporaneous use of the term to refer to surges in unauthorized foreign immigration… Put simply, the overwhelming textual and historical evidence does not support Texas's understanding of the State War Clause" (United States District Court).

Ezra's historical basis for this ruling is based on the Report of 1800, drafted by James Madison, one of the main framers of the Constitution. Madison emphasizes that "Invasion is an operation of war" (Madison), not something minor, albeit serious, like illegal immigration. While defenders of Texas' argument have claimed that the term 'invasion' could be understood metaphorically, this is quite far-fetched and very unusual in deciding constitutional cases. As late Supreme Court Justice Antonin Scalia wrote in his majority opinion in *District of Columbia v. Heller*, courts must prefer the simple meaning of words rather than "secret or technical meanings that would not have been known to ordinary citizens in the founding generation" (Supreme Court, "District of Columbia v. Heller"). Thus, Judge Ezra has significant precedent and proof that Texas' liberal use of 'invasion' is not a valid argument.

Furthermore, Judge Ezra lays out in his ruling the dangerous consequences and precedent it would set should Texas' argument be accepted. First and foremost, the writ of *Habeas Corpus*, which protects against unlawful imprisonment, would be jeopardized if Texas were to

successfully argue that illegal immigration constitutes an invasion (American Civil Liberties Union). Article I, Section 9 of the Constitution clearly establishes that, "Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" ("Constitution of the United States," art. 1, sec. 9). As Judge Ezra lays out, only four times in United States history has *Habeas Corpu*s ever been suspended, in which all were "imminent and overwhelming violent direct threats to the stability of the state or federal government" (United States District Court). For Texas to claim that illegal immigration and drug cartels pose any semblance to the Civil War, one of the few events where Habeas Corpus was suspended, is bordering on ridiculous, according to Ezra. Moreover, this could not be the intention of the framers of the Constitution, given that one of the major causes of the American Revolution was the eagerness of the British to suspend *Habeas Corpus* without proper cause (Tyler). Judge Ezra concludes the ruling, "It is not plausible that the Framers, so cognizant of past abuses of the writ and so careful to protect against future abuses, would have granted states the unquestioned authority to suspend the writ based on the presence of undocumented immigrants" (United States District Court).

In addition to the suspension of *Habeas Corpus*, many legal scholars point to an additional dangerous implication of Texas' 'invasion' argument; the potential to wage war against these cartels inside of Mexico. Prominent conservative legal scholar John Yoo, a border hawk himself, warns that this argument allows states to "attack drug-cartel members not only across the border but all the way back to their hideouts," thereby triggering large-scale hostilities with Mexico. "Preventing states from provoking such conflicts," he writes, "was the very purpose of Article I, Section 10's (State War Clause) bar on state war-making" (Yoo). Thus, it is very

inconsistent with the intentions of the Framers of the Constitution to use the Invasion Clause. Since the State War Clause was specifically designed to reign in the autonomy of states to wage war on their own, any argument that it could be used to allow Texas to wage war by its own volition seems almost inconceivable.

Unsurprisingly, Texas appealed Judge Ezra's decision, and its case is now being adjudicated in the Fifth Circuit Court of Appeals (Serrano). Meanwhile, the law came before the Supreme Court while the case was pending a trial for the Court to decide whether it could be enforced. On March 19, 2024, the Supreme Court allowed Texas police to enforce SB 4, however, the court did not rule on the constitutionality of the law (Serrano and Garcia). More likely than not, this case will come again into the halls of the Supreme Court in the near future, where it will be decided whether this controversial law is in fact allowed under the Constitution or not.

Conclusion

Texas has every right to feel abandoned and let down by the Biden Administration's handling of the border. However, it is quite apparent that SB 4 goes too far in many respects and directly puts the law at odds with the Constitution and established legal precedent on the handling of immigration and deportation. As Judge Ezra says in a powerful line from his ruling, "No matter how emphatic Texas' criticism of the federal government's handling of immigration on the border may be…disagreement with the federal government's immigration policy does not justify a violation of the [U.S. Constitution's] Supremacy Clause"(United States District Court).

Echoing Judge Ezra, Texas should amend this law in order to make it more compliant with established precedent; otherwise, it seems to have no chance at surviving in its current form.

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